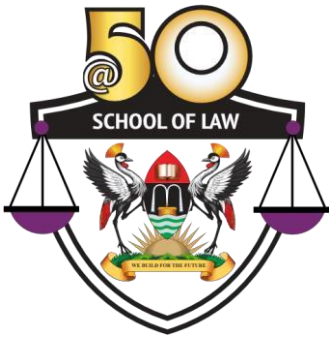


MAKERERE LAW JOURNAL 2019

Journal of the Makerere Law Society (MLS)

School of Law, Makerere University

Editor-in-Chief

Dominic Adeeda

MAKERERE LAW JOURNAL

2019

MAKERERE LAW JOURNAL 2019

EDITORIAL BOARD

MAKERERE LAW JOURNAL 2019

The Makerere Law Journal (MLJ) is an annual student-edited publication of the Makerere Law Society at the School of Law, Makerere University.

Contributions for publication should be original, thoughtful and well referenced. Authors should indicate their details; Professional, Academic, and others as is applicable, including their e-mail contact.

Note: The views expressed in the articles published in this journal do not reflect the views of the Editors, Advisory Board, Makerere Law Society, the School of Law or Makerere University.

This Journal should be cited as MAKERERE LAW JOURNAL 2019.

In case of further inquiries, contact the Editorial Board;

Makerere Law Society (MLS)

School of Law, Makerere University

P.O. Box 7062,

Kampala-Uganda.

CHIEF EDITOR'S NOTE

On behalf of the 2019/20 editorial board, I am delighted to present to you this year's edition of the prestigious Makerere Law Journal. This edition provides an impeccable collection of scholarly works and sets the pace for the reader to explore and read the well scripted articles covering a broad range of legal topics.

This edition is indeed intellectually captivating and illuminating because it captures and explains an array of legal and quasi – legal intricacies, chronicled by distinguished and accomplished scholars and it is surely worth your read!

For this work, I want to particularly thank the Editorial Board 2019/2020 for their commitment and diligence. My deputy Ms. Kwitonda Charlotte Liza and the entire team of editors and associate editors, thank you! All the works contained herein have been possible because of your meticulous, and unwavering enthusiasm and I am profoundly honoured to have led a team so dedicated and hard working.

I am also especially appreciative of and humbled by the guidance and inspiration of past editors in chief who have greatly helped in the success and eventual publication of this edition. You are the giants on whose shoulders we stand.

I want to wish you dear reader, a thrilling experience as you turn the pages of this year's edition!

Thank you!

Dominic Adeeda
Editor-In-Chief

Contents

MAKERERE LAW JOURNAL SEPTEMBER 2019

VOLUME 15 ISSUE 2

LONG WALK TO JUSTICIABILITY: ARTICLE 8A AND UGANDA'S NATIONAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

Kansiime M. Taremwa and Lisandra Kabagenyi

RECOMMENDED CITATION:

Kansiime M. Taremwa and Lisandra Kabagenyi (2019), "Long Walk to Justiciability: Article 8A and Uganda's National Objectives and Directive Principles of State Policy" Volume 15 Issue 2, Makerere Law Journal, pp 1-17.

LONG WALK TO JUSTICIABILITY: ARTICLE 8A AND UGANDA'S NATIONAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

Kansiime M. Taremwa and Lisandra Kabagenyi[1]

Abstract

The 1995 Constitution of the Republic of Uganda was lauded by many commentators as one of the best in the region. Much of these sentiments of admiration gained traction because of the comprehensive nature of the Bill of Rights in Chapter 4 of the Constitution. However, the main body of Chapter 4 did not include a number of economic, social and cultural rights and they were instead included as part of the manifesto of aspirations code named, the "National Objectives and Directive Principles of State Policy." Judicial enforcement of ESCRs became difficult because of the fact that these National Objectives were not considered justiciable. In 2005, the Constitution was amended, introducing a new Article 8A in its main body that seemed to suggest that NODSPs were not merely aspirations. Notwithstanding some victories, the experience that the courts have had with Article 8A has left a lot to be desired.

[1] LLB Graduands, Makerere University School of Law (2015-19).

1.0 Introduction.

Uganda's 1995 Constitution[2] was once lauded by commentators as one of the best in the region.[3] Most of the admiration sprang from the comprehensive nature of its Bill of Rights
(Chapter four).[4]

Chapter four, however, did not include a number of economic, social and cultural rights (ESCRs), which were instead included within the manifesto of national aspirations that is the 'National Objectives and Directive Principles of State Policy'.[5] These National Objectives include aspects of both civil and political rights (CPR's) and ESCRs. In this article, ESCRs will be the focus of our discussion.

Given their outright inclusion within Chapter four, CPR's have been considerably dealt as far as their legal/judicial enforcement is concerned. In contrast, only a few ESCRs made it to Chapter four and they include; the right to education,[6] the right to join or form trade unions and partake in industrial action,[7] protection of children from economic exploitation[8] and the right to equal treatment for men and women in employment, remuneration, economic opportunities and social development.[9]

In the report of Uganda's Constitutional Commission, Justice Benjamin Odoki notes that these objectives were intended to make the state more responsive to

---

2 Promulgated on October 8, 1995 and replacing the 1967 Constitution.

3 Proceedings from the Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level, held on 9-11 September 2003 in Arusha, alluded to by Justice Mpagi-Bahigeine in Constitutional Petition No.2 of 2003, Uganda Association of Women Lawyers and Others v Attorney General, Constitutional Petition No.2 of 2003. September 2003 in Arusha-Tanzania.

4 Mostly Articles 20-45.

5 Hereinafter referred to simply as 'the National Objectives'.

6 Article 30, Constitution of the Republic of Uganda, 1995.

7 Article 40.

8 Article 34, Constitution of Uganda, 1995.

9 Article 33, Constitution of Uganda, 1995.

social needs, link the state and the society, define the role of the society in development, identify the duties of the state, and clarify the purposes for which power is to be exercised.[10]

However, judicial enforcement of ESCRs appearing within the National Objectives and not within Chapter four became difficult because Courts considered the National Objectives to be non-justiciable. In other words, that they were not enforceable as substantive rights.

In 2005, as part of the *Kisanja amendments*,[11] the Constitution was altered to introduce a new Article 8A into its main text. Article 8A provided that National Objectives were more than just aspirational ideals; that they were in fact justiciable. This meant that an action in court could be founded and sustained based on this Article. However, the experience that the courts have had with Article 8A has albeit with some victories left a lot to be desired.

Uganda has ratified a number of instruments that contain Economic Social and Cultural Rights (ESCRs); these include the African Charter on Human and Peoples Rights,[12]the African Charter on the Rights and Welfare of the Child,[13]the Convention on the Rights of the Child,[13] the Convention on the Elimination of All Forms of Discrimination Against Women,[1415]and the International Covenant on Economic Social and Cultural Rights, [16] which is the main international instrument protecting these rights.

By virtue of these ratifications, Uganda is bound by the provisions of these instruments[17] and it has a duty to guarantee the rights therein as part of its

---

10 Report of Uganda's Constitutional Commission, Paras. 0.54, 5.73, 5.77.

11 Oloka Onyango, Decentralization without Human Rights? Local Government and Access to Justice in PostMovement Uganda, HURIPEC Working Paper 12, p.15.

12 Ratified on 10 May 1986.

13 Ratified on 17 August 1994.

14 Ratified on 10 September 1990.

15 Ratified on 21 August 1985.

16 Ratified on 21 April 2008.

17 Article 14 of the Vienna Convention on the Law of Treaties.

municipal law.[18] However, Uganda's attitude towards discharging this obligation has been a controversial one. In this paper, we will discuss the enforcement of ESCRs before the inclusion of Article 8A in the Constitution, probe the history behind the inclusion of Article 8A, analyse what the courts have done with Article 8A and what its existence means for the enforcement of Economic, Social and Cultural Rights in Uganda. The question we interest ourselves in is whether in view of Article 8A and subsequent judicial pronouncements, National Objectives and Directive Principles of State Policy have now attained the status of justiciability.

Why is Justiciability an Issue?

John Murphy J defines 'justiciability'[19] as a set of man-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life that is to say, what is subject to judicial review and enforcement. It is the notion that a set of rights are enforceable by a court of law. Justiciability is concerned with whether rights are enforceable by legal means.[20]The ideological parameters within which this concept was developed lend credence to the fact that traditionally, courts were not avenues for the poor. It was developed to lock out those who posed a danger to the capitalist interests of profit maximization.[21] Justiciability of ESCRs is for the marginalized and the vulnerable in society and it is an urgent concern. If the poor and marginalized cannot run to a court to have the rights that affect their existence, their dignity and quality of life, why in the first place would the courts exist? This is why Article 8A and what it means

---

18 Christopher Mbazira, Public Interest Litigation and The Struggle over Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights, HURIPEC Working Paper No.24, 2008, p.17.

19 Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General,) 2008 NSSC 111 (CanLII); 267 NSR (2d) 21.

20 Report of the Uganda Constitutional Commission, Para.23.29.

21 Oloka Onyango, When Courts Do Politics: Public Interest Litigation in East Africa, 2017, pp.162-163.

for National Objectives and Directive Principles of State Policy is a crucial issue for discussion.

2.0 Enforcement of ESCRS in the Pre-Article 8A Dispensation

As earlier shown, the National Objectives and Directive Principles of State Policy were the home of economic, social and cultural rights in the 1995 Constitution. The framers of the 1995 Constitution deemed it wise that these types of rights should not be part of the enforceable aspects of the main body of the Constitution.[22] Oloka-Onyango has decried this state of affairs and has pointed out that the choice that the Constitutional Commission made left a lot to be desired in terms of offering serious protection for ESCRs.[23] What is shocking is that the Constitutional Commission had rightly observed that human rights are indivisible and interrelated[23] only to turn around and subject ESCRs to a different categorization.[24] What precipitated this decision was summed up by the Commission in these words;

> "*There is consensus that the economic and social rights should be spelt out in the Constitution. At the same time, we are mindful of the fact that the economic situation of the country would make it impossible for the people to enjoy these rights immediately on the coming into effect of the new Constitution or indeed in the foreseeable future. Even countries which are economically more advanced than Uganda find it prudent not to make them enforceable rights. Nevertheless, provision of such rights in a non-enforceable form will set vitally important directions for future policy and programmes of*

---

22 Report of the Uganda Constitutional Commission, Paras.23.85-23.87.

23 J. Oloka-Onyango Interrogating NGO struggles for economic, social and cultural rights in contemporary UTAKE: A perspective from Uganda. Human Rights & Peace Centre Working Paper Series, No. 4, 2006. 23 Report of the Uganda Constitutional Commission, Para.23.4.

24 Ibid, Para.23 .85-23.86.

government"

The Commission was mindful of the economic conditions of the country at the time and therefore decided that some 'less serious' rights like the right to food, shelter, among others should wait in the queue. Oloka- Onyango (2017) has noted that such excuses that allude to the economic status of a country are escapist.[25] Their aim is to simply insulate the State from responsibility and accountability.[26] The Commission's excuse that even more developed countries did not have ESCRs as enforceable rights also begs the question of whose interests the Commission represented. Why did they deny the people of Uganda an opportunity to ask their courts to enforce their economic, social and cultural rights? After-all, what would it cost to enforce a policy that ensures social parity?[27]

The judiciary quickly became an avenue for many cases especially on questions of Constitutional interpretation but it was mainly concerned with civil and political rights. In fact, the cases on ESCRs have been somewhat accidental[28] and sporadic.[29] The earlier decisions concerned civil political rights but they always begged for the view of trial or appellate courts on the status of National Objectives. In the first case before the Constitutional Court which concerned a high ranking officer of the Ugandan army and his denied request for retirement from the UPDF, that is, *Tinyefuza v Attorney-General,* [30]Egonda Ntende JCC observed that the National Objectives and Directive Principles of State Policy should guide all organs of the state including the judiciary in the interpretation

---

25 Oloka Onyango, When Courts Do Politics: Public Interest Litigation in East Africa, 2017, pp.162-163.

26 Ibid.

27 Ibid, p.163.

28 Ibid, p.173. ;Cases have been somewhat accidental because some of the earlier views that shaped jurisprudence as we understand it now came from the liberal interpretation of traditional civil and political rights to include some ESCR's. ESCR's were never the intention of the parties as is seen in the *Abuki case*.

29 Ibid.

30 Constitutional Petition No.1 of 1996.

of the Constitution. The learned Justice however fell short of saying that these objectives and directives are by themselves legally binding.[31] In Zac*hary Olum & Another v Attorney-General,* the court observed that although the National Objectives and Directive Principles of State Policy form an important part of the Constitution and are crucial canons in the interpretation of the Constitution, they are not justiciable.[32] The two decisions increased the uncertainty over the future of rights that were encased in the National Objectives and Directive Principles of State Policy. They restricted National Objectives to mere tools of Constitutional interpretation but with no real efficacy in Constitutional enforcement. While the statements made by both justices in the *Tinyefuza* and *Olum* cases appear attractive on the surface, they simply gave National Objectives no biting legal status, they left them impotent for the purposes of enforcement.

The decision of the Constitutional Court in *Salvatori Abuki and Anor v Attorney General*, however demonstrated the creativity with which activist judges can enforce socio-economic rights without necessarily reading from the script of the main body of the Constitution but from its spirit. Justice Egonda-Ntende in that case interpreted the right to life to encompass the right to livelihood. He observed that once a person is banished from his community, he is subjected to homelessness which violates his right to shelter and the right to food, consequently his right to life and livelihood.[32] The *Abuki* decision seemed to have settled the qualms, but we were to learn that in the absence of a clear statement from the judiciary, justiciability of National Objectives and consequently of ESCRs would remain in abeyance. Indeed as Oloka-Onyango notes, the *Abuki* decision dealt with ESCRs obliquely.[33] This approach is similar to that proposed by some that rights that are not expressly provided for in the main body of the

---

31 Ben Twinomugisha, Fundamentals of Health Law in Uganda, p.28. 32 Constitutional Petition No. 6 of 1999.

32 Constitutional Case No.2 of 1997.

33 Oloka, FN 20, p.173.

Constitution can be read into the same using the open door policy of interpretation that Article 45 proposes.

Article 45 states that, the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned. However Article 45 has been interpreted to mean that the rights being referred to are those which appear in international instruments which Uganda is a party to.[34] This approach does not resolve the question that surrounds the justiciability of National Objectives. The reason for this is that Article 45 is not new in the Constitution, if the framers intended it to have an effect on National Objectives, they would have stated so. Article 45 indeed exists to bring Uganda into conformity with its international obligations but it does not in our opinion aim at such rights as those which were safely tucked away in the National Objectives in a bid to avoid their enforcement.[36] They aim at such rights which the Commission considered justiciable from the beginning not those which it sought to shield from justiciability. Article 45 does not assist the case for the justiciability of National Objectives in a greater degree.

3.0 History of Article 8A: How Did It Get into The Constitution?

As earlier pointed out, National Objectives in the 1995 Constitution were meant to be nonjusticiable.[35] These principles were to "guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."[36] This was the legal status of the National Objectives,[39] all they could do was to guide in the implementation of government programs.

---

34 Uganda Law Sciety and Anor v The Attorney General, Constitutional Petitions No.2 and 9 of 2009, Judgment of Twinomujuni JA, p.20. 36 See FN 9 and FN 19.

35 Report of the Uganda Constitutional Commission, Supra Note 9.

36 Objective I (i) of the National Objectives and Directive Principles of State Policy.

39 Mbazira, See FN 17, p.18.

However, the reasoning of the court in *Zachary Olum,* dispelled all ideas of inferring that the term 'guidance' meant justiciability.[37] This situation left the enforcement of ESCRs in doubt.[38] In 2005, there were amendments to the Constitution. These amendments have been christened as the '*Kisanja Amendments*'[39] since their main objective was to remove Presidential term limits from the Constitution. However, neither the Constitutional Review Commission chaired by Professor Fredrick Ssempebwa nor the Government White Paper had mentioned or discussed any amendments with respect to National Objectives.[40] The origins of Article 8A are traced from the parliamentary debates (Hansard) that were spear-headed by Margaret Zziwa the then Kampala Woman Member of Parliament.[41] It can be argued that Article 8A was an after-thought, serving no particular purpose. It was a camouflage to legitimize amendments that were already unpopular in the court of public opinion. Perhaps this explains why Article 8A has not been taken seriously by the courts or any other organs of state. Article 8A was never on the agenda then and maybe it is not on the agenda now. It is also possible that it was rushed into the Constitution without adequate consultation about its efficacy.[42]

Be that as it may, Article 8A provides thus;

> **8A National Interest**
>
> *(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives of state policy.*

---

37 Constitutional Petition No.6 of 1999, Judgment of Okello, JJA.

38 Oloka, See FN 20, p.14.

39 J.Oloka Onyango, Decentralisation without Human Rights? Local Governance and Access to Justice in Post-Movement Uganda, HURIPEC Working Paper No.12, June 2007, p.15.

40 Oloka, See FN.20, pp.172-173.

41 Ibid 4.

42 There is no record to show that there was even a semblance of consultation of the citizens and other stakeholders prior to including it in the Constitution. In fact, the Ssempebwa Commission which was tasked with the consultative process prior to the 2005 Amendments did not interface with it.

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

Mbazira (2008) has argued that the full effect of this provision was to make National Objectives and Directive Principles of State Policy justiciable and in fact it did as this provision read all of them into the main body of the Constitution.[43]However, as Twinomugisha (2015) points out, this would be an over-simplification of the issue as the resultant effect of clause (2) of Article 8A would mean that unless Parliament passes a law to give full effect to clause (1), the status of Article 8A remains fairly uncertain.[44]It is not clear what Article 8A (2) means by requiring Parliament to make relevant laws. Does this mean that all laws passed by Parliament must meet the standard of National Objectives and Directive Principles of State Policy?[45] Or would it mean that there must be a specific law that codifies all the aspects in the National Objectives into a single legislation?[46]What is clear is that unless this ambiguity is done away with, there cannot be a concrete understanding of the effect that Article 8A has on the status of National Objectives and Directive Principles of State Policy in Uganda. The test for the legitimacy of any law is whether it meets the Constitutional standard.[47] It would appear to us therefore that every law passed by parliament must be in conformity with the Constitution as a whole and Article 8A in particular. The emphasis of Article 8A is on 'relevant laws' not a single law and therefore the view that all laws must meet this standard is the more liberal and compelling one.

4.0 What Have The Courts Done With Article 8A?

43 Mbazira, See FN.17, pp.9, 18.

44 Twinomugisha, See FN. 31, p.29.

45 The State of Implementation of Economic, Social and Cultural Rights in Uganda, A Parallel Report Submitted to The 53rd Session of the United Nations Committee on the Occasion of its Consideration of the 1st Periodic Report of Uganda, Prepared by the National Coalition on Economic, Social and Cultural Rights C/O Human Rights Network-Uganda, April 2015,p.1-2.

46 Ibid.

47 Constitution of the Republic of Uganda, 1995, Article 2(2).

The preceding section discussed what the historical background of Article 8A is and demonstrated that there remains an ambiguity as to what its legal effect is. This ambiguity can in a greater detail be resolved by judicial interpretation. In this section, we analyze some of the cases that the courts have interacted with and how they have dealt with them with respect to Article 8A.

The attitude of the courts has been one of caution and avoidance. The courts have shied away from dealing with the question of the enforcement of National Objectives and Directive Principles of State Policy even in the face of Article 8A.

4.1 In *Centre for Health Human Rights and Development and Ors v Attorney General,*[48] the petitioners petitioned the Constitutional Court seeking declarations to the effect that the non-provision of essential maternal health commodities in public health facilities and the unethical conduct and behavior of health workers towards expectant mothers are inconsistent with the Constitution and a violation of their right to health and other related rights namely, women's human rights,[49]right to freedom from torture[50] and the right to life.[54] The issues agreed upon were many but for this discussion we shall focus on the third issue which was seeking to know whether non-provision of basic maternal health care services in health facilities contravenes Article 8A, NODPSP XIV and XX of the Constitution. At the outset of the petition, the lawyers from the AG's chambers raised a preliminary objection to the effect that the case raised matters that were in the realm of the political question doctrine[55] because the matters that the petitioners were litigating over were in the express purview of the executive and legislature.

In essence, the court had no jurisdiction over this matter. The Constitutional Court held thus;

---

48 Constitutional Petition No. 16 of 2011.

49 Article 33 of the Constitution.

50 Article 24 of the Constitution.

54 Article 22 of the Constitution.

> "*Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is … reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies of government, for inter alia, the good governance of Uganda … This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and let on, their implementation. If this Court determines the issues raised in the petition, it will be substituting its discretion for that of the Executive granted by law … From the foregoing, the issues raised by the petitioners concern the matter in which the Executive and the Legislature conduct public business, issues or affairs which is their discretion and not of this court. This court is bound to leave certain constitutional questions of a political nature to the Executive and the Legislature to determine.*"[51]

The Court demonstrated that it was unwilling to take a bold step and declare the constitutionality of the right to health. This decision was not only a threat to the enforcement of ESCRs,[52] it was also an indication that the judiciary was unwilling to move past the cowardice that has characterised it in the face of heavy executive interests.[53] The case also demonstrated that the court was still held

---

According to Black's Law Dictionary, 9th Ed, p.1277, The Political Question Doctrine is a judicial principle that a court should not decide an issue in the discretionary power of the executive or the legislature.; In the case of *Marbury v. Madison 5 U.S. (1 Cr.) 137 (1803),* the US Supreme Court held that the province of the court was solely to decide on the rights of individuals and not to inquire how the Executive, or Executive officers perform duties in which they had discretion and secondly, that questions, which are by their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.

51 Cehurd and others v AG, p.25.

52 Ben Twinomugisha, Supra, p.37.

53 This cowardice can be traced from as early as 1966 in the infamous case of *Ex-Parte Matovu;* this subject is sufficiently dealt with by Prof.J.Oloka Onyango in his Inaugural Lecture, "Ghosts and the Law."

back by the vagaries of this history of cowering into submission when the Executive appears before the court instead of allowing history to aid a pragmatic enforcement of ESCRs.[54] The case was appealed to the Supreme Court, Uganda's highest appellate court.[55]

The Supreme Court in dealing with the same matters in *CEHURD and Ors v AG*,[56] expounded on the duty that courts have in protecting human rights of any nature. The court held that the petitioners had raised competent questions for interpretation of the Constitution, [57] that the Constitutional court had the requisite jurisdiction to hear the matters raised in the Petition[58] and should go ahead to decide it on its merits.[59] The court also held that the Political Question Doctrine had limited application in Uganda,[65] which was very important because it deprived courts of the convenient excuse not to hear matters that were purportedly within the "preserve of the executive and the legislature." In essence, the court was saying that such an excuse would not hold forte in a constitutional democracy like Uganda. Chief Justice Bart Katureebe also unequivocally noted that the Constitutional Court could determine whether implementation of programs and policies was consistent with National Objectives and Directive Principles of State Policy.[60] He also noted that an interpretation of Article 8A of the Constitution had to be made by the Constitutional Court.[61] In his own words, the Chief Justice said;

> "*The court would have to interpret what amounts to "all practical measures to ensure the provision of basic medical services." The court should also be guided by* ***Objective I*** *which spells out that*

---

54 Maale Mabirizi and Ors v The Attorney General, Consolidated Constitutional Appeals No. 2,3 and 4 of 2019, Judgment of Stella Arach-Amoko,p.49, Para20.

55 Article 132(1) of the Constitution of the Republic of Uganda.

56 Constitutional Appeal No. 1 of 2013.

57 Ibid, Judgment of Esther Kisaakye, JSC, P.12.

58 Constitutional Petition No. 16 of 2011.

59 Ibid, pp.27-32; Judgment of Katureebe, CJ, pp1-2. 65 Ibid, Katureebe, CJ, pp.4-29.

60 Ibid, p.17.

61 Ibid, P.18.

> *"the objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society." (Emphasis added) The court should, in my view, also have to consider* ***Article 8A*** *about the National interest which states that:* ***'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.***"

One can indeed understand the sentiments of optimism that this decision aroused. These words by the highest authority in the judiciary were putting all doubts to rest about what courts can and should do with National Objectives and Directive Principles of State Policy; courts should enforce them because they are justiciable. However, one wonders why the Supreme Court did not go ahead and unequivocally make that determination without having to send it back to the Constitutional Court. The Supreme Court was seized with jurisdiction to do such a thing. It is important to note that a lot has been written about the jurisdiction of the Constitutional Court and the High Court but very little has been said about the nature of the appellate jurisdiction of the Supreme Court in Constitutional appeals. This is part of what exacerbates the situation. There are arguments against the monopoly of Constitutional interpretation that the Constitutional Court enjoys and that the framers of the Constitution should have given this jurisdiction to other courts to allow them to freely engage with the Constitution.[62] In other words, other courts should be able to ably determine whether an act or omission by any person or authority is in consonance with the Constitution. It should not be left to the Constitutional Court alone. In fact, the Constitutional Commission noted that there were many fears surrounding this sort of

[62] Mbazira, See FN.17, p.46.

monopolisation of Constitutional interpretation.[63] The solution to these fears of monopolisation were to be resolved by creating an avenue for appeals on matters of constitutional interpretation.[64] This is the genesis of the appellate jurisdiction of the Supreme Court in matters of that taste. The jurisdiction of the Supreme Court in Article 132(3) of the Constitution is to the effect that any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision. That jurisdiction is premised on the need for promptness in dealing with the matter.[65] The answer in knowing what the Supreme Court can and cannot do lies in the understanding of the word "decision" as it appears in Article 132(3). This is important because it would be helpful to know whether the Supreme Court as in *Cehurd* can restrict itself to decisions on the preliminary objections since that was the 'decision' of the Constitutional Court or whether the Supreme Court can liberally probe into the decision behind that decision and then deal with that which the Constitutional Court was reluctant to deal with. The latter seems to be the approach that the Court took in *Paul*

Kawanga Ssemogerere, Zachary Olum and Anor v AttorneyGeneral, [66] where the Constitutional Court was faulted for misdirecting itself to the effect that it would have no jurisdiction to inquire into whether the amending sections, if they properly became part of the constitution, were unconstitutional. The Supreme Court went ahead and declared the Constitutional (Amendment) Act unconstitutional without having to send it back to the trial court for determination.[67]This approach would mean that the Court would be in the unenviable or enviable—depending on which side of the fence you sat— position of determining a matter which the Constitutional Court sought to escape under the guise of technicalities and in many ways that feeds into Article 126(2)(e);

---

63 Report of the Uganda Constitutional Commission, See FN 9, Para.17.90.
64 Ibid, Para.17.92.
65 Ibid, Para.17.92(c).
66 Constitutional Appeal No.1 of 2002.
67 Ibid, Judgment of Kanyeihamba, JSC.

substance not form. The point we are making is, that if faced with an opportunity, the Supreme Court should never defer a matter of Constitutional importance to a subordinate Court if it can offer an opinion on the same, even if that opinion is in obiter.

There were many other ways that the Supreme Court could have gone around it without necessarily offending the sacred territory of jurisdiction. In such a case, it could even have given the Constitutional Court a definite timeline within which to determine the matter. While there may be questions of judicial independence that may arise, the Constitution already considers Constitutional petitions such as Petition *16* with a unique urgency.[68] It is the business of the Supreme Court to ensure that all subordinate courts are properly directed in matters of law so much so that even where the Supreme Court has been relying on an erroneous precedent, it can depart from it when it seems right to do so and the subordinate courts will be bound by such precedent.[69] The *Cehurd* appeal was an even more interesting opportunity because the Chief Justice was a member of the panel and as such could issue such orders as to the specific timeline within which to hear the petition.[70]

Instead, the situation became more appalling because ever since the Supreme Court laid down this decision in 2015, the Constitutional Court has never delivered a judgment on the merits of Constitutional Petition. In fact, the case only came up for mention recently, almost 8 years since its first filing.[71] Is this not a denial of justice to the litigants in that case?[72] The two CEHURD cases in the highest courts in the land were an opportunity to unequivocally break the

---

68 Article 137(7) permits the Court to even suspend any other matters before it to dispose of a Constitutional Petition.

69 The Constitution of the Republic of Uganda, 1995. Article 132(4).

70 Ibid, Article 133(1) (b).

71 On 2nd May 2019, the Constitutional Petition came up for mention, 8 years since it was first filed. Accessible at: https://www.cehurd.co.org.

72 Under Article 126(2) (b) of the Constitution, one of the principles a court of judicature should be alive to when dealing with any case is that justice must not be delayed. This is in consonance with the appellate jurisdiction that the framers of the Constitution the intended for the Supreme Court in cases requiring Constitutional interpretation.

silence on Article 8A's import and they did not. The courts chose the exhausting path of exclusionary jurisdiction than the liberal path of complimentary jurisdiction. As it stands, in *Petition 16,* the anxiety over the merit of its merits continues to grow.

The *Age Limit cases*[73] have also made an attempt at discussing the import of Article 8A in the Constitution. The Constitutional Court decision was laden with an extensive discussion on the place of National Objectives and Directive Principles of State Policy. Cheborion, JCC observed that National Objectives read together with Article 8A form part of the basic structure of the 1995 Constitution of the Republic of Uganda.[74] In very emphatic terms, Justice Elizabeth Musoke observes that "pursuant to Article 8A, the Objective Principles are now justiciable."[75] The Supreme Court in the *Age Limit Case* did not depart from the reasoning of the Justices of the Constitutional Court with respect to the place of National Objectives and therefore, there is cause for optimism. The Supreme

---

73 Constitutional Petitions Nos. 49 of 2017, 3 Of 2018, 5 Of 2018, 10 Of 2018, And 13 Of 2018 And Constitutional Appeals No.2, 3 And 4 Of 2018.

74 See FN 79, Judgment of Cheborion- Barishaki, para.15, p. 764.

75 See FN 79, Judgment of Elizabeth Musoke, JCC, Para.5, p.649; We should note in passing, that it was in Justice Elizabeth Musoke's court that the Political Question Doctrine ghost resurrected to deny litigants in a health-related case a fair day in court. In *Institute of Public Policy Research (Uganda) v The Attorney General*, the applicant appeared before the court to apply for an injunction against the government. This was the Brain-Drain case where the Ministry of Foreign Affairs intended to export Ugandan doctors and nurses to Trinidad and Tobago. On that occasion, Justice Elizabeth Musoke relied on the PQD and the litigants were stopped in their tracks. Even then, Article 8A was operational, did she ignore it, was she unaware or was it convenient to ignore it then? The past may not be past.

82 Constitutional Appeals Nos. 2, 3 and 4 of 2018, Judgment of Ekirikubinza, JSC, p.21.

83 Ibid, p.21.

84 Ibid.

85 See FN 32.

86 See FN 81.

87 Article 38 of the Constitution.

88 Part of this uncertainty is deduced from the inconsistencies which we highlighted in passing in FN 81.

Court posited that the National Objectives and Directive Principles of State Policy are part of the preamble of the Constitution which postulates that there was need to end a history of exploitation and injustice.[82] The National Objectives are part of the basic structure of the Constitution.[83] In essence, they form an important part of the 1995 Constitution and therefore should not be treated with disdain by the courts or anyone for that matter.[84] The Supreme Court was reading from the same script as the Constitutional Court in that regard and the sum of the two courts' conclusions is that Article 8A strengthened the position of National Objectives and Directive Principles of State Policy. Article 8A in effect clothed with might what the Constitutional Commission had left in weakness, the National Objectives do not just have a role to guide in interpretation (which seems to be the compromise, Okello, JSC adopted in *Zachary Olum*,[85]) they have a central role in determining whether governance in Uganda is based on national interest and common good by virtue of Article 8A. The Courts are saying, that before Article 8A, these National Objectives had a fringe role that could potentially be ignored, however with Article 8A in the equation the status and force with which National Objectives speak has been fundamentally amplified- they are justiciable.[86]

Two things need to be noted though, the first is that application of Article 8A in the Age Limit cases was with respect to civil and political rights of participation in governance. These are already protected in the main body of the Constitution.[87] So there remains a fair share of uncertainty as to whether the courts will be as emphatic when it comes to an outright economic, social or cultural right where the same Article 8A is the saving provision for their enforcement.[88]The reasoning is that the very things that forced the Constitutional Commission to veil majority of the ESCRs in the National

Objectives rendering them unjusticiable are still existent, the resources are still meagre and the political players are still non-committal.[76]

The second thing is one highlighted above, is the judiciary sufficiently armed with courage to enforce ESCRs with the aid of Article 8A even when it is not convenient? Is there a willingness of the Courts to be more liberal and non-conformist? These questions will hover over the judiciary at least until we see the outcome of *Petition 16*.

5.0 CONCLUSION·

We have traced the track-record of judicial interaction with Economic, Social and Cultural Rights in Uganda even when they are not expressly provided for in the main body of the Constitution. We have also shown how Courts dealt with cases of this nature before the enactment of Article 8A that read National Objectives and Directive Principles of State Policy into the Constitution. We then traced the history of Article 8A and how it found itself in the Constitution and we made the point that perhaps because of its belated addition, it was not initially taken seriously by the courts. We then showed how 10 years after its inclusion in the Constitution, the courts began to recognize that Article 8A had a cutting edge and now has attained that coveted status of being justiciable. We conclude by highlighting, that attaining that tag in pronouncement may not in itself make it obvious that the courts will consider National Objectives justiciable in all circumstances. In fact, it is possible that the courts will shy away from actually enforcing Article 8A strictly when it is in favour of an economic, social or cultural right, but we will count our blessings.

---

76 This attitude is visible in the way government actors treat judicial pronouncements with contempt as has been seen in the manner in which the government refused to comply with the orders of the Supreme Court in Amama Mbabazi v Y.K. Museveni and Ors, Presidential Election Petition No.1 of 2016. This is now a subject of court process in a case that has been filed by Prof. Fredrick Ssempebwa and Prof. Fredrick Jjuko together with Kituo Cha Katiba against the Attorney General in the Supreme Court.

References.

The Constitution of the Republic of Uganda.

Black's law dictionary, 9th edition.

Christopher Mbazira, "Public Interest Litigation and The Struggle over Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights," HURIPEC Working Paper No.24, 2008, p.17.

J Oloka-Onyango, "Interrogating NGO Struggles for Economic, Social and Cultural Rights in
Contemporary UTAKE," A Perspective from Uganda Human Rights & Peace Centre Working Paper Series, No. 4, 2006.

J. Oloka Onyango, "Decentralisation without Human Rights? Local Governance and Access to Justice in Post-Movement Uganda," HURIPEC Working Paper No.12, June 2007, p.15.

Oloka Onyango, When Courts Do Politics: Public Interest Litigation in East Africa, 2017.

Ben .K. Twinomugisha, Fundamentals of Health Law in Uganda.

Reports

The State of Implementation of Economic, Social and Cultural Rights in Uganda, A Parallel Report Submitted to The 53rd Session of the United Nations Committee on the Occasion of its Consideration of the 1st Periodic Report of Uganda, Prepared by the National.

Report of the Uganda Constitutional Commission.

Professor J. Oloka Onyango in his Inaugural Lecture, "Ghosts and the Law."

Centre for Health Human Rights and Development (CEHURD) and Others v Attorney General, constitutional petition NO.16 OF 2011.

Centre for Health Human Rights and Development (CEHURD) and ors v AG constitutional appeal NO.1 of 2013.

Paul Kawanga Ssemwogerere and Zachary Olum and Anor v AG, Constitutional Appeal No.1 of 2002.

Amama Mbabazi v Y.K. Museveni and Ors, Presidential Election Petition No.1 of 2016.

Male Mabirizi and Ors v The Attorney General, Consolidated Constitutional Appeals No. 2, 3 and 4 of 2019.

Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General,) 2008 NSSC 111 (CanLII); 267 NSR (2d) 21. Accessed at http://www.canlii.org/en/ns/nssc/doc/2008/

The Age limit cases, Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 13 of 2018 and Constitutional Appeals No.2, 3 and 4 of 2018.

MAKERERE LAW JOURNAL OCTOBER 2019

VOLUME 15 ISSUE 3

THE HUMAN RIGHTS IMPLICATIONS OF UGANDA'S BORROWING

Ruth Muhawe

RECOMMENDED CITATION:

Ruth Muhawe (2019), "The Human Rights Implications of Uganda's Borrowing" Volume 15 Issue 3, Makerere Law Journal.

THE HUMAN RIGHTS IMPLICATIONS OF UGANDA'S BORROWING

Ruth Muhawe*

Abstract

The relationship between the sovereign debt of developing countries and the protection of the social rights of citizens in those countries has received considerable analysis from the economic, political and moral perspectives, but relatively little has been written from the legal point of view. Consequently, this paper provides legal insights into the lingering crisis that sovereign debt poses to human rights, with a specific focus on the economy of Uganda. The paper is particularly concerned with examining what Uganda's debt burden means for the basic observance and enjoyment of human rights by its citizens of both the present and the future.

> Africa's burden of foreign debt represents the single largest obstacle to the continent's development. It takes its toll on human beings with a brutality difficult to capture in words. For the majority of poor people in Africa, continued debt repayment means increasingly inadequate diets, insufficient income to feed and educate children, and mounting susceptibility to diseases. As long as African countries are forced to spend almost US$15 billion each year repaying debts to G8 governments and international financial institutions, they will be unable to address their urgent domestic needs. The constant outward flow of desperately needed resources undermines poverty-reduction initiatives and cripples efforts to cope with the devastating impact of disaster and disease.[1]

---

* LLB IV Student, Makerere University.

1 Fantu Cheru, 'Playing Games with African Lives: The G7 Debt Relief Strategy and the Politics of Indifference' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006) 36

1.0 INTRODUCTION

The gist of the phenomenon of the "social contract" as developed by philosophers like John Locke and Jean-Jacques Rousseau is that when men and women agree to yield parts of their autonomy and cede control to the state, the government is then obliged to protect the natural rights of its subjects.[2] If the government neglects this obligation, it forfeits its validity or legitimacy and ultimately its office.[3] This theory underlies the provision in Article 1(3) of the 1995 Constitution of Uganda which emphasizes that the power and authority of government and its organs derives from the people.

Public debt is incurred primarily for financing budget deficits, the development of domestic financial markets, supporting the country's balance of payments position, bolstering foreign reserves and pursuing monetary policy objectives.[4] Economists however caution against 'debt overhang' – the acquisition of large debts which creates a climate of permanent financial fragility in a country, leaving it in a financial and economic slump without domestic revenue to pay for current expenditures.[5] Appropriate development means development activities that are consistent with international human rights standards, are sustainable, and that involve the beneficiaries in the design, implementation and management of the development activity.[6]

Human rights on the other hand are based on principles of empowerment, participation and accountability. At one time, these were seen as irrelevant or antagonistic to economic growth and development. Today however, the importance of participatory and accountable decision making has been echoed by virtually every relevant international body, and good governance directives are a key element of

---

2 John Locke, *Two Treatises of Government* (Awnsham Churchill, England 1689)

3 Jean- Jacques Rosseau, *The Social Contract* (France 1762)

4 Office of the Attorney General, 'Follow-up Audit Report on the Utilisation of External Public Debt' (2015). Accessible at: www.oag.go.ug

5 Christian Barry, 'Sovereign Debt, Human Rights and Policy Conditionality' [2011] The Journal of Political Philosophy 4.

6 Daniel Bradlow, 'Debt, Development and Human Rights: Lessons from South Africa' [1991] 12 Michigan Journal of International Law 649.

multilateral lending.[7] Accountability is therefore at the core of human rights, and is the rationale behind the spirit and content of human rights instruments. Accountability by the State is arguably a specific human right vested in the citizens of any country. National law is the primary mechanism for the protection of human rights, even when the laws may not explicitly be labelled as pertaining to human rights.[8] This is important to note because not every human rights standard gives rise to a remedy in the event of violation.[9] Redress is usually available only if the country accused of the violation has agreed to be held accountable by an international human rights body, or if the right is protected by domestic law, the obligation of the State clarified and the remedy also set out.[10] While discussing agency as one of the proposed UN Basic Principles on Sovereign Debt, the UN Conference on Trade and Development (UNCTAD) emphasises that government officials involved in sovereign lending and borrowing transactions do so for the public interest.[11] The principle is expounded to mean that when they contract debt obligations, they have a responsibility to protect the interests of their citizens. This is because sovereign debt binds the continuing legal entity of the State including the future generations of its citizens. Another principle discussed thereunder is that of transparency which imposes an obligation on states to put in place and implement a comprehensive legal framework that defines procedures, responsibilities and accountability mechanisms. Because the tax payers of a country will ultimately be responsible for the repayment of sovereign debt, their representatives in the legislature should be involved in the decisions about whether and how to incur the debt. In a developed world, it is easy to ignore the problem of the sovereign debt of developing countries, or to take no more than a general political interest in the issue

---

7 Chris Jochnick, 'The Legal Case for Debt Repudiation,' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press) 142.

8 Under national law, the 1995 Constitution of Uganda provides for accountability to the people by those in governance- under Objective XXVI. Article 8A of the Constitution gives this objective the force of law by requiring that the State be governed in line with the national principles and directives of state policy. In addition, Article 38 requires that citizens be allowed to participate in the affairs of government individually or through their chosen representatives, and Article 159(2) restricts government's power to borrow or lend to the approval of Parliament.

9 Chrystin Ondersma, 'A Human Rights Framework for Debt Relief,' [2014] 36 (1) U. Pa. Journal of International Law 287.

10 *ibid.*

11 UNCATD, *UN Basic Principles on Sovereign Debt* (10th January 2012)

when it is portrayed by the media at special occasions.[12] And yet this problem touches on many fundamental issues such as concepts of justice, tensions between human rights protection and financial interests, and the relationship between the developing world and the industrialized North.[13] Decisions about fiscal policy usually make front page news and form the focus of political controversy, while debt management policy usually gets little attention.[14] It is the quiet part of government's efforts at economic stabilization.[15] Debt management is not just an automatic program of financing the deficit; the way government finances the deficit has major consequences for the economy.[16] For example, the near-global financial melt-down in 2008 arose directly from the excessive accumulation of debt within the US.[17] In addition, the history of international finance is littered with instances of governments that declared themselves unable to meet their financial obligations on a timely basis.[18] Governments with a poor track record, little credibility and limited political resolve especially when their own financial woes were aggravated by widespread corporate and bank failures have been particularly susceptible to default.[19] Notwithstanding the above, human rights under international law predominate over conflicting obligations including debt servicing.[20] In fact, the essence of the legal obligation of debt incurred by a government is to ensure the economic and social aspirations of its people, by assigning priority to their basic health, nutritional and educational necessities.[20] Clearly therefore, the people and their well-being should be at the centre of all policy decision-making including the acquisition and management of public debt, as opposed to being a mere after-

---

12 Sabine Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt- A Legal Perspective* (2nd Edition Routledge 2014) 1.

13 i*bid.*

14 Paul Nadler, 'Decisions about Financing the National Debt Influence Our Economy' [1993] 8 Com. Lending Review 63.

15 *ibid.*

16 *ibid.*, p.66

17 Joseph Stiglitz, 'Free fall; America, Free Markets And The Sinking Of The World Economy' [2010] 231-234.

18 See the cases of Greece and Argentina for further analysis.

19 Arturo Porzecanski, 'Dealing With Sovereign Debt: Trends and Implications' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis*, (Oxford University Press 2006) 268. 20 Jochnick (n 7) 141.

20 IACHR Res. 322 of 1982.

thought as some form of collateral to handle after the crisis befalls the economy. Unfortunately, the latter is commonly the practice. Economic human rights are a powerful foundation for macro-economic performance, but so long as nation states value sovereignty, it is not likely that these rights will be enforceable by citizens against their own governments.[21] This paper therefore considers what should legally be the place of the people at the table of decision-making on issues relating to sovereign debt. Attention is drawn to the inevitable link between a country's debt and the human rights of its citizens. The paper also holds a discussion on the concept of illegitimate or odious debt and analyses its application to and implications for Uganda's borrowing. Focus is then shifted directly to the case of Uganda—tracing its debt from the 1980s to date, with a detailed presentation of the current debt situation and analysis of developing trends. A brief overview of the existing legal, policy and institutional framework guides the critique on whether the same is adequate. A discussion is also made of how Uganda's borrowing affects both current and future generations, with a critical consideration of the degree to which enough or any attention is being paid to the issue. The paper concludes by making the recommendations necessary to progress towards a more comfortable and desired position.

---

[21] Steven Ramirez, 'Taking Economic Human Rights Seriously After the Debt Crisis' [2011] 42 Loy. U. Chi. Law Journal.713-739

2.0 SOVEREIGNITY, SOVEREIGN DEBT AND HUMAN RIGHTS.

The international financial community portrays lending as necessary and good, but since 1999 developing countries have been paying more than US$260m per day to the industrialised countries because of that lending, and it seems that the benefits to many poor countries are less than what has been claimed.[22] First, International policies often make the conferral of aid, debt, relief or additional trading opportunities to a country depend upon its having successfully implemented specific policies, achieved certain social or economic outcomes, or demonstrated itself as committed to conducting itself in specified ways.[23] The countries of Sub-Saharan Africa have largely been turned into an IMF/World Bank 'macro-economic guinea pig' because their poor credit ratings make them largely dependent on resources from the multilateral institutions.[24] As a result, these countries have ceded important parts of their sovereignty to these institutions.[25] Besides, debt servicing that infringes upon a government's ability to carry out basic sovereign functions as it instead focuses on meeting conditions imposed by creditors undermines the right to self-determination.[26] For example, the HIPC initiative[27] has failed to resolve Africa's debt crisis and has instead left many developing countries committing scarce resources to debt servicing instead of meeting the needs of their people.[28] However, the UN condemns the repayment of debt under predatory conditions due to the direct negative effects it has on the capacity of sovereign governments to fulfil their obligations on economic social and cultural rights in particular.[29] Countries

---

22 Joseph Hanlon, 'Defining Illegitimate Debt: When Creditors Should Be Liable For Improper Loans' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads:*

23 Barry (n 5) 1.

24 Cheru (n 1) 39-40.

25 T. Mkandawire and C. Soludo, *Our Continent, Our Future; African Perspectives on Structural Adjustment (*Africa World Press 1999).

26 Jochnick (n 7) 145.

27 The initiative fronted by the IMF and World Bank in 1996 to assist highly indebted poor countries (HIPC) with debt relief.

28 Cheru (n 1) 51.

29 UNGA Res. 68/304 of 2014

should not be forced to exhaust all resources to pay off sovereign debt, much less when repayment will be at the expense of the well-being of their citizens.[30] Debt servicing deprives governments of as much as half their annual budgets, eliminating vital social services, undermining democratic processes and condemning the poorest populations to a vicious cycle of impoverishment.[32] When a state borrows, it is effectively selling a resource to the creditor- the right to part of the future taxable income of those subject to its tax authority.[31] Also, since creditors cannot *de jure* take control of a country or seize a significant amount of its assets in the event of default, supply of credit to the debtor state is instead restricted.[32] But setting aside the periodic crises and stunted development caused by over-indebtedness, the real cost of sovereign debt is paid in tiny instalments every day by people without access to health care, education and clean water, whose livelihoods are crimped by crumbling public infrastructure and faltering economies.[33] A possible counter argument made by some scholars is that since improvements in a country's highways or ports, schools or hospital care all benefit future tax payers, long-term borrowing is merely a way for the government to share the present costs of such projects with those future tax payers through interest and principal repayments, which their taxes will cover[34] An immediate criticism however lies in the reasoning that the agents who take out the loan and those obliged to repay it are different (as it is the finance ministers and other public officials who make the decision to borrow a sum to be suffered by present and future citizens) and sometimes, the much promised benefits simply don't accrue.[35] There therefore seem to be many parallel but supporting angles to this link between sovereign debt and human rights. On the one hand, poor countries may need to borrow to have enough to fulfil the economic, social and cultural rights of their citizens. On the other hand, over- borrowing

---

30 Julieta Rossi, 'Sovereign Debt Restructuring, National Development and Human Rights' [2016] 23 Sur- International Journal on Human Rights 185, 192. 32 Jochnick (n 7) 132.

31 Barry (n 5) 8.

32 Daniel Marx, Jose Echague and Guido Sandleris, 'Sovereign Debt and the Debt Crisis in Emerging Countries: The Experience of the 1990s' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis*, (Oxford University Press 2006) 56.

33 Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis*, (Oxford University Press 2006) 3.

34 Barry (n 5) 3.

35 *ibid.*, p.7

results in a heavy tax burden on the citizens to meet debt servicing obligations. Eventually, failure to meet these obligations restricts the supply of credit to the debtor country, credit it needs to function and take care of its citizens. This paradox has been captured by some analysts thus:

> It is hard to imagine how most countries would govern themselves well or reliably fulfil the human rights of their people without their national government enjoying some rights to borrow in the name of their present and future citizens. Sovereign debt raises serious human rights concerns however, when very high levels of debt significantly limit the ability of countries to manage their affairs effectively. High debt levels can limit the capacities of governments to provide the social services necessary to ensure even a minimally adequate standard of living for their people, and divert resources and energy from the pursuit of short and long- term strategies that would further their peoples' well-being.[36]

The question then becomes about where to draw the line. A government can always tax more or spend less to make resources available to service its debt, but too much taxation can eventually become economically inefficient and counter-productive.[37] Reducing expenditures can also cut into basic services that many would rank morally preferable or in some ways more desirable than debt service. [38] The reconciliation point would therefore be that those in charge of debt acquisition and management involve the people, be adequately accountable and present clear and tangible indicators of how the loans taken out are benefiting the population.

---

36 Barry (n 5) 3.

37 Jack Boorman, 'Dealing Comprehensively and Justly With Sovereign Debt' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis,* (Oxford University Press 2006) 233.

38 *ibid.*

Instead, present and past governments of many excessively-indebted countries are being criticised for not being even minimally representative of the interests of those they rule.[39] They are constantly accused of failing to give due consideration to the interests of their people, in both the making of decisions, and in the decisions themselves. Proving the accuracy of these assertions is what would determine whether sovereign debt is not just a factor explaining the human rights under-fulfilment in Africa, but has elevated into a manifestation of human rights violation.

2.1 The Concept of Illegitimate and Odious Debt.

The doctrine of odious debt originated with arguments made by the US in 1898 during peace negotiations following the Spanish-American war. The US claimed that neither the US nor Cuba should be responsible for the debt Cuba incurred under colonial rule because first, the debt had been imposed upon the people of Cuba without their consent and second, it had not been incurred for the benefit of the Cuban people. These arguments prevailed, with Spain taking responsibility for the Cuban debt under the peace treaty.[40]

The doctrine of odious debt holds that debt should not be transferable to successor regimes if (1) it was incurred without the consent of the people and (2) was not for their benefit.[41] By established principle, consent of the people could be equated with coming to power through a free and fair election. Could it be extended to debt incurred only by decisions or sanction of representatives of the people in Parliament? The underlying principle is that just as an individual does not have to repay money that someone fraudulently borrows in her name, a country should not be responsible for debt that was incurred without the people's consent and was not for their benefit.[42] Even the debt relief movement rests on two main arguments: debt further impoverishes poor countries, and loans were often illegitimate in the first place.[43]

---

39 Barry (n 5) 7.

40 Treaty of Paris, December 10, 1898.

41 Seema Jayachandran and Michael Kremer, 'Odious Debt' [2006] 96(1) American Economic Review 1.

42 *ibid.*, p. 2

43 *ibid.*, p. 17

Some campaign groups including Jubilee South have argued that a substantial part of poor- country debt is 'illegitimate' and that therefore the people of those countries should not be saddled with repayment of those debts. This notion is vastly explored by Joseph Hanlon in his paper, '*Defining Illegitimate Debt: when Creditors Should be Liable for Improper Loans.'*[44] First, he explains that a loan is illegitimate if it would be against the national law, is unfair, improper, objectionable, or infringes public policy. This broad test has received a lot of criticism as will be shown. Hanlon argues the concept around illegitimate debt to be that the lenders should instead be made

liable for their bad lending and that the people of poor countries should not be forced to repay loans that the lender should never have made in the first place.

His paper also provides examples of debts that have been considered illegitimate: from loans which fuelled corruption, to loans for dams and mining projects which resulted in intense environmental and social damage as argued by Jubilee South 2001. It is also frequently argued that the rich North has a debt to the South, historically for slave trade and colonialism, and more recently for the damage done by cold war proxy wars and environmental depredations. Some loans have been considered politically incorrect, for example an Argentine federal judge in 2000 who ruled that debt contracted during the period of military dictatorship (1976-83) was illegitimate.[45]

But more interestingly, Hanlon argues that inappropriate loans include those to formally elected governments that have become dictatorial and are no longer using the funds in the interest of the people. The problem with how far this line of argument can be used to get out of indebtedness is that it is more social and humanitarian than legal. One author has argued that the attempt by several NGOs notably Jubilee South to stretch the concept of illegitimacy to cover the bulk of all Southern sovereign debts by for example defining debts for projects that failed to deliver the expected benefits as illegitimate is legally and economically untenable.[46]

---

44 Chris Johnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006) 109- 131

45 Olmos Alejandro v Various Former Government Officers, 14 July 2000.

46 Raffer Kunibert, 'Odious, Illegitimate, Illegal or Legal Debts- What Difference Does it Make for International Chapter 9 Arbitration?' [2007] 70 Law and Contemporary Problems 221, 231.

There is great conflict between the narrow and the broad definition of illegitimate or odious debt, with each school of thought making sound argument for why it should be construed one way and not the other. For the broad school, differing definitions have been used. A debt has been said to be illegitimate when; the debt was incurred by an undemocratic regime, the borrowed funds have been used for what are regarded as morally reprehensible purposes such as financing suppressive regimes, repayment is a threat to fundamental human rights, the debt has grown to unmanageable proportions as a result of external factors over which the country has no control like higher market interests, and when debt that was originally commercial is taken over by the government of a debtor country through the triggering of government guarantees.[47]

The Norway Minister of foreign Affairs (2004) commented on this definition as appearing to catch all debt, and warned that if all these criteria were accepted, to advocate for cancelling illegitimate debt would easily be seen as a recommendation to cancel all developing countries debt which is neither appropriate nor desirable.[50] Hanlon's very broad definition therefore reflects the problem that 'illegitimate' threatens to cover virtually any sovereign, developing-country debt.

The issue is that if one implication of the illegitimacy debate is that developing countries have no responsibility for having taken up loans for illegitimate purposes, this is a very dangerous premise. Naturally, if debts can be defined as illegitimate later on the basis of evolutions impossible to predict when loans were signed, this in itself would mean less financing and more expensive loans, especially for the poorest countries.[48] It would also be blatantly unfair to bona fide creditors who comply with their legal duties, as the risk that perfectly legal and legitimate contracts might suddenly turn illegitimate is wholly different.[49] A duty of care is already imposed on lenders to observe professional standards and investigate

---

47 Ministry of Foreign Affairs, Norway (2004) *Debt Relief for Development- A Plan Of Action* p.19. Accessed at http://www.regjeringen.no/upload/kilde/ud/rap/2004/0225/ddd/pdfv/217380-

50 Ministry of Foreign Affairs (n 49).

48 Kunibert (n 48) 230.

49 *ibid.*

53 *ibid.*

relevant facts, such as whether the person signing the contract has authority to do so.[53] But there are limits to creditor duties , and not all risk can or should simply be shifted onto creditors.

Another conflict exists around what constitutes 'odious' debt. One view is that under the existing doctrine, both conditions ('without the consent of the people' and 'not for their benefit') must hold for a debt to be considered odious. Thus, the debts of a regime that loots but rules democratically or of a non-democratic regime that spends in the interests of the people would not be considered odious.[50] This view further argues that whereas loans are beneficial to the people if the government is not odious and detrimental to them if the government loots the proceeds, a country should repay its loans either way, even if it has been looted by an odious regime.[51] Therefore for debt to be odious the borrowing government has to be both undemocratic and loot the funds or use them for repression.

A contrary view takes a more liberal approach to suggest that one should also consider cases where the government is democratic but loots the proceeds from borrowing or is democratic but spends incompetently so its borrowing does not benefit the people.[56] It is argued that in the latter case, even if the international community does not want to go so far as to block such government's ability to borrow, it might still want to make it clear that it would not help rescue creditors who lend to the government.[57] While most would argue that a democratic country following inefficient policies should be able to spend as it pleases, many contend that the international community should not have to subsidise wasteful spending, and it sometimes does so in the form of international aid packages to countries whose economies have collapsed.[52]

There are a number of cases in which dictators have borrowed from abroad, expropriated the funds for personal use, and then left the debts to the population they ruled. For example under Mobutu Sese Seko, the former Zaire accumulated

---

50 Michael Kremer and Seema Jayachandran, 'Odious Debt' (2002) NBER Working Paper No. 8953.

51 *ibid,* p. 8

56 *ibid*, p. 25

57 *ibid.*

52 Kremer and Jayachandran (n 54) 27.

59 Kunibert (n 48) 229.

over $12billion in sovereign debt while Mobutu diverted public funds to his personal account, overseas treasure and to his efforts to retain power. Similarly, the apartheid regime in South Africa borrowed from private banks through the 1980s and a large percentage of its budget went to financing the military and police and otherwise repressing the African majority.

In addition, there are debts that might be legal by strictly formal standards, yet whose existence or servicing violates established norms.[59] If these debts were recognised as illegal, there would be no need for relief as the debts would be void ab initio. But this doctrine remains a minority legal view among legal scholars and has gained little momentum within the international law community, largely out of concern that the concept of odious debt could prove to be a very slippery slope.[53] Countries could claim that previous debt was odious as an excuse to renege on legitimate debt, and if creditors anticipated being unable to collect on legitimate loans, the debt market would shut down.[54]

Therefore, although as Hanlon points out the concept of illegitimacy is important in pointing the blame of the debt crisis to politically driven and imprudent actions of creditors rather than on the borrowers, this is not yet a well Uganda can draw from. There is need to first define the terms 'odious' and 'illegitimate' in a meaningful, uniform and internationally recognised way, so as to determine what precisely is to be understood by such debts in order to determine how they should be treated if those accepted legal norms prevailed. Only then can the case for Ugandan citizens being absolved of the duty to pay back the wildly accumulating and yet unproductive debt be properly be made.

Additionally, defining Uganda's debt as illegitimate could put the country at risk of economic sanction. There are proposals for an institution that assesses whether regimes are odious.[55] On such determination, arguments are made to shut down the borrowing capacity of illegitimate regimes as a form of economic sanction against them.[56] Even further, there are calls to block regimes from any borrowing that will

53 Jayachandran and Kremer (n 43) 2.
54 Jayachandran and Kremer (n 43) 2.
55 Kremer and Jayachandran (n54) 1.
56 *ibid.*, p. 2

be used in ways that do not benefit the people, even if the regime does not loot or repress them but simply follows bad economic policies.[57]

This is based on the earlier stated rationale that the international community should not subsidise wasteful spending, and trade sanctions have been seen to be ineffective as third parties have incentives to break them. Instead, the case is made for limiting sanctioned governments' ability to borrow. For a country like Uganda which doesn't fund even half of its own budget, such a position would be very disastrous to the economy and heavily impact the ability of its citizens to enjoy even the minimum standard of human rights.

3.0 THE HISTORY OF UGANDA'S DEBT.

The existence of over-indebtedness throughout most of the developing world for decades defies the implication of immediacy and urgency that normally defines what would be termed as a crisis.[58] For over 25 years, the guiding principle of official debt relief has been to do the minimum to avert default, but never enough to solve the debt predicament.[59] Uganda's story can be summarised this way:

> Since the 1980s, the international financial institutions and Western creditor governments engaged in a self-deceptive and destructive game of managing the third world debt problem from afar and forcing unpopular economic policies down the throats of powerless countries in the belief that the bitter medicine of macroeconomic adjustment would ultimately put those countries on a path to prosperity and freedom from debt. Two decades later, however, many poor countries are in worse condition than when they started implementing structural adjustment programs (SAPs) mandated by the IMF and World Bank.[60]

---

57 Kremer and Jayachandran (n 54) 25.
58 Johnick and Preston (eds.) (n 35) 4.
59 *ibid.*
60 Cheru (n 1) 35.

In nominal terms, Uganda's debt burden rose from US$172m in 1970 to US$3.6b in 1998, the year in which it first received debt relief under the HIPC Initiative.[61] The country's external debt had increased over the decades because of the accumulation of arrears as a result of successive governments defaulting on debt obligations, deteriorating terms of trade, expansionary fiscal policies and heavy borrowing for economic recovery and stabilisation programmes.[69] By 1994, 70% of Uganda's debt was owed to multilateral creditors. In total, Uganda was granted debt relief amounting to US$1b in net present value (NPV) terms to be delivered over a period of 20 years.[62] The Ministry reports as follows;

> Nearly two decades ago, Uganda's debt had peaked to unsustainable levels such that the economy did not have the capacity to meet its debt obligations. Fortunately, Uganda became the first country to qualify for debt relief under the HIPC initiative in 1998 and subsequently under the Enhanced HIPC in 2000. In 2006, Uganda benefited from another form of debt relief under the Multi-lateral Debt Relief Initiative (MDRI). All this debt relief eased Uganda's debt service obligations and our debt position has since remained sustainable.[63]

However, it also reports a slowing-down of the country's economic growth in the last five years, averaging 4.5% compared to the 7% achieved during the 1990s and early 2000s.[64] The combined relief given to Uganda under HIPC I and II was supposed to enable the country remain on a sustainable development path for the foreseeable future. [65] However, results from the two debt sustainability analyses (DSAs) conducted in 2002 showed a rise in debt levels to almost 200%.[66] Since 1998, a series of sovereign debt crises in the developing world have reminded everybody that

---

61 Florence Kuteesa and Rosetti Nayenga 'HIPC Debt Relief and Poverty Reduction Strategies: Uganda's Experience' in Jan- Joost Teunissen and Age Akkerman (eds.), *HIPC Debt Relief, Myths And Reality* (FONDAD 2004) 48. Accessible at www.fondad.org.ug [69] *ibid.*

62 *ibid.*

63 Ministry of Finance, Planning and Economic Development, 'Public Debt Management Framework' (2013) 2.

64 Ministry of Finance, Planning and Economic Development, 'Report on Public Debt, Guarantees, other Financial Liabilities and Grants for the Financial Year 2017/2018' (presented to Parliament in March 2018) 4.

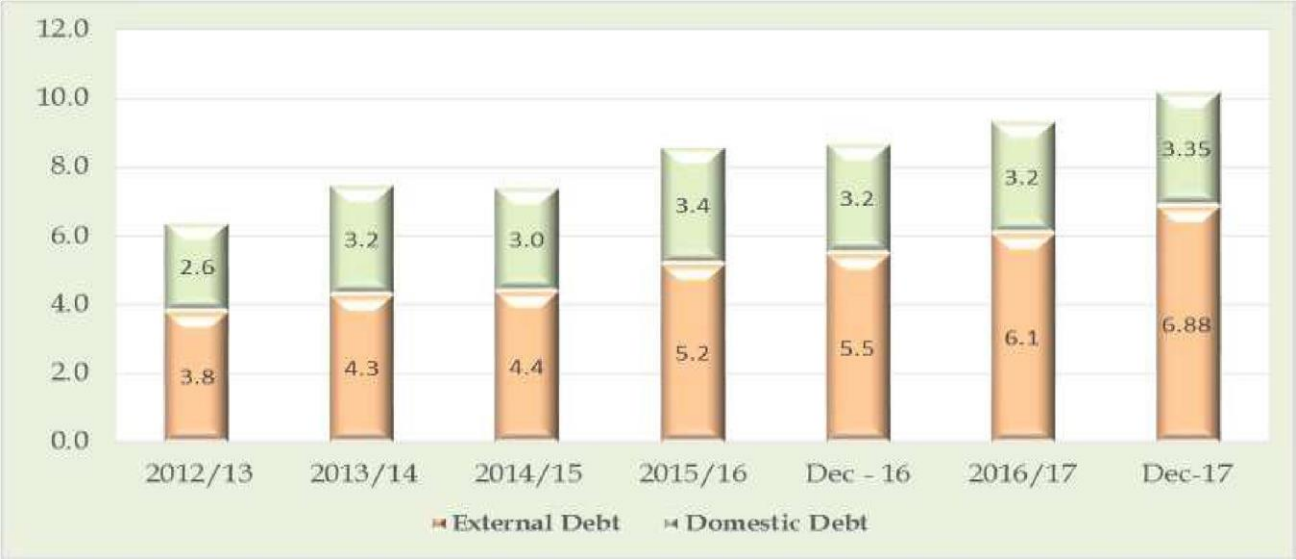
65 Kuteesa and Nayenga (n 68) 53.

66 *ibid.*

although increased external financing can enhance economic growth and welfare, it may also make countries more vulnerable to costly debt crises.[67]

The following table illustrates how Uganda's debt continues to grow rapidly over the years.

Figure 1: Trend of Public Debt in Billion USD from FY 2012/13 to December 2017



Source: Debt Policy and Issuance Department Report, Ministry of Finance, Planning and Economic Development.

A trend analysis of growth in interest payments over the last 10 years notes steady progress in the increase of government expenditure on interest payments with an annual average percentage of 78.5, which should raise a red-flag to debt mangers, advisers and policy makers.[68] Indebtedness over the years has been aggravated by poor economic governance at the national level, as corrupt and unaccountable

67 Marx (n 34) 55.

68 Uganda Debt Network, 'Performance of Uganda's Debt Portfolio and Development Challenges; Key Lessons' [2017] Issues Paper 5.

political elites often supported by Western powers indulge in corruption, abuse of office and repression, ill-conceived projects, fiscal imprudence and capital flight which subsequently increase external debt.[69] The excesses of many corrupt leaders, however, does not raise eyebrows as long as these puppet regimes faithfully serve the foreign polices of Western powers.[70]

4.0 UGANDA'S CURRENT DEBT SITUATION- THE CRISIS[71]

Uganda's debt burden is gradually deepening as debt build up is increasingly getting discordant with debt sustainability and economic growth. [72] Heavy borrowing in recent years has tested government's prudence in fiscal utilization and the management of borrowed resources from the time of debt relief in the 1990s and 2000s. Some reports have indicated a public debt stock beyond the 50% threshold, pushing the country into another debt trap.[73] Such figures are unhealthy for an economy aspiring to reach middle-income status with a debt position that is half of its GDP and with domestic borrowing also increasingly getting costly.

Total public debt rose to $10.2b in December 2017 from $8.7b at the end of December 2016 with 67% external debt. This is an increase of 17%, a result of which increased the public debt to GDP ratio from 35.7% to 38.1%. Public debt service involves payment of the principal, interest and other contractual obligations in relation to government debt.[74] By end of December 2017, total external debt service amounted to $120.9m: 61.6% principal, 32% interest loan service and 6% commissions. Debt service increased by 0.9% from 2016 to 2017.

---

69 Cheru (n 1) 38.

70 *ibid.*

71 The statistics presented hereunder are a summary of information gathered from various government publications including the 2013 Public Debt Management Framework, the Medium Term Debt Management Strategy 2018/2019- 2021/2022 of April 2018, and the Report on Public Debt, Guarantees, Other Financial Liabilities and Grants for the Financial Year 2017/2018 of March 2018, all by the Ministry of Finance, Planning and Economic Development.

72 Uganda Debt Network (n 76) 1.

73 *ibid.*

74 Article 160(2) of the 1995 Constitution of Uganda defines public debt to include the interest on that debt, sinking fund payments in respect of that debt and the costs, charges and expenses incidental to the management of that debt. See also Section 3 of the PFMA 2015.

Multilateral creditors accounted for 68%, while the rest was provided by bilateral and commercial creditors. Bilateral creditors involve both Paris and non-Paris Club creditors.[75] The latter in Uganda include China, Saudi Arabia and India while the largest Paris Club creditors include Germany, France and Japan. Multilateral creditors are now dominated by the International Development Association and the African Development Fund.

According to the Ministry of Finance, the current debt portfolio is dominated by concessional external debt characterised by fixed and low interest rates, with long repayment periods and maturities. These features have a strong influence on the overall cost and risk exposure on Uganda's existing debt portfolio. But even more disturbing is the country's large undisbursed balance which stood at US$4.5b as of December 2017. Such poor external debt portfolio performance issues relate to committing loans without sufficient project preparation by the implementing entities. The low absorption capacity for resources has continued to increase the cost of government debt through aspects like commitment fees.

One scholar has argued that to the extent that highly indebted poor countries are effectively bankrupt, it follows that they are not servicing their debts.[76] If they 'appear' to be servicing their debts that is in large part because they are simultaneously receiving new money from official lenders in the form of loans or grants in a phenomenon known as defensive lending.[77] No government or individual minister wants to admit the reality of the debt problem and yet in most cases, these are the people who oversaw the accumulation of that debt. [78] Therefore, the much-quoted ratios of public or external debt to GDP often do not convey the degree of vulnerability of a sovereign to default risk.[79]

---

75 Paris Club is an informal group of creditor nations whose objective is to find solutions to payment problems faced by debtor nations. It has 19 permanent members, including most of the Western Europe nations, the US and Japan. Non- Paris Club Bilateral Creditors on the other hand consists of nations that do not belong to the former.

76 David Roodman, 'Creditor Initiatives in the 1980s and 1990s,' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006) 27.

77 *ibid.*

78 Boorman (n 39) 234.

79 Porzecanski (n 19) 26.

But even the Uganda government acknowledges that whereas the present value of total public debt to GDP is within the 2013 Public Debt Management Policy Framework and IMF and World Bank benchmarks, there are still glaring risks to the rapidly-rising public debt especially external debt.[80] It warns that the exchange rate volatility and slow growth in exports could constrain Uganda's ability to meet her debt obligations.[81] Civil society also warns that due to financing development through increased indebtedness, the government is now confronted with a huge debt cost burden such that the sustainability of Uganda's debt is questionable.[82] In addition, high debt may strain various prospects for economic growth by discouraging public investment due to the high debt service costs. Following debt relief under the HIPC initiative and MIDR initiative over the past two decades, external debt has rapidly increased in recent years and is increasingly becoming a source of concern to policy makers, analysts and multilateral institutions.[83] Despite evidence that debt relief can save lives, none of these initiatives has succeeded in resolving Uganda's debt crisis.[84]

The most recent developments from the Office of the Auditor General in a Report released to Parliament this January 2019 indicate that Uganda's public debt has increased by 22% over the last financial year.[85]The Auditor General reported that if the government were to service the loans as projected in the next financial year 2019/2020, it would require more than 65% of the total revenue collections, which is over and above the historical sustainability levels of 40%. He also noted that significant value loans have stringent conditions which could have adverse effects on Uganda's ability to sustain its debt. These conditions include a waiver of sovereign immunity by the government over all its properties and itself from enforcement of any form of judgement, adoption of foreign laws in any proceedings

---

80 Bank of Uganda, 'Monetary Policy Report' [2018] 17.

81 *ibid.*

82 Uganda Debt Network. (n 76) 2.

83 Ministry of Finance, Planning and Economic Development (MoFPED) (n 72) 15.

84 Cheru (n 1) 48.

85 Moses Kyeyune, 'Uganda's Public Debt Worrying- Auditor General' *Daily Monitor* (5th January 2019). Accessible at: www.monitor.co.ug

to enforce agreements, and requiring the government to pay all legal fees and insurance premiums on behalf of the creditor.

In essence, Uganda is continuously becoming a slave to her masters of credit, while the much promised long-term development by borrowing to invest in infrastructure and industry does not seem to be producing the intended results. Therefore, while external debt ratios currently may appear manageable, their rapid growth is a concern and requires action if a re-occurrence of the debt crisis of the late 1980s and the 1990s is to be avoided.

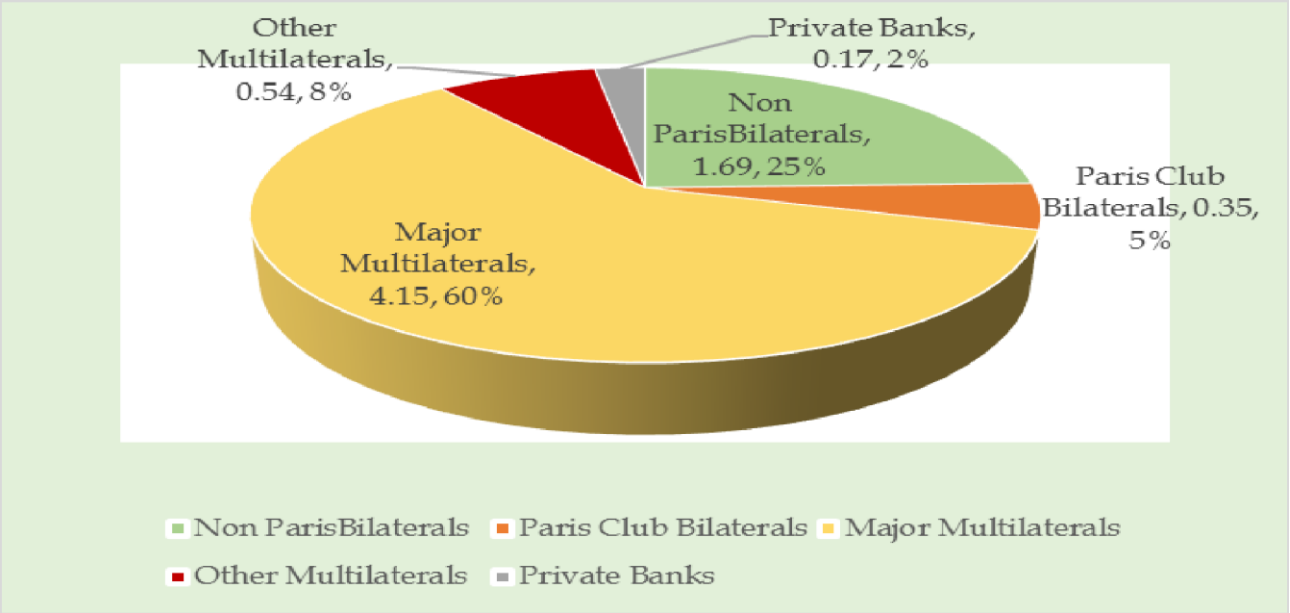
5.0 Developing Trends.

Sovereign credit markets changed substantially in the 1990s in comparison to the 1980s. The most striking transition was in the composition of creditor groups: the resolution of a debt crisis now requires dealing with a very large number- tens of thousands of bondholders scattered around the globe.[86] Markets have changed. Countries, and especially the emerging market countries, rely much less on commercial bank credit and much more on securitized debt issued in the international bond markets.[87]

In Uganda; China, Japan, France and Germany are the leading creditors in the bilateral category that accounted for 28.7% of the external debt as at end of December 2017.[88] The Public Debt Management Framework 2013 expands the scope of debt from the traditional concessional financing to alternative means of financing. [89] Today, China loans dominate the credit portfolio from non-concessional sources.[90] The sourcing of Uganda's debt as of 2017 is illustrated below.

Figure 2: External Debt Composition by Creditor.

86 Marx (n 34) 68.
87 Boorman (n 39) 233.
88 MoFPED. (n 72).
89 p.7
90 Uganda Debt Network (n 76) 5.



Source: Ministry of Finance, Planning and Economic Development. (see FN 72)

By the mid-1980s, the World Bank and the IMF increasingly pressed troubled debtors to make still deeper reforms in exchange for adjustment loans. If governments privatised state entities, ended subsidies and removed barriers to foreign trade and investment, the international financial institutions argued, then investors would take risks again, economies would grow and tax revenues and foreign exchange would flow into government coffers.[91] Unfortunately, this did not work. And rather than working to reduce the market failure or offset the consequences, the IMF and other developed country lenders have done what they can to make sure that those countries that have entered into these unfair contracts fulfil them, whatever the costs to their people.[92]

The debt crises of the 1980s demonstrated that financial institutions exert influence over the social and economic policies of developing countries in financial distress. The IMF and the World Bank increased their influence by expanding the scope of the conditions attached to their financial support to include a broad range of economic and development issues.[93] Commercial bank creditors on the other hand

---

91 Roodman (n 84) 18.

92 J.E Stiglitz, 'Ethics, Market and Government Failure, and Globalization: Perspectives on Debt and Finance' in Chris Jochnick and Fraser Preston (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006) 162.

93 Bradlow (n 6) 647.

have used their leverage to force sovereign debtors to assume most of the costs associated with renegotiating their debt, and where applicable, to assume responsibility for private sector debt.[94] This situation is troubling and challenges the sovereignty and freedom of action of debtor countries.

The resultant failure of globalisation to promote good governance and protect human rights has created a vacuum that has been filled by China.[95] This dynamic was analysed thus:

> The flaws associated with globalisation have given rise to a new politics of confrontation due to dissatisfaction among the developing countries. This has allowed China to revive the South and assume its leadership…China seeks to build relations that are seemingly accommodative and non-antagonistic as opposed to competition which lies at the heart of globalisation…China accepts individual African countries' political and economic systems as it does not insist on democratisation, human rights protection, the rule of law, good economic management or economic reforms as preconditions for political, social and economic relations.[96]

China and Japan generally exclude human rights and good governance conditions in their initiatives.[97] They give priority to infrastructural development, trade, investment and rural development. With this laxity, Chinese-Africa relations are most likely to drive the continent into serious debt, which works against the dignity of the African people.[98] Also, while Uganda's government consistently reports that debt portfolio is sustainably below the requisite threshold, the current increasing non-concessional bilateral borrowing trend debt will definitely not be sustainable in the long run, signalling that future spending will predictably rise even higher.[99]

---

94 *ibid.*

95 Zibani Maudeni, 'Globalisation and its Failure: Implications for Governance and Human Rights in Africa' [2010] 10 University of Botswana Law Journal 87.

96 B. Osei-Hwedie, 'China-Africa Relations in the New Millennium: Opportunities and Challenges' [2005] 2(1) The ICFAI Journal of International Relations 45-59.

97 Maudeni (n 103) 89.

98 *Ibid.,* p.88

99 Uganda Debt Network (n 76) 7.

6.0 THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK FOR UGANDA'S DEBT MANAGEMENT.

Historically, what has mattered most for development is not whether governments intervened in the workings of the economy, but the fine details of how they did so.[100] The UN Basic Principles on Sovereign Debt Restructuring Processes call for transparency to enhance the accountability of the actors concerned, by the timely sharing of data and processes related to sovereign debt workouts.[101] Government officials who authorize and execute borrowings carry responsibilities *vis-á-vis* the people who must ultimately repay the money, which status makes wrongful any form of self-interest or peculation on the part of government.[110]

As demonstrated earlier, Uganda's Constitution provides for accountability to the people, in particular through their representatives. Under Article 152, no tax can be imposed except under the authority of an Act of Parliament. Article 159 grants government the power to borrow or lend from any source, subject to authorisation by Parliament.[102] The President is required to cause information to be presented to Parliament on the utilisation and performance of the loan. This mandate is extended to the Auditor General by Article 163(3b) which requires that the office conduct financial and value-for-money audits in respect of any project involving public funds. Parliament is also further mandated to monitor all expenditure of public funds under Article 164(3).

In 2015, the Public Finance and Management Act (PFMA) was promulgated to handle among others, the aspect of debt acquisition and management. It provides that the fiscal objectives of the country shall be based on the maintenance of prudent and sustainable levels of public debt.[112] Again, Parliament is required by §12(2) to ensure that public resources are held and utilised in a transparent, accountable, efficient,

---

100 Roodman (n 84) 19.
101 UNGA Res. A/69/L.84, Principle 3.
110 UNCATD (n 11) Principle 8.
102 Article 159(2), 1995 Constitution of Uganda
112 Public Finance and Management Act 2015, S 4(2)(b)
113 PFMA 2015, S 36(5).

effective and sustainable manner. Section 36 vests the authority of government to raise loans in the Minster for Finance. With specific exception to loans raised to manage monetary policy and those raised through the issuance of securities, the Act requires that all other loans raised by the Minister have their terms and conditions laid before Parliament. [113] No loan is to be enforceable unless approved by a parliamentary resolution.

Other safeguards include the requirement by §42 that the Minister in charge submit a report to Parliament on public debt and cause it to be published. The Ministry is required, while presenting the national budget, to table a plan on public debt and any other financial liabilities for the financial year. [103] Section 43 restricts all expenditures to be incurred by government on projects which are extremely financed, to appropriation by Parliament. Part VII of the Act provides for accounting officers, accountant generals, an internal auditor general and audit committees. By §78(1), if any of these officials or departments fail to meet the requirements of the Act, Parliament is mandated to ask the Minister to make a report with an explanation.

The Ministry releases Medium Term Debt Management Strategies occasionally[104], explaining the factors that informed the choice of the plan presented, the state of the country's debt and its composition by creditor, as well as the characteristics of the prevailing debt portfolio. Government also undertakes Debt Sustainability Analysis (DSA) on an annual basis to assess the country's level of indebtedness (solvency) and its ability to service its debt, now and in the future (liquidity) based on the performance of the economy.[105] These initiatives are in compliance with the policy set out by the 2013 framework (supra), which sets the benchmark for government of Uganda to be that the country's debt as a proportion to GDP does not exceed 50%.[106]

---

103 PFMA 2015, S 13(10a) (iv). The latest is the Report on Public Debt, Guarantees, Other Financial Liabilities and Grants for the Financial Year 2017/2018, presented to Parliament by Hon. Matia Kasaija in March 2018.

104 The 4th Edition for the period 2018/2019- 2021/2022 released in April 2018 is the 4th to be released since the beginning of the initiative.

105 MoFPED (n 71) 37.

106 p. 12

Other players include the Office of the Auditor General which compiles Follow-up Audit Reports on the utilisation of external public debt as well as Value for Money Audit Reports to check the management of public debt by the Ministry. Bank of Uganda also records commentaries and observations on the current values of public debt and the projected impacts on the economy.[107] Civil society is represented by Uganda Debt Network, an organisation founded in 1996 to champion the cause for debt relief. [108] It has now established itself as a leading avenue to influence accountable public resource management in Uganda. The Office of the Auditor General in the Follow-up Audit Report of December 2015 mentioned as its motivation, the organisation which raised concerns over the slow absorption of loans as well as media reports.[109]

On the face of it therefore, Uganda seems to have in place the required comprehensive framework defining procedures, apportioning responsibility and drawing out accountability. The focus should as such be shifted to whether the same is being adequately implemented and yielding the necessary results. There have been complaints of missing information from the Auditor General's reports which portrays a low level of transparency in the dissemination of key information about loan-supported projects to various stakeholders, but also impairs the picture of economic returns the country would obtain.[110] Also, some loans are periodically signed before parliamentary approval which affects and sometimes delays loan effectiveness.[111] This remains a cost to citizens in terms of loan repayment when outright expected performance falls short.

On the international level, the UN observed that the link between sovereign debt and governing state commitments to respect and guarantee human rights was generally absent in the regulations governing the international financial sector.[112] It took *the Argentine conflict* with the holdout bondholders who had participated in its debt restructuring to bring to light legal gaps at the international level that had to be

---

107 See for example, Monetary Policy Report by Bank of Uganda, August 2018, p.17

108 https://www.udn.or.ug

109 p.2

110 Uganda Debt Network (n 76) 2.

111 *Ibid.*, p.3

112 UNHRC, 'Guiding Principles on Foreign Debt and Human Rights, and the Principles on Promoting Responsible Sovereign Lending and Borrowing'

filled.[113] This is a legal gap evident in Uganda's framework as well. For developing countries, one must take into account that debt relief especially debt cancellation and restructuring of debt is an important mechanism to safeguard the people's well-being and their ability to exercise basic rights.[125] Therefore, it is important that more efforts are steered in that direction.

7.0 HOW UGANDA'S DEBT AFFECTS ITS CITIZENS.

Sometimes, even those calling for the forgiveness of debt lose sight of the identification of the definitive source of credit and the cost to the ultimate providers.[114] Behind every official credit are tax payers. It is frequently argued that the heavy and unsustainable debt that developing countries are asked to repay largely originates from periods when they were governed by dictatorial regimes that did not necessarily represent the interests of the people who are now expected to repay this debt.[115] However as explained earlier, a state borrowing in essence gives the creditor a right to the future taxable income of those subject to its tax authority, i.e. the present and future generations of citizens. A person's human rights are fulfilled when they have access to the natural and social resources that are ordinarily required to achieve a level of civic status and a standard of living that are minimally adequate, and when such access to these resources is secure.[116] Uganda's expenditure on interest payments consumes a huge chunk of national resources thereby cheating human development and service delivery efforts. Such cost burdens deprive other sectors of resources necessary to address the social recurrent economic needs of the citizens. As a consequence, debt has a dramatic impact on health, education, nutrition and the employment of hundreds of millions of people. It also undermines political stability, the environment and long-term development. Consequently, living standards for the majority of Ugandans continue to decline.

---

113 *NML Capital Ltd v Republic of Argentina*, 573 U.S Supreme Court 2250, 189 L. Ed. 2d 234 (2014) 125 Rossi (n 31) 189.

114 Boorman (n 39) 241.

115 Michalowski (n 12) 3.

116 Barry (n 5) 1.

The delay or failure to utilize loans increases the cost of debt to tax payers in the form of commitment fees paid on undisbursed loans. It also undermines timely implementation of the projects for which these resources are borrowed and therefore denies citizens the intended benefits of the loans.[117] For the year ending June 2015, while other East African countries had disbursement levels above the African average of 20% for their World Bank portfolio, Uganda was at 12%.[118] In 2017, the energy sector realised more loan disbursement than other sectors, at 43.1%. This was followed by works and transport at 18.6%. Health on the other hand was at 2.7% and education at 3.5%.[119]

It is trite to point out that the much-touted economic adjustment has been achieved on the backs of the poor. Liberalisation of the economy and privatisation of state enterprises in the 1990s by the government saw the retrenchment of many employees who were left to suffer the drastic effects of job loss—some of them to date. Increasing malnutrition, rising unemployment and poverty levels continue to threaten the social fabric of highly indebted poor countries. It has actually been observed that;

> Debt servicing often absorbs well over one-quarter of African countries' limited government revenues, crowding out critical public investment in human development. Throughout Sub-Saharan Africa, health systems are collapsing for lack of medicines, schools have no books and universities suffer lack of library and laboratory facilities. Even the so-called African 'success' cases such as Ghana and Uganda are basically being held afloat for demonstration purposes by continuing aid inflows…Many of the highly indebted poor countries currently service their debt at the cost of widespread malnutrition, premature death, excessive morbidity and reduced prospects for economic growth. If the resources devoted to debt service were freed up and successfully redirected toward basic human needs, there would be significant improvement in human welfare.[120]

---

117 Office of the Auditor General (n 4) 3.

118 *ibid.*

119 MoFPED (n 71) 44.

120 Cheru. (n 1) 42, 50.

These observations are supported with data presented by another scholar who records;

> The poorest and most highly indebted poor countries account for 2/3 of all AIDS victims and have an average life expectancy of 51 years. The immediate benefits of debt relief underscore the flip side of the crisis. Debt payments now outweigh international aid by a factor of almost 10:1 and make it impossible for developing countries to tackle pressing crises including AIDS, refugees and natural disasters. Having sacrificed a generation of children, sold or destroyed much of their natural resources and therefore undermined their economic potential to service debts, the long term prospect for these countries is desperate.[121]

This desperation explains the extreme levels of taxation in Uganda today, the most recent being the introduction of the controversial and highly contested Over-the-Top (OTT) tax on the use of social media and mobile money services.[122] This was shortly followed by the tabling of a bill to tax workers' retirement benefits.[123] Whereas fiscal policy is one of the major tools the government has at its disposal to enable the fulfilment of debt obligations, questions need to be asked about what such developments mean for the citizens' rights to information and to the internet, to social security, to development, as well as the enjoyment of other economic and social rights.

The impact of debt on Uganda's sovereignty is another blow to the human rights of its people. Rather than writing off bad loans, debts have resulted in a permanent state of economic crisis for debtor countries, a steady flow of resources from South to North and an ever stronger political-economic influence of creditor governments over the policies of developing countries. [124] Meanwhile, attempts to defend sovereignty can only go so far. In 1998, the Central Bank in *Bank of Uganda v. Banco*

---

121 Jochnick (n 7) 134.

122 The Excise Duty (Amendment) Act, 2018.

123 The National Social Security Fund (Amendment) Bill 2019, Section 19 and 20

124 Jochnick (n 7) 135.

Arabe Espanol[125] sought to deny liability for a loan of US$1m that the Uganda government had borrowed from the Spanish bank. Kanyeihamba JSC (as he then was) delivered the lead judgement dismissing the Bank's arguments and affirming the duty to repay the loan. He noted that:

> Uganda, a sovereign state, and its central bank freely and willingly sent their emissaries to Spain looking for a loan which they got from the respondent, a respectable banking institution, and they accepted the terms and conditions of that loan which government received … There have been cases in the past and presumably there will be more such cases in the future, in which it is right and proper to plead and argue vigorously for the sovereignty of the state of Uganda and in its defence and that of its institutions against all sorts of claims. In my opinion, this is not one of them. [138]

Therefore, debt repayment and servicing also opens the door to foreign influence and intervention in fundamental development decisions. Once the economy is being driven by such external forces, it ceases to matter that the people have representation in Parliament and can rally behind civil society organisations.

8.0 CONCLUSION AND RECOMMENDATIONS.

A major push toward more effective means of dealing with unsustainable debt came from the recognition that the absence of such measures has been extremely costly both for citizens of the debtor countries and for the countries' creditors.[126] But Uganda is not going to miraculously swing into a period of debt freedom and budgetary surplus. History has proven that even initiatives for debt relief alone are insufficient to cause such transformation. Ending debt trouble almost always requires that creditors and debtors strike realistic compromises on repayment.[127]

---

125 Bank of Uganda v Banco Arabe Espanol, SCCA No.8 of 1998 [1998] UGSC 1 (1 January 1998). Accessible at http://www.ulii.org. [138] Bank of Uganda (n 88) 11-12.

126 Boorman (n 39) 226.

127 Roodman (n 63) 14.

Immediate measures are required to improve the absorption and utilisation of external resources. A formal mechanism would require the creation of institutional structures through which funds flow from banks to qualifying projects.[128] Findings of the different audits should continuously be publicised to ensure transparency and accountability in debt management. Specifically, there is a need for a clear empirical analysis on the exact contribution of debt to economic growth. This information is missing from all the reports published by government. The country needs to re-evaluate its priorities and deal with resource underutilisation and mismanagement. Whereas it may be inevitable to borrow, we must answer the question as to whether we are borrowing for the right reasons. More importantly, whether the debt accumulation is yielding any substantial fruit.

The international plane sets an even higher standard for accountability.[129] States are required to ensure greater transparency in negotiations and agreements between states and international financial and aid institutions. This must include the publication and the widest possible dissemination of proposed and final agreements concerning financial aid, debt repayment and monetary policy. After all, citizens have a right to information in possession of the State.[130] In addition, the public must be given an appropriate opportunity to provide their own views prior to final decisions being made, with plan modifications remaining a possibility at any time. The UN also demands that any foreign debt strategy be designed not to hamper the steady improvement of conditions guaranteeing the enjoyment of human rights, and must be intended, *inter alia*, to ensure that debtor developing countries achieve an adequate growth level to meet their people's social and economic needs. [131] Furthermore, it emphasizes that the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot and should not be subordinated to the

128 Bradlow (n 6) 670.
129 UNSG Report 1995, para. 91.
130 Article 41, 1995 Constitution of Uganda.
131 UNCHR (1989: Article 21).

implementation of structural adjustment policies, growth programs and economic reforms arising from the debt.[132]

There is a call from NGOs and others, including the IMF itself, for civil society to have a role in the discussions leading to a debt-relief plan.[133] The question is not whether they should participate, especially in ostensibly-democratic societies like Uganda, but the form and mechanism through which such participation should be organised. This goes down to the issues of how policies and debt sustainability are really determined. For example, the government budget is the key instrument of economic policy. Civil society should continue to vigorously take part in the budget-making process by making representations to the government through participation in parliamentary debate, submitting presentations to the committees in charge, general lobbying, and through any other means available. That is where effective participation is required; that is where transparency is needed; and the process through which the trade-offs that ultimately help determine sustainability will be made.[134]

Lastly, Instead of concentrating only on taxation, Uganda should explore alternative and more rigorous efforts at sustainability to create a stable debt situation. It should now look into how best it can promote inclusive economic growth and sustainable development, whilst minimizing economic and social costs and respecting human rights. Sustainable development strategies must pay due regard to the human rights of a country's citizens. The indifference toward African lives must be challenged and exposed if we are to create a just world order where human rights and human dignity take precedence over corporate rights and creditors' greed.[135]

---

132 UNHCR (2001: Article 7).
133 Boorman (n 39) 241.
134 Boorman (n 39) 243.
135 Cheru (n 1) 51.

REFERENCES

Bank of Uganda, 'Monetary Policy Report' August 2018.

Bradlow D, "Debt, 'Development and Human Rights: Lessons from South Africa' [1991] 12 Michigan Journal of International Law.

Christian Barry, 'Sovereign Debt, Human Rights and Policy Conditionality,' [2011] The Journal of Political Philosophy.

Constitution of the Republic of Uganda, 1995

Inter-American Commission for Human Rights, Resolution 322 of 1982.

Jayachandran S and Kremer M, 'Odious Debt' [2006] 96(1) American Economic Review.

Jochnick C and Preston F (eds.), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford University Press 2006)

Kunibert R, 'Odious, Illegitimate, Illegal or Legal Debts- What Difference Does it Make for International Chapter 9 Arbitration?' [2007] 70 Law and Contemporary Problems

Kuteesa F and Nayenga R, 'HIPC Debt Relief and Poverty Reduction Strategies: Uganda's Experience' in Teunissen J and Akkerman A (eds.), *HIPC Debt Relief, Myths And Reality*, (FONDAD 2004). Accessible at www.fondad.org.ug

Locke J, *Two Treatises of Government* (Awnsham Churchill 1689).

Maudeni Z, 'Globalisation and its Failure: Implications for Governance and Human Rights in Africa' [2010] 10 University of Botswana Law Journal.

Michalowski S, *'Unconstitutional Regimes and the Validity of Sovereign Debt- A Legal Perspective'* (2nd Edition, Routledge 2016)

Ministry of Finance, Planning and Economic Development, 'Public Debt

Management Framework 2013'

Ministry of Finance, Planning and Economic Development, 'Report on Public Debt, Guarantees, Other Financial Liabilities and Grants for the Financial Year 2017/2018'

Ministry of Foreign Affairs, Norway, 'Debt Relief For Development-A Plan Of Action' (2004)

Mkandawire T and Soludo C, *Our Continent, Our Future; African Perspectives On Structural Adjustment*, [1999] Africa World Press.

Nadler P, 'Decisions about Financing the National Debt Influence Our Economy' [1993] 8 Com. Lending Review.

Office of The Attorney General, 'Follow-up Audit Report on the Utilisation of External Public Debt' (December 2015)

Ondersma C, 'A Human Rights Framework for Debt Relief' [2014] 36(1) U. Pa. Journal of International Law.

Osei-Hwedie B, 'China-Africa Relations in the New Millennium: Opportunities and Challenges'[2005] 2(1) The ICFAI Journal of International Relations.

Public Finance and Management Act, 2015.

Ramirez S, 'Taking Economic Human Rights Seriously After the Debt Crisis' [2011] 42 Loy. U. Chi. Law Journal.

Rossi J, 'Sovereign Debt Restructuring, National Development and Human Rights' [2016] 23 Sur- International Journal on Human Rights.

Rousseau J(1762), *The Social Contract* (France 1762).

Stiglitz J, *Freefall; America, Free Markets and the Sinking of the World Economy* (2010).

The Excise Duty (Amendment) Act, 2018.

The National Social Security Fund (Amendment) Bill, 2019.

Treaty of Paris, December 10, 1898.

Uganda Debt Network, 'Performance of Uganda's Debt Portfolio and Development Challenges; Key Lessons' (2017) Issues Paper.

United Nations Commission for Human Rights(UNCHR): (1989: Article 21)

United Nations Conference on Trade and Development (UNCATD), 'UN Basic Principles on Sovereign Debt' (10th January 2012).

United Nations General Assembly Resolution 68/304 of 2014.

United Nations Human Rights Committee (UNHRC), 'Guiding Principles on Foreign Debt and Human Rights, and the Principles on Promoting Responsible Sovereign Lending and Borrowing'.

United Nations Secretary-General's (UNSG) Report, September, 1995.

MAKERERE LAW JOURNAL NOVEMBER 2019

VOLUME 15 ISSUE 4

THE AFRICAN WOMAN IN INTERNATIONAL LAW

Lornah Afoyomungu Olum

RECOMMENDED CITATION:

Lornah Afoyomungu Olum (2019), "The African Woman in International Law" Volume 15 Issue 4, Makerere Law Journal.

THE AFRICAN WOMAN IN INTERNATIONAL LAW

Lornah Afoyomungu Olum[1]

"How long shall the fair daughters of Africa be compelled to bury their minds and talents beneath a load of iron pots and kettles?"[2] *~ 1831 Maria W. Stewart*

Abstract

This article interrogates the problematic nature of classical international law, showing the ways in which it historically privileged, and advanced, European values and interests over those of subaltern groups. While acknowledging the contributions of the Third World Approaches to International Law (TWAIL) and Feminist approaches, as important challenges to traditional international law, the article argues that these critical movements themselves contain a blind spot - insofar as they do not adequately surface the needs and concerns of the African woman as a subject of international law. To this end, the article suggests a need for further reflection upon, and responses to, the multiple ways in which the African woman is excluded - normatively and institutionally - in the contemporary international legal framework.

1.0 Introduction

This article seeks to contribute to scholarship underlining the glaring gap that exists in regards to the African woman in international law. While wide research has been carried out in the context of feminism and African

---

1 LLB (Hons) (MUK). This article was inspired by a series of conversations with Dr. Busingye Kabumba in the earlier part of this year. I am indebted to him both for challenging me to embark along this journey, as well as for comments on earlier drafts of this work. I am similarly grateful to the anonymous reviewers of this article, for their insightful feedback, which helped me to clarify a number of the arguments presented herein. My thanks also to the editors of the Makerere Law Journal, particularly Mr. Dominic Adeeda, for their hard work and patient guidance throughout the process of preparing this article for publication. Finally, my deepest gratitude is owed to the African Development Law Institute (ADLI) for the institutional support provided during the writing, and revision, of this work. *Asanteni Sana*. All errors and omissions, of course, remain my sole responsibility.

2 Collins H.P (2000) Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (2nd edition) New York: Routledge. Available at; https://uniteyouthdublin.files.wordpress.com/2015/01/black-feminist-thoughby-patricia-hill-collins.pdf. (Last accessed 22 September, 2019).

approaches to international law and Third World Approaches to International Law (TWAIL), negligible jurisprudence can be found that satisfactorily places the 'African Woman' squarely at the centre of international law. The article addresses how the Eurocentric history and nature of international law reinforces the continued exclusion of the African woman.

It also explores the way in which the TWAIL and feminist critiques of international law, which address the exclusion of the Third World and half the world's population from international law, respectively, have failed to make significant strides in promoting the recognition and inclusion of the African woman in institutional and normative structures of regional and international law. Specific examples of regional and international instruments are given illustrating the way in which these international institutions were developed for a homogenised African woman who does not exist.

2.0 History and Development of International Law

International law is the set of rules generally regarded and accepted as binding in relations between states and between nations. It serves as a framework for the practice of stable and organised international relations. The term was first used by Bentham (1789) in his 'Introduction to the Principles of Morals and Legislation' in 1780.[3]

For a long time, international law was regarded as the law existing between "civilized" states.[4] Though today it is the main currency regulating international relations, international law or the law of nations is a

---

[3] Bentham, J. (1789) An Introduction to the Principles of Morals and Legislation, p.6, T. Payne, London; Practice of stable and organised international relations.

[4] Mutua W.M, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', Vol 16(4) *Michigan Journal of International Law*, pg. 1120. Available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1522&context=mjil. (Last accessed 28 October, 2019).
See, also, Crawford J, The Criteria for Statehood in International Law, 48*BRIT. Y.B. INT'L L.* 93, 98 (1976-77).
See, also, Umozurike U.O, (1993) *Introduction to International* 9-10.
Makua (n3 above), 1120.
See, also, Oppenheim, I.L, *International Law: A Treatise* 4 (Arnold D. McNair ed., 4th ed. 1928).

development out of exclusively European historical circumstances.[4] Similarly, this exclusive body of law has identified the sources from which it may be derived as custom, treaty, general principles of law common to all major legal systems, and the judicial decisions and the teachings of highly regarded publicists from different countries.[5]

Mr. Justice Gray, while delivering a judgement in *Hilton v Guyot* in the Supreme Court of the United States in 1895, attempted to define international law as:

> *International law, in its widest and most comprehensive sense, - including not only questions of right between nations, governed by what has been appropriately called the "law of nations" [or "public international law"], but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, - is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.*[6]
>
> Another definition of international law is offered by Whiteman, that: *International law is the law of an organised world community, constituted on the basis of States but discharging its community functions*

---

5 Article 38 of the Statute of the International Court of Justice, the premier authority on the sources of international law, provides:

a. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

6 (1895), 159 U.S. 113, cited in HJ. Steiner & D.F. Vagts, Transnational Legal Problems, 3" Edn (Mineola: The Foundation Press, 1986) at 11-12.

> *increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon the individual citizen, and confronted with a wide range of economic, social and technological problems calling for uniform regulations on an international basis which represent a growing proportion of the subject matters of the law.*

The definition stated here above encompasses international law as that which governs the mutual relations of the States. In short, international law is the standard of conduct, at a given a time, for States and other entities thereto.[7]

States have long been the main actors on the international scene, firmly embedded in the Westphalia peace treaty in 1648. It was then the notion of the 'nation state' as the main player emerged.[8] However, global history no longer takes the nation state as the traditional object of historical analysis. Instead, to global historians, the major actors or subjects of a global history are movements such as the peace movement, or women's suffrage movement and business-like chartered companies. Interestingly, current international legal scholarship also focuses on non-state actors as emerging subjects of international law. Another objective of global history is to overcome the primarily European heritage of national history. Therefore, attention is directed to non-European societies and regions. Their modern history is understood as an autonomous development, and not as a mere reaction to European conquest.[9]

Overtime, international law has been criticised as fundamentally Western. Certainly, most international law is based on Western notions.
'Eurocentrism is the practice, conscious or otherwise, of placing emphasis on European and, generally, Western concerns, culture and values at the

---

7 Whiteman W.M, *Digest of International Law*, Vol 1, pg.1.

8 Shaw, M. (2008) *International Law*, p.1, Cambridge University Press, Cambridge. The Age of Rights, Columbia University Press, New York.

9 Fassbender B, Peters A (eds.) (2012), *Oxford Handbook of International Law*, Oxford University Press.

expense of those of other cultures.'[10]Eurocentrism often involved claiming cultures that were not white or European as being such, or denying their existence at all.[11]

International law primarily governed European inter-state relations and was founded on European values and beliefs, a phenomenon that is collectively summed up as Eurocentrism.[12] The law did not equally extend to non-European countries, which were labelled 'uncivilised' and were objects, rather than subjects, of international law. After 1945, a number of African states emerged as independent nations and became subjects of international law. Africa since then tried to adopt and promote international law in many fields, but some of the rules and principles of international law are seen as obstacles toward the promotion of the interests of African states.[13]

Several African states adopted international law, in their municipal laws, and accepted the principles of the UN. Through their participation, African states expanded the norms of international law to strengthen and develop their states, and their acceptance of the norms of international law, but not the traditional norms; they also encouraged a just system of international law.[14] Even though the contribution to international law by the African states is noticeable,[15] the Eurocentric nature of international law is a limitation in its

---

10 Ashcroft B., Gareth G. and Tiffin H. (2002) *The Empire writes back*, Routledge, London.

11 https://afroetic.com/2012/10/11/education-europe-centered-eurocentrism-vsafrican-centered. (Last accessed 25 November, 2019).

12 See, Orakhelashvili A, 'The Idea of European International Law', Vol. 17(2) (2006), The European Journal of International Law; Available at; http://ejil.org/pdfs/17/2/77.pdf.

13 See, Mitharika P.A, 'The Role of International Law in the Twenty-First Century: An African Perspective', Vol. 18(5) (1994), *Fordham International Law Journal.* Available at; http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2566&context=ilj. (Last accessed 30 October, 2019).

14 See, Fox H.G, 'The Right to Political Participation in International Law, Vol. 17(2), 1992, *Yale Journal of International Law.* Available at; https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1600&context=yjil. (Last accessed 30 October, 2019).

15 Unfortunately, despite these contributions, Adrien Katherine Wing, et al., observes that: 'In the Western hemisphere, Africa is frequently viewed as a basket case and 'welfare

application on the continent. This limitation caused attempts at the confrontation of traditional international law principles and values through critiques like the Third World Approaches to International Law.

The problematic history of international law demonstrates the notion that its institutions and structures were gendered and therefore closed off to women, most especially the African woman, since their inception. The lack of access to decision making organisations and judicial institutions perpetrated by institutional selection mechanisms that view the qualifications of women as inferior to those of men, means that the African woman has to work twice as hard to overcome multiple intersections of race, gender and class within the domestic and international sphere.

3.0 Critiques of International Law

3.1 Third World Approaches to International Law

Third world approaches to international law, also known as TWAIL[16] has been defined by various international law scholars.[17] Makau M Mutua in his critique of traditional international law, asserts that:

> *'The regime of international law is illegitimate! It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of*

---

continent' rather than a market place and exporter of values and norms. This is particularly the case in scholarly and policy-making circles in the U.S. Nowhere is there more ignorance and misunderstanding about Africa than among American legal academics and the U.S. foreign policy establishment'.
Wing A.K, Levitt J and Jackson C, 'An Introduction to the Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?' (2003) *Transnat'l L. & Contemp. Probs.* 1.

[16] The TWAIL acronym in this article is used in its earlier form referring to "Third World Approaches to International Law". It differs from the TWAIL of the present conference which translates TWAIL as "Third World and International Law".

[17] See, Ramina L, 'TWAIL-"Third World Approaches to International law" and human rights: some considerations. Rev. Investing.
Const. Vol.5 no.1 Curitiba Jan./Apr. 2018.
Available at; http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2359563920180001002 61 (Last accessed 4 October, 2019).
See, also, Gathii T.J, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' *Trade L. & Dev.* 26 (2011). Available at https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1203&context=facpu bs. (Last accessed 4 October, 2019).

> *global order and make international law a just, equitable and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation. This broad dialectic of opposition to international law is defined and referred to here as Third World Approaches to International Law (TWAIL).*[18]

TWAIL is characterised by three primary objectives according to Makau Mutua.

> *'Firstly, to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Secondly, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.*[19]

He further states that "TWAIL is not a recent phenomenon." That it is part of a long tradition of critical internationalism.[20] Its intellectual and inspirational roots stretch all the way back to the Afro-Asian anti-colonial struggles of the 1940s–1960s, and even before that to the Latin American de-colonization movements.[21] It is also deeply connected to the New International Economic

---

18 Mutua W.M, 'What is TWAIL?' *American Society of International Law Proceedings*, 94, 31, 2000, pg.31. Available at; https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1559&cont ext=articles (Last accessed 03 October, 2019). 19 Mutua (n19 above), 31.

19 Ibid.

20 Gathii J.T, 'Rejoinder: TWAILing International Law' (2000) 98 *Mich. L. Rev.* 2066.

21 Mickelson K, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 *Wis. Int'l L.J.* 362-368.

Order/G-77 movements that were launched in the 1960s, carried on into the 1970s, and stymied by powerful global forces in the 1980s and 1990s.[22] Thus, an earlier generation of TWAIL scholars like Upendra Baxi, Mohammed Bedjaoui, KebaM'baye, and Weeramantry J. did foreground most of the very same concerns that contemporary TWAIL scholarship now expresses.[23]

For TWAIL scholars such as Anghie and Chimni, in whose view international law gained its defining characteristic of universality through the colonial encounter, this means a perpetuation of that same system. A system in which doctrines were built on subordination by trying to impose the universal international legal system on the non-European other - a continuation of the colonial encounter. It is this orthodox and Eurocentric teleology of international law that TWAIL scholars oppose.[24]

Even though the TWAIL analysis of international law seeks to expose the fact that the West's use of international law vis-à-vis the Third World embodies various forms of intolerance, including racism to denigration of non-Western cultural beliefs and practices to blind faith in liberalism's panacea,[24] it does not sufficiently address status of the African woman in the deconstruction of traditional international law norms and principles. In fact, according to

---

22 Okafor O.O 'Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective' *Osgoode Hall Law Journal* Vol. 43 No. 1&2 (2005), pg. 177178. Available at; http://biblioteca.cejamericas.org/bitstream/handle/2015/2890/Newness-Imperialism-and-International-Legal-Reform-in-Our-Time-A-TWAIL-Perspective.pdf?sequence=1&isAllowed=y. (Last accessed 4 October, 2019).

23 Lundberg H, 'Permanent Colonialism over Natural Resources? Tracing Colonialism in the Post-Colonial State' (2018), pg. 14. Available at http://www.juriskandidatprogrammet.se/WEB.nsf/(MenuItemByDocId)/ID27D17AE5595F2E5AC1257D6300302F4A/$FILE/JUCN21%20VT18%20Essay%20Hugo_Lundberg.pdf (Last accessed 14 October, 2019).

24 According to Anghie, 'The colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign state can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal position.' Anghie A, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999), 1.

feminist scholars like Diane Otto,[25] some TWAIL scholars enforce the oppression of the African woman in their attempt to reject the imports left behind by the imperialists by holding onto cultures[26] that promote the subjugation of women further. She gives an example of sexual autonomy and freedom of expression as one issue that is often considered incommensurable with a Third World perspective.

3.2 Feminist Critique of International Law

In addition to postcolonial scholarship that is widely viewed as the primary method of critique in addressing international law's relationship with the world, feminist critiques of international law have also adopted a radical and complex perspective.[27] Feminist approaches have adopted an intersectional perspective where race, class, and gender are seen as historically constitutive. Hilary Charlesworth, Christine Chinkin, and Shelley Wright argued that the structures of international law "privilege men."[28]

Charlesworth[29] states that feminist analysis of international law has two major roles, the first is the deconstruction of the explicit and implicit values

---

25 Otto D 'The Gastronomics of TWAIL's Feminist Flavourings: Some Lunch Time Offerings' *International Community Law Review* 9(4):345-352 (2007), pg.349. Available at; https://www.researchgate.net/publication/249567746_The_Gastronomics_of_TWAIL's_Feminist_Flavourings_Some_LunchTime_Offerings. (Last accessed 5 October, 2019).

26 Culture is broadly interpreted to mean the various ways that social business is conducted and mediated through language, symbols, rituals and traditions and influenced by issues like race, ethnicity, religion, material base, etc. in Tamale S, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' *Sex Matters* (2007) pg. 150-151. Available at; http://www.fahamu.org/mbbc/wp-content/uploads/2011/09/Tamale-2007Right-to-Culture.pdf. (Last accessed 5 October, 2019).

27 Charlesworth, Chinkin& Wright argue that generally, the feminist analysis of international law involves searching for the silences of the discipline. That by examining the structures and the substance of the international legal system to see how women are incorporated into it. She further asserts that the feminist approach offers a challenge to the implicit liberalism of the dominant theories

28 Charlesworth. H, Chinkin. C & Wright. S, 'Feminist Approaches to International Law', 85 (1991) *AJIL* 613.

29 Charlesworth H, 'Feminist Critiques of International Law and Their Critics', Vol 1 Article 1 (1994) *Third World Studies,* pg.3. Available at

of the international legal systems by challenging their claim to objectivity and rationality because of the limited base on which they are built.[30] That all tools and categories of international legal analysis become problematic when we understand the exclusion of women from their construction.[31] Secondly, that the feminist approach to international law is to reconstruct a truly human system of international law.[32]

There are a number of international institutions including, the Commission on Human Rights (CHR), the Human Rights Committee (the Committee), the Commission on the Status of Women (CSOW), and the Committee on the Elimination of Discrimination against Women (CEDAW).[33] Some feminists critique mainstream institutions, CHR and the Committee, for not taking women's rights sufficiently seriously, while others critique the entire

https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1&context=twls (Last accessed 12 October, 2019)

30 about international law- the idea that international law simply sets a structure by which the actors within it can pursue their vision of the good life- by asserting that international law has a gender, a fundamental, if sometimes subtly manifested, bias in favour of men. See generally Hilary Charlesworth, Christine Chinkin& Shelley Wright, Feminist Approaches to International Law, 85 (1991*) AJIL* 613.

31 According to Catherine Mackinnon, in a national context, the state and its major institution, the legal system, are a direct expression of men's interests.
Mackinnon C, (1989) *Feminism unmodified.*
See, also, Franzway S, Court D & Connell R, (1989) *Staking a claim.*

32 Charlesworth (n37 above), 5.
See, also, Tesón Fernando R. "Feminism and International Law: A Reply." *Virginia Journal of International Law* 33 (1992–1993): 647–684.

33 The Commission on Human Rights and the Commission on the Status of Women are functional commissions under the United Nations Economic and Social Council. See generally UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 14-20, U.N. Doc. ST/HR/2/Rev. 3 (1988). Structurally, the Commissions are on an equal plane in the United Nations, although the Commission on the Status of Women was initially created as a sub-commission of the Commission on Human Rights, but received commission status, in response to the sense that women's issues should have their own forum. See infra text accompanying notes 173-75. The Human Rights Committee (the Committee) is the institution established to enforce the Covenant on Civil and Political Rights, while the Committee on the Elimination of Discrimination against Women is the institution created by the Women's Convention to enforce that Convention. See UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS.
See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at; https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mjil (Last accessed 13 October, 2019).

institutional structure for granting specialized women's institutions, CSOW and CEDAW, less power and less effective enforcement mechanisms than are granted mainstream institutions. The institutionalist position, then, alternates between suggesting that all institutions more fully assimilate women's rights and focusing on specialized institutions.[34]

In response to the essentialism critique of the feminist approach, Charlesworth admits that the search for universal women's predicaments can obscure differences among women and homogenize women's experiences.[35] She suggests one of the ways of overcoming essentialism is to focus on common problems women face whatever their cultural background, for instance violence against women. However, whether such an approach allows feminists critiques to accommodate the widely different perspectives of women worldwide remains to be seen.

Charlesworth acknowledges that the tactic of identifying universal issues for women is not without complexity.[36] She is then tempted to address the issue of culture as a rigid and a historical practice in the favour of men.[37] She seems to suggest that expecting feminist analysis to avoid all universal, global analysis of the position of women is unfair and that women should be identified as an underclass in the international arena, as long as such

---

34 See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mj il (Last accessed 13 October, 2019).

35 Charlesworth H, 'Martha Nussbaum's Feminist Internationalism', 111 (2000) *Ethics*, pp 64-78 at pg.73.

36 Charlesworth (n37 above), 10.

37 She quotes Arati Rao asserting that: 'the notion of culture favoured by international actors must be unmasked for what it is: a falsely rigid, a historical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top'.
See, Rao A, The Politics of Gender and Culture in International Human Rights Discourse in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 167, 174 (Julie Peters & Andrea Wolper eds. 1995).
See, also, Charlesworth (n37 above), 11.

identification rests on a "loving perception" of other women.[38] The question raised in this article is whether this recognition of antiessentialist scholarship by non-western feminists is sufficient to reintroduce the African woman in international law. African legal feminist scholars like Dawuni have suggested that the homogenisation of the experiences of women of African descent can be eliminated by a renewed commitment to documenting the lives, experiences, and contributions of individual women, and the collective of African women in leadership in the domestic, regional, and international spheres. Such theorising must proceed from a positionality that considers the identity, location, and experiences of women across the continent as quite independent and variegated along multiple and intersecting identities.[39]

---

38 Bunting A, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies' in Bottomley A and Conaghan J (eds.) (1993) *Feminist Theory and Legal Strategy* 6, 11.

39 The term matri-legal feminism was coined by Dawuni to highlight the lived experiences of the African woman in international law. Matri-legal feminism argues the need for emphasizing cultural differences inherent in the experiences of women in international law. It cautions against linking the experiences of "non-Western" women to a lack of agency. While it undergirds the importance of gender diversity, matri-legal feminism further problematizes the importance of acknowledging regional diversity among and within women in the international system. It emphasizes the importance of recognising the varied experiences of all women under international law.
Dawuni J.J, 'Matri-legal feminism: an African feminist response to international law' in Ogg K and Harris S (eds.) (2019) *Research Handbook on Feminist Engagement with International Law*, Edward Elgar Publishing, pg. 446.

4.0 Locating the African Woman in International Law

4.1 Status of the African Woman

As espoused by various scholars, the African woman suffers compound discrimination as a result of gender, race, class, ethnicity, and religion, among other components of her identities. Other than the image of the wife and mother, the most common portrayal of the African woman is that of victim. The identification of the African woman as a subordinate victim, devoid of any form of agency to resist or challenge oppression, has roots in historical, economic, social, cultural and political structures. It is therefore impossible to envision a homogenous African woman due to their diversity of histories, cultures and social circumstances, shared experiences among the women of African descent, whether urban or rural, educated or illiterate, young or old.[40]

As discussed earlier in this article, scholarship has highlighted the fact that an enduring discourse in African human rights literature relates to the tension between culture and women's rights, that is, an extension of the universality and cultural relativism debate. This debate centres on discriminatory practices against women, commonly termed "cultural" and/or "traditional" practices, particularly female genital cutting. Others include inheritance rights, widowhood practices and early marriage or child marriage, which undermine the right of the girl child to good health, education, freedom of speech and association, among other rights. Third World feminist scholars criticise the inherently problematic nature of defining these practices as "cultural" and "traditional," arguing that this conceals the power relations.[41]

---

[40] Fagbongbe M.D, 'Reconstructing Women's Rights in Africa using the African Regional Human Rights Regime: Problems and Possibilities' (2010), pg.52. *A thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Faculty of Graduate Studies (Law), University of British Columbia (Vancouver).* Available at; file:///C:/Users/user/Downloads/ubc_2010_fall_fagbongbe_mosope.pdf. (Last accessed 29 October, 2019). [41] Fagbongbe (n52 above), 90.

[41] See, Nyarayan U, (1997) Dislocating Cultures: Identities, Traditions and ThirdWorld Feminism, New York: Routledge, pg. 57, 87.
See, also, Mohanty C.T, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in *Feminism without borders: Decolonizing theory, practicing solidarity,* Durham& London: Duke University Press, 2003.

The overall consequences of the above challenges encourage violence and aggression towards women; discourage women's participation in the public domain and decision-making; condition women into being less ambitious, motivated and involved in their own advancement; as well as enable the ineffective and inconsequential integration of women in the development process.[42] The focus on cultural practices as the primary and most important challenge confronting women of African descent denies class, ethnic and national cleavages in African societies, as well as the agency and complexities of women's realities.[43]

Locating women in a subordinate victim position in popular culture and especially human rights literature provokes extensive scholarly analyses on the effects, consequences and actions to eliminate such cultural practices often at the expense of other prevailing forms of violence against women. Despite the absence of a unitary or homogenous African culture, the African woman is characterised as a powerless, perpetual victim: a victim of culture reinforced by stereotypical and racist representation of culture.[44]

This point is that the use of "culture" promotes an essentialist and a racialized understanding of things African. It posits a "good" culture against a "bad" culture to sustain a racialized discourse. She categorically states that while she makes no attempt to justify harmful practices, she argues that the focus on African "culture" or "traditional" practices is not only problematic because it conceals power relations and how they operate in the garb of "culture," but also because it ignores practices that may further human rights goals. In most African societies the practice of the extended family system serves as a safety net for economically marginalised women. Also, commentators regard the

---

[42] Fagbongbe (n52 above), 91.
See, also, Udegbe B, 'Portrayal of Women in Nigeria Media and the Psychological Implication' in Odejide A (ed.), Women and the media in Nigeria (Ibadan:
Women's Research and Documentation Centre) at 131-136.

[43] Fagbongbe (n52 above), 91.
See, also, Ogundipe-Leslie M, *Recreating Ourselves: African Women and Critical Transformations*, Trenton: Africa World Press, 1994.

[44] Fagbongbe argues that African culture is as diverse as there are ethnic groups. This perception also holds true for Muslim women especially with regards to discussions relating to the Sharia. Fagbongbe (n52 above), 92.

focus on African culture as a form of ideological domination that misrepresents the realities of African women.[45]

The flexible nature of culture is indicative of the imperative to decolonise the subordinate assumptions that dominate the ideological construction of the woman of African descent, whether as mothers, wives, politically and economically disempowered, or as minors or victims, whether in the public or the private sphere. The construction of women as victims of culture is consistent with the problematic ideological and racialized discourses of culture. In sum, the uncritical application of terms, such as culture and motherhood to represent practices that violate the rights of women is problematic neglecting other applications that may be more beneficial in promoting rights.[46]

In feminist legal studies, culture is often viewed as a deviation from the path of human rights. Chandra Mohanty demonstrated effectively how 'first world' feminists have represented 'third world' women as helpless victims of culture, as objects devoid of any agency. She explores the simplified construction of the "third-world woman" in hegemonic feminist discourses. Mohanty extends this critique to urban middle class 'third world' scholars who write about their own cultures and rural sisters in the same colonizing fashion.[47]

Most of what is understood as "Culture" in contemporary Africa is largely a product of constructions and (re)interpretations by former colonial authorities in collaboration with African male patriarchs.[48] As Frantz Fanon bluntly put it: "After a century of colonial domination we find a culture which is rigid in the extreme, or rather what we find are the dregs of culture, its mineral strata."[49]

---

45 Ibid See, also, Taiwo O, 'Feminism and Africa: Reflections on the Poverty of Theory' in Oyewumi O, *African women and Feminism: Reflecting on the Politics of Sisterhood*, Trenton, NJ: Africa World Press, 2003 at 61.

46 Fagbongbe (n52 above), 52.

47 Tamale (n28 above), 150-151.

48 Ibid

49 Ibid

Some African feminist scholars have warned that such approaches are myopic and dangerous as they create an extremely restrictive framework within which African women can challenge domination.[50]

Legal scholars like Abdullahi An-Na'im approach culture in a nuanced and refreshing fashion, seeking to integrate its local understanding within the human rights discourse and advocating for internal cultural transformation.[51]

An-Na'im, for example, raises questions about whether international law really can be of any use to women. As with other advocates, a concern for cultural differences guides his questions. At one point he concentrates on enlisting the cooperation of Muslim women and men in enforcing the law, which he believes would require them to see that the law is normal, not alien, to Muslim culture:

> *International standards are meaningless to Muslim women unless they are reflected in the concrete realities of the Muslim environment.... To obtain their cooperation in implementing international standards on the rights of women, we need to show the Muslims in general that these standards are not alien at all. They are, in fact, quite compatible with the fundamental values of Islam. In other words, we need to provide Islamic legitimacy for the international standards on the rights of women.*[52]

He suggests a more strategic approach towards the implementation of women's rights:

> *Our commitment should not be to the rights of women in the abstract, or as contained in high-sounding international instruments signed by official delegations. It should be a commitment to the rights of women in practice.... It is irresponsible and inhumane to encourage these women to move too fast, too soon and to repudiate many of the established norms*

---

50 Tamale (n28 above), 150-151.

51 An-Na'im A, 'The Rights of Women and International Law in the Muslim Context', 9 *WHITTIER L. REV.* (1987). 52 An-Na'im (n63 above), 515.

52 See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at; https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mj il (Last accessed 13 October, 2019).

of their culture or religious law, without due regard to the full implications of such action.[53]

4.2 African Legal Feminism

In the process of developing "home-grown" jurisprudence, African legal feminists have drawn inspiration from the contributions of Western ideological movements such as, feminist legal theory, critical legal theory, critical race theory, Post structural theory and Marxist theory.[54] Increasingly, when African legal feminists make use of theories originating in the West, attempts are made to interrogate their contexts, find differences and similarities with the local contexts and engage with the extent they can be usefully applied. As espoused earlier in this article, caution must be taken to avoid uncritical superimposition of Western paradigms onto the condition of African women as this may end in disastrous results.[55]-African feminism "encompasses freedom from the complex configurations created by multiple oppressions."[56] African feminism combines racial, sexual, class, and cultural dimensions of oppression to produce a more inclusive brand of feminism through which women are viewed first and foremost as human, rather than sexual, beings. It can be defined as that ideology which encompasses freedom from oppression based on the political, economic, social, and cultural manifestations of racial, cultural, sexual, and class biases. It is more inclusive than other forms of feminist ideologies and is largely a product of polarizations

---

53 An-Na'im (n63 above), 515.
See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at; https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mj il (Last accessed 13 October, 2019).

54 The Status of Legal Feminism in Africa: Gains & Limits. Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 20 September, 2019).

55 The Status of Legal Feminism in Africa: Gains & Limits. Available at http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 20 September, 2019).

56 Steady C.F, 'African Feminism: A Worldwide Perspective' in Terborg-Penn R, Harley S, Rushing B.A (eds.), *Women in Africa and the Diaspora*, Washington, DC: Howard University Press, 1987 at 4.
See, also, Fagbongbe (n52 above), 15.

and conflicts that represent some of the worst and chronic forms of human suffering.[57]

African feminist scholars have therefore begun to rewrite the history of African society to reflect the role women have played and can play in African societies.[58] In light of this, feminism provides an invaluable foundation for challenging male mainstream and the status quo, whether within or outside feminist discourses, and it offers a valuable tool for analysing women's rights in Africa.[59] Legal feminist activism on the continent came of age during the late 1980s when female lawyers who doubled as gender activists organized to pursue gender equality. Prominent among such organizations and networks were the various country chapters of FIDA (the International Federation of Women Lawyers), Associations of Women Jurists (Francophone Africa), Women and the Law in Southern Africa (WLSA), Women and the Law in Eastern African (WLEA), Women and the Law in West Africa (WLWA), Women Living Under Muslim Laws (WLUML) and Women in Law, Development for Africa (WiLDAF).[60]

In 1998 the African Women Lawyers Association (AWLA), the umbrella body of African women lawyers, was launched to strengthen networking between women lawyers in the region in their common goal to promote gender equality. It must be noted, however, that legal activism is not limited to lawyers as they

---

57 Steady C.F, 'African Feminism: A Worldwide Perspective' in Terborg-Penn R, Harley S, Rushing B.A (eds.), *Women in Africa and the Diaspora*, Washington, DC: Howard University Press, 1987 at 4.
See, George E, *Feminism and the Future of African International Legal Scholarship*, Cambridge University Press.
See, also, Fagbongbe (n52 above), 15.
See, Ofodile E.U, The past and future of African International law scholarship: International trade and investment law.

58 Zeleza P.T, (1997) *Manufacturing African Studies and Crises, Dakar:* CODESRIA Book Series, at Chapters 9 and 10.
See, also, Steady C.F, (2006) Women and Collective Action in Africa: Development, Democratization, and Empowerment, with Special Focus on Sierra Leone, New York: Palgrave Macmillan.
See, Fagbongbe (n52 above), 15.

59 Fagbongbe (n52 above), 15.

60 Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 13 October, 2019).

are numerous non-lawyer human rights activists on the continent engaged in this field.[61]

One of the obstacles to the development of African feminist literature is that there is no such thing as 'African women'. African feminist scholars have argued[62] that while at the aggregate level, there is nothing wrong with a broad categorisation of any group of people from a particular region of world, the problem arises when these categorisations are stretched to the point where the lines are blurred, thereby eroding the nuances that are necessary for establishing specificity in casual linkages.

There is a tendency by various feminist scholars to categorise the lives of people from Africa as simply 'African' with little attention paid to the multiplicity of historical, cultural[63], religious, geographic, and socio-political

---

[61] Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 13 October, 2019). [62] Dawuni (n51 above), 445.

[62] Culture is often invoked as a justification for violations of women's human rights, reflecting deep-seated patriarchal structures and harmful gender stereotypes. In several countries, culture is invoked to negatively impact the rights of women, in particular in the areas of marriage and property. However, culture is not a static or unchanging concept, although some States tend to present it as such in order to justify discrimination and violent practices against women and girls. 'Human Rights of Women in Africa: Conceptualizing rights,' pg.18. Available at; https://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf. (Last accessed 24 September, 2019).

[63] Historically, for instance, Tamale states that the colonialists constructed the hyper sexed, polygynous female body, and made a case for the strict regulation and control of African women's sexuality. This was the final stage in politicising African women's sex and sexuality. Laws were imported from the imperial metropolis to repress and police women's sexuality. Traditional customs, which themselves were not very egalitarian in the first place, were reconfigured to introduce new sexual mores, taboos and stigmas, and the total medicalisation of women's reproduction. The result was a more repressed sexuality akin to the Victorian type. Colonialists worked hand in hand with African patriarchs to develop inflexible customary laws that evolved into new structures and forms of domination.
Tamale S. 'Women's sexuality as a site of control & resistance: Views on the African continent,' Keynote Address delivered at the International Conference on Bride price on 14 February 2004 at Makerere University, Kampala. Available at; https://mifumi.org/wp-content/uploads/2017/02/MIFUMI-Bride-Price-Conference-2004-Women%E2%80%99s-Sexuality-as-a-Site-of-Control-Resistance-Views-on-the-African-Context-Sylvia-Tamale.pdf. (Last accessed 22 September, 2019).
See, also, Schmidt, Elizabeth. 1991. 'Patriarchy, Capitalism, and the Colonial State in Zimbabwe.' *Signs: Journal of Women in Culture and Society* 16(4): 73256, Mama, Amina. 1996. 'Women's Studies and Studies of Women in Africa during the 1990s.' *CODESRIA Working Paper Series S/96, Dakar: CODESRIA.*

differences and diversity across the continent.[64] That by representing the experiences, discourse, and engagement of women of African descent as simply those of 'African women', feminist scholars are reproducing the hierarchy power structures inherent in scholarship.

Such reproduction therefore renders the lives and stories of the women they describe as faceless and lacking in personal agency. Scholarship emerging from different disciplines has contributed to the iconoclastic attempts at what Dawuni refers to as 'lazy theorising' with a mission to be masters and-experts on a whole continent without so much as gaining a deeper knowledge of one country[64]. In 2006, a group of over two hundred African feminists sitting in Accra during The African Feminist Forum developed a Charter of Feminist Principles for African feminists,[65] seeking to re-energise and reaffirm African feminism in its multiple dimensions. Feminism coming out of Africa has given more impetus to questions of development and underdevelopment, being informed by the particular challenges and predicaments that face the African continent.[66]

African feminism has been able to bring the key role of gender in African underdevelopment to many international arenas. Gender discourses in international development have only become acceptable as a result of years of painstaking research and activism, challenging male bias in development. Feminist thinkers from Africa have played key roles in the international networks that have driven this change. Notable among these are the Southsouth network Development Alternatives with Women for a New Era (DAWN), and the continental Association of African Women in Research and Development (AAWORD), both established in the early 1980s. Despite the

---

64 Dawuni (n51 above), 445.

65 Available at; http://awdf.org/wpcontent/uploads/Charter_of_Feminist_Principles_for_African_Feminists.pdf. (Last accessed 5 October, 2019).

66 Ahikire J, 'African Feminism in context: Reflections on the legitimation battles, victories and reversals' pg.12. Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/feminist_africa_journals/archive/02/features_-_african_feminism_in_the_21st_century_a_reflection_on_ugandagcos_victories_battles_and_reversals.pdf. (Last accessed 5 October, 2019).

failure of many institutions to implement policy commitments to gender equality, the fact is that feminists have succeeded in shifting the discourse in important ways. According to the 2018 World Economic Forum's Global Gender Gap Report[67], in eleven African countries, women hold close to one-third of the seats in parliaments. With 61 percent, Rwanda has the highest proportion of women parliamentarians in the world. Africa has the highest regional female entrepreneurial activity rate in the world. One in four women starts or manages a business. With Rwanda and Namibia, two Sub-Saharan African countries belong to the top ten of the most gender-equal countries. The lacuna in feminist international law scholarship is the failure to address the active participation of the African woman in international law.

An African feminist critique of the international system drawing, simultaneously, from postcolonial and TWAIL posits that the African woman has always been at the forefront in resisting domination, at local and global levels. [68] For instance, the well-documented involvement of women in liberation and independence movements across Africa, from Algeria to Zimbabwe, provide women with new spaces in fighting oppression, Western patriarchy, and imperial domination. The involvement of women in militant combat provides one window of explanation on the personal agency of African women in fighting against injustice of any kind. Women's roles continue to date. In many African societies, women are still taking the reins of leadership.[69]

Within the political sphere, the continent has had two democratically elected women presidents and several vice presidents.[70] Women are making modest

---

67 Available at https://www.un.org/en/sections/issues-depth/africa/index.html. (Last accessed 12 October, 2019).

68 Dawuni (n51 above), 455.

69 Levitt J (2015), Preface, in Levitt J (ed.), *Black women and international law: Deliberate interactions, movements and actions*, Cambridge: Cambridge University Press, xvi-xvii.
See, also,Dawuni (n51 above), 455.

70 President Ellen Johnson Sirleaf of Liberia is the first woman to have held the position as a democratically elected president of an African nation. Others include President Joyce Banda of Malawi (Catherine Samba-Panza of the Central African Republic held the position as interim president during the transition in 2014), Rose Francine Rogombe served as interim president in Gabon in 2015. See, Skaine R (2008), Women Political Leaders in Africa, North Carolina:

strides in some national parliaments, with Rwanda leading globally in the number of women in Parliament. Within the legal arena, women are continuing to spearhead significant positions of leadership as chief justices and presidents of constitutional courts.[71]

4.3 Normative gaps in International Law

4.3.1 The African Woman in International Instruments

Many African governments have signed up to international instruments on women's rights and put national gender policies that pledge commitment to gender equality. While it is clear that these governments do very little when it comes to concrete operationalisation and commitment of resources, [72] international instruments are also riddled with normative gaps that permanently limit them from being beneficial to the African woman because the experiences of all women are essentialized in one fits all laws.

The Convention on the Elimination of All Forms of Discrimination against Women.[73]

The United Nations through the General Assembly adopted the Convention in 1979 and it entered into force in 1981. The Convention prohibits private and public discrimination against women, outlaws discrimination against women in all spheres of society. A Protocol to the Convention was adopted in 1999 which provides for individual complaints procedure, through which individuals can make complaints of violations against states parties to the CEDAW Committee.

It is, however, important to identify the weaknesses in the Convention in the representing of the African woman. Although CEDAW has been cited in

McFarland and Company Publishers. See, also, Dawuni (n51 above), 455.

71 Dawuni (n51 above), 455.

72 Ahikire (n81 above), 12.

73 Available at https://www.ohchr.org/documents/professionalinterest/cedaw.pdf. (Last accessed 12 November 2019).

domestic courts within Africa[74] to challenge discriminatory laws, through highlighting the ways in which it has failed to provide adequate and specific protection towards women in Africa, the normative gaps in international law are exposed.

Women experience intersectional discrimination on the basis of multiple identities such as race, ethnicity, religion, which is inextricably linked to other factors and experiences like poverty, level of education, among others.

CEDAW fails to protect against some forms of discrimination that had not yet gained international attention at the time of its drafting. For example, CEDAW fails to explicitly provide protection for members of the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) community.[75]The intersectionality theory means that the African woman in the LGBTQI community and a gender minority is at a further layered disadvantage that is not experienced by a heterosexual woman in Africa. This is because most African states have laws criminalising same-sex marriages and communities that are violent and homophobic towards members of the LGBTQI community.[76]

The language of CEDAW references to culture as regressive and women as victims of custom and culture. It has been countered that while it is certainly the case that much of the discussion around matters of culture and tradition in the CEDAW context focuses on the negative impact on women's enjoyment

---

74 Unity Dow v Attorney General of Botswana [1991] L.R.C 574 (Bots.), Longwe v. Intercontinental Hotels (1992) 4 L.R.C 221 [HC] (Zam), Ephraim v Pastory& Anor (1990) L.R.C. 757 [HC] (Tanz).

75 Bond E.J, 'CEDAW in sub-Saharan Africa: Lessons in Implementation' Vol.241 *Michigan State Law Review* (2014), pg. 246. Available at https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1077&context=lr. (Last accessed 12 November 2019).

76 Ibrahim M.A, 'LGBT rights in Africa and the discursive role of international human rights law', Vo. 15 Issue 2 (2015) *African Human Rights Law Journal.* Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996- (Last accessed 13 November, 2019) See, also, Bond E.J, 'CEDAW in sub-Saharan Africa: Lessons in Implementation' Vol.241 *Michigan State Law Review* (2014). Available at; https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1077&context=lr. (Last accessed 12 November 2019)

of human rights, that is hardly surprising, given that the purpose of the Convention is to respond to violations of women's human rights, and a goal of the reporting procedure is to identify shortfalls and difficulties with a view to addressing them.[77] There should, however, be a nuanced analysis of custom, including its possible benefits to the African woman.[78]

CEDAW, which specifically aimed to protect women from discrimination, similarly failed to meet the needs of women in the African context. CEDAW was diluted by reservations. In total, twenty-five States Parties made a total of sixty-eight substantive reservations. To date, it is one of the most heavily reserved of all international human rights instruments. Although these reservations technically do not undermine the object and purpose of the treaty, the numerous reservations based on Islamic law and contravening domestic law make it impossible for the women's rights movement to catalyse a coherent realization of women's rights in all countries.

Most reservations are related to Articles 2and 16, which are considered core provisions of the Convention thus defeating the object and purpose of the Convention. This translates directly to sustaining discrimination against the African woman and therefore denying her the protection that the Convention intended.[79]

The United Nations Security Council Resolution (UNSCR) 1325 on Women, Peace and Security

It was adopted by the UN Security Council at its 4213th meeting on 31 October 2000. Contained within the Resolution are provisions on participation of women in conflict resolution and peace processes; gender mainstreaming in

---

77 Byrnes A, 'The Committee on the Elimination of Discrimination against Women', in Hellum A &Aasen S.H (eds.) (2013) *Women's Human Rights: CEDAW in International, Regional and National Law*, at 27, 58-59.

78 Merry E.S, (2009) 2nd ed., *Human Rights and Gender Violence: Translating International Law into Local Justice*, 130.

79 Amnesty International: 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women Weakening the protection of women from violence in the Middle East and North Africa region.' Available at https://www.refworld.org/pdfid/42ae98b80.pdf. (Last accessed 26 November 2019)

conflict-prevention initiatives; protection of women's rights and bodies in peace and war; and relief and recovery, especially for survivors of sexual violence. The issue of conflict and war is an important subject especially for the African woman since women face a disproportionate amount of discrimination during war situations, which are, unfortunately, rampant on the continent.

It has been argued that the resolution fails to address the structural causes of inequality that render women the most victimised in war zones. In attempts to mainstream gender within the UN, the focus is always superficial, a trait reflected by UNSCR-1325.[80] It does not consider the institutional inequality and power relations that structure approaches to gender in international organisations. Instead, gender mainstreaming is simply attached to the existing power structures.[81] Structural causes that inhibit women acting as agents [82], such as poverty, lack of access to education, and cultural conceptions (young age of marriage, etc.) are not included within the framework of UNSCR-1325. [83] Women are brought into the dominant structures of hegemonic militarism and war.[84]

This 'add women and stir' approach renders UNSCR-1325 ineffectual, as it does not allow women to determine the terms of the dialogue, which keeps them as the 'other' and prevents them from contributing meaningfully to women's peace and security. This also prevents women from contributing to strategies aiming to protect women in war zones, leaving such things to the

---

80 Otto, D (2006) 'A Sign of "Weakness? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325,' Vol. 13 *Michigan Journal of Gender and Law.*

81 Vayrynen, T (2004) 'Gender and UN Peace Operations: The Confines of Modernity,'Vol.11 No.1, International *Peacekeeping.*

82 According to UN Women, a UN body that promotes women's empowerment and gender equality, women constitute fewer than 10% of peace negotiators globally and only 3% of signatories to peace agreements. Available at; https://www.un.org/africarenewal/magazine/december-2015/women-peacesecurity. (Last accessed 25 November, 2019)

83 Pratt, N & Richter-Devroe, S (2011) 'Critically Examining UNSCR 1325 on Women, Peace, and Security,' vol.13, no.4 *International Feminist Journal of Politics.*

84 Willett, S (2010) 'Introduction: Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security,' vol.17, no.2, *International Peacekeeping.*

masculine majority, maintaining the status quo. It heavily focuses on the role of women as victims. That is, insight from women may be beneficial to global decision makers, as it provides insight from the perspective of the victim.[85] UNSCR-1325 focuses on women as peace-builders, which reaffirms gender stereotypes that situate women as natural peacemakers, and as being conflict-averse.[86]

These highlighted weaknesses of the Resolution are particularly damning for the African woman because during conflicts and crises in African states, women and girls are singled out by terrorist and extremist groups who abduct them for use as suicide bombers or sex slaves. Therefore, leaving women out of peace and security processes hinders communities from finding long lasting peace.[87]

4.3.2 The African Woman in Regional Instruments

African countries and their governments have recognised that the vision for 'The Africa We Want' cannot be achieved until and unless women enjoy their full rights as equal partners in development. Accordingly, several normative and legislative protocols have been adopted, including the Maputo Protocol[88],

---

85 Gibbings, S (2004), *Governing Women, Governing Security: Governmentality, Gender-Mainstreaming and Women's Activism at the UN*, MA Thesis, Toronto, York University.

86 Pratt, N & Richter-Devroe, S (2011) 'Critically Examining UNSCR 1325 on Women, Peace, and Security,' vol.13, no.4 *International Feminist Journal of Politics.*
O'Connor T, 'The UNSC & Women: On the Effectiveness of Resolution 1325' (2014), *Australian Institute of International Affairs.* Available at; http://www.internationalaffairs.org.au/news-item/the-unsc-women-on-theeffectiveness-of-resolution-1325/. (Last accessed 13 November, 2019).

87 Available at; https://www.un.org/africarenewal/magazine/december2015/women-peace-security. (Last accessed 25 November, 2019)

88 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Available at; https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf. (Last accessed 12 October, 2019)

the Solemn Declaration on Gender Equality in Africa[89] and Agenda 2063.[90] While this is commendable progress with regards to adoption of legal and policy frameworks that promote women's rights on the continent[91], much

---

[89] The Solemn Declaration on Gender Equality in Africa 2004 (SDGEA) was adopted at the Third Ordinary Session meeting of the Heads of State and Government of Member States of the African Union in Addis Ababa, Ethiopia. This was against the backdrop of a decision on gender parity taken at the inaugural Session of the African Union Assembly of Heads of State and Government in July 2002 in Durban, South Africa implemented during the Second Ordinary Session of the Assembly in Maputo, Mozambique 2003 through the election of five female and five male Commissioners. The solemn declaration on Gender Equality in Africa focuses on Combating HIV/AIDS, Malaria, Tuberculosis and other related infectious diseases; promotion of Peace and Security; Campaign for Systematic prohibition of the recruitment of Child Soldiers; Fight against Trafficking in Women and Girls; Promote the Gender Parity Principle; Promotion of the implementation of all Human Rights for Women and Girls; Implementation of the Legislation to guarantee Women's Land, Property and Inheritance Rights; Education of Girls and Literacy of Women; Domestication and Implementation of Regional and International instruments on Gender Equality. Available at https://www.un.org/en/africa/osaa/pdf/au/declaration_gender_equality_2004. pdf. (Last accessed 24 September, 2019)
See, also, Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,' (2013), pg.16. *International Institute for Democracy and Electoral Assistance*. Available at; https://www.idea.int/sites/default/files/publications/africanunion-mechanisms-to-foster-gender-mainstreaming-and-ensure-womenspolitical-participation.pdf. (Last accessed 24 September, 2019)
See, also, Report of the Chairperson on the Implementation of the Solemn Declaration on Gender Equality in Africa (SDGEA). Available at; http://www.peaceau.org/uploads/ex-cl-729-xxi-e.pdf. (Last accessed 25 September, 2019).

[90] In January 2015 the Heads of State and Governments of the African Union adopted Agenda 2063. The vision and ideals in the Agenda serve as pillars for the continent in the foreseeable future, which will be translated into concrete objectives, milestones, goals, targets and actions/measures.
Agenda 2063 strives to enable Africa to remain focused and committed to the ideals it envisages in the context of a rapidly changing world. Available at https://www.un.org/en/sections/issues-depth/africa/index.html. (Last accessed 12 October, 2019)

[91] At a sub-regional level, the African Union has provided guidance to the RECs in complementing and harmonizing global and regional frameworks by integrating and translating various resolutions and commitments into their policies and plans of action. The RECs have already started implementing some coordination and harmonization mechanisms, which will certainly help eliminate discrepancies; and the establishment of priority areas of focus will assist in producing results. But bolder action is still needed. The RECs are expected to monitor the implementation of integration-related policies and programmes, to mobilize the necessary resources to support such policies and programmes, and to report on progress. For example, the RECs all possess dedicated gender units, which include declarations and tools for gender audits and mainstreaming, The Southern African Development Community (SADC) established a Gender Unit in 1996, adopted a Gender Policy Framework in 1997 and established gender focal points at the sectorial level. An SADC Plan of Action for gender and development was created to audit the programmes and to mainstream gender; while the

more needs to be done to ensure that the African woman is adequately represented in regional instruments.

Economic Community of West African States (ECOWAS) has instituted a gender policy to guide its member states in gender mainstreaming.

The establishment of NEPAD, adopted in Zambia in 2001, is another important initiative with considerable focus on gender issues. Its objective is to enhance Africa's growth and development and its participation in the global economy. Under the NEPAD/Spanish Fund for African Women's Empowerment, 38 projects were finalized from the first phase of the Fund. Under the second phase, 31 projects were approved for a total of EUR 8.2 million. The project proposals covered three priority sectors: economic empowerment, civil society strengthening and institutional strengthening.

The APRM, a self-monitoring instrument voluntarily accepted by member states of the AU, aimed at fostering the adoption of policies, standards and practices and strengthening accountability with respect to commitments to good governance as well as gender equality and women's empowerment.

See, Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,'

(2013), pg.10. *International Institute for Democracy and Electoral Assistance*. Available at https://www.idea.int/sites/default/files/publications/africanunion-mechanisms-to-foster-gender-mainstreaming-and-ensure-womenspolitical-participation.pdf. (Last accessed 24 September, 2019).

Also, The Fund for African Women was created as a single mechanism to ensure policy implementation as well as the effective mainstreaming of gender in policies, institutions and programmes at regional, national and local levels. It became operational in 2011. The AU organs, RECs and member states in this regard are committed to allocate a budget for the implementation of policy (member states are requested to devote 1 per cent of assessed contribution to the Fund; some members states have contributed more) and, since the funds mobilized through this means are insufficient, to strengthen partnerships with international financial agencies and institutions to increase technical expertise, and facilitate the exchange of best practices and financial support for the implementation of AU gender policy. During its first year of operation in 2011, the Fund supported 53 grassroots projects across 27 AU member states. (Australia has also supported the fund.) Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,' (2013), pg.16. *International Institute for Democracy and Electoral Assistance*. Available at; https://www.idea.int/sites/default/files/publications/african-unionmechanisms-to-foster-gender-mainstreaming-and-ensure-womens-politicalparticipation.pdf. (Last accessed 24 September, 2019).

See, also, Report of the Chairperson on the Implementation of the Solemn Declaration on Gender Equality in Africa (SDGEA). Available at http://www.peaceau.org/uploads/ex-cl-729-xxi-e.pdf. (Last accessed 25 September, 2019).

The African Charter on Human and Peoples' Rights[92]- The African Charter on Human and Peoples' Rights, also known as the Banjul Charter is a regional human rights instrument developed for the purposes of promoting and protecting human rights in Africa. Though the Banjul Charter was, created with human rights in mind, it only mentions women twice, that is in Article 2[93] and Article 18(3)[94] requiring states to eliminate "every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

This created the need to introduce a women-specific protocol. In particular, NGOs and States Parties alike realized that the Charter did not explicitly address commonplace practices like female genital mutilation (FGM), forced marriages, or bride price and, as a result, failed to protect the African woman from harm adequately.[95]

The Protocol to the African Charter on Human and Peoples' Rights (The Maputo Protocol)[96]

The Maputo Protocol was adopted by the African Union in 2003 and came into force in November 2005 after achieving the required 15 ratifications.[97] The AU, in adopting a treaty specifically concerning women, intended to reinforce the "message that women's rights require priority attention in the protection of universal and inalienable rights." The Protocol, among others, affords

---

92 Available at; http://www.humanrights.se/wp-content/uploads/2012/01/African-Charteron-Human-and-Peoples-Rights.pdf. (Last accessed 13 November, 2019).

93 Article 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

94 Article 18(3): 'The State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'

95 Ayeni O.V 'The impact of the African Charter and the Maputo Protocol in selected African states' (2016) *Pretoria University Law Press.* Available at; http://www.kelinkenya.org/wp-content/uploads/2016/07/DOC-20160718WA0005.pdf. (Last accessed 13 November, 2019).

96 Available at; https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_200

97 Ayeni (n110 above) 8.

specific legal protection against gender-based violence, in both the public and private sphere and affirms the primacy of women's rights to nondiscrimination.[98]

Laudable though the aim might be, the Protocol is useless if it does not contribute to substantial changes in the situation of the African woman. Although it offers a tool for the transformation of the unequal power relations between men and women, there is need to demand for action by African leaders to the existing commitments. African states have been criticised for the slow implementation or lack thereof by states that have ratified the Protocol.[99]

While the adoption of legal and policy frameworks that promote women's rights on the continent is commendable progress, more needs to be done in terms of implementation, accountability and most importantly, dismantling institutional international law structures which limit women, particularly where economic, social and cultural rights are concerned.

4.4 Institutional gaps in International Law

International institutions are important players in creating legal norms. Article 38(1) (d) of the Statute of the ICJ, implies international courts do not only settle the dispute before them, but also create binding norms.

The minimal representation of the African woman in international institutions like the International Court of Justice (ICJ), International Criminal Court (ICC), International Centre for Settlement of Investment Disputes (ICSID), World Trade Organization's Dispute Settlement Body (WTO DSB), the

98 'Under the African Charter, the lack of specifity on discrimination against women left them vulnerable to arguments that "cultural values" and community norms should prevail, even when it results in physical harm.' Journey to equality: 10 Yeas of the Protocol on the Rights of Women in Africa. Available at; http://www.soawr.org/images/JourneytoEquality.pdf. (Last accessed 25 November, 2019).

99 Journey to equality: 10 Yeas of the Protocol on the Rights of Women in Africa. Available at http://www.soawr.org/images/JourneytoEquality.pdf. (Last accessed 25 November, 2019).

International Criminal Tribunal for Rwanda (ICTR's), the African Court on Human and Peoples' Rights (ACtHPR), the Economic Community of West African States (ECOWAS) Court of Justice and the East African Court of Justice, among others reinforces the exclusion of the African woman in shaping and forming international law in a way that promotes her rights and interests.[100]

4.4.1 The African Woman in Regional Courts and Tribunals

The African Court on Human and Peoples' Rights (ACtHPR)[101] was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), signed in 1998, and came into force in 2004 with twenty-four ratifications.[103]The first judgment of the Court to deal with the rights of women and the rights of the child in Africa, in *Association Pour le Progrès et*

---

100 It is important to note however, that countries across Africa have made substantial gains in the numbers and leadership roles of women judges, as documented in *Gender and the Judiciary in Africa: From obscurity to parity?* Across, the continent, women occupy important leadership positions such as that of Chief Justices and Heads of Constitutional Courts and these developments at the domestic levels have been replicated at the international level with a growing number of African women judges serving on international courts. However, a lot still needs to be done to increase the numbers on all courts and especially international tribunals.

101 The ACtHPR is made up of thirty member-states, out of the fifty-four nations on the continent. Judges on this court are to hear and dispose of cases guided by principles of international law and rules of procedure. Taking into account the poor record of international courts in attaining an equitable distribution of the sexes, the framers of the treaties establishing the ACtHPR took into account the need for gender representation in the nomination and selection processes. Protocol to the African Charter on Human and Peoples' Rights on the Establishment, Article 12: 'NOMINATIONS 1. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State. 2. Due consideration shall be given to adequate gender representation in the nomination process.' Available at; https://www.refworld.org/docid/3f4b19c14.html. (Last accessed 22 September, 2019)
Article 14(3) of the Protocol addresses the election process, which is undertaken by the Assembly of Heads of State and Government, and states that "[i]n the election of the judges, the Assembly shall ensure that there is adequate gender representation." Thus, through the nomination and voting procedures, there appears to be emphasis placed on ensuring an adequate gender representation on the court. The meaning of "adequate" is unclear, and thus leaves room for political manoeuvring by States. This provision tends to receive secondary consideration relative to the provisions aimed at achieving regional and geographic balance. Since the first judicial election was held in 2006, the ACtHPR has had only eight women, out of a total of twenty-three judges, but these numbers have since changed with the last election in 2018. On August 27, 2018, the newly elected judges on the Africa Court on Human and Peoples' Rights were sworn in at the seat of the Court in Arusha, Tanzania.
See, also, Dawuni J.J 'Vive La Diversité! A Roadmap to Gender Parity on African Regional Courts?' VÖLKERRECHTSBLOG (2017). Available at; https://voelkerrechtsblog.org/vive-la-diversite/. (Last accessed 22 September, 2019).

la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali. With this decision, the Court has placed strict obligations on states to uphold international human rights standards within the sphere of family law, even when to do so may require them to disapply religious and customary law. This decision was significant because the African Court took a firm stance on the authority of the Maputo Protocol as a human rights instrument binding upon African States. This is vital in the advancement of the rights of women on the continent.

The positive effect of the force of African feminism is visible on the continent in various ways for instance increased participation of African women in regional and international courts.[102] As of January 2017, women on the African Court on Human and Peoples' Rights (ACtHPR) made up five of the eleven seats on the bench and thus achieving gender parity for the first time in the 11-year history of the Court.[103] The following year, during the 31st Ordinary Session of the Assembly of Heads of State and Government of the African Union election, the gender composition of the court was increased to six women and five men.[104]

---

[102] See, also, Dawuni J.J and Kang A, "Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa", (2015) *Indiana University Press.* Available at; https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1072&context=poli_scifacpub. (Last accessed 22 September, 2019)
See, also, Dawuni J.J, 'Beyond the Numbers: Gender Parity on the African Court on Human and Peoples' Rights— A Lesson for African Regional Courts?' (2018) *Voices on International Law, Policy, Practice.* Available at https://ilg2.org/2018/08/28/beyond-the-numbers-gender-parity-on-theafrican-court-on-human-and-peoples-rights-a-lesson-for-african-regionalcourts/. (Last accessed 22 September, 2019)

[103] Available at; https://www.refworld.org/docid/3f4b19c14.html. (Last accessed 22 September, 2019)

[104] The relationship between the women's movement and women's representation in the justice sector is understudied. Nonetheless, there is some anecdotal evidence that countries with higher levels of women judges is an indication of the strength and visibility of women in national law associations, and their lobbying efforts often prove pivotal in encouraging governments to appoint women to judicial posts.
International Development Law Organization: 'Women Delivering Justice: Contributions, Barriers, Pathways' (2018), pg. 30. Available at; https://www.idlo.int/sites/default/files/pdfs/publications/IDLO%20-%20Women%20Delivering%20Justice%20-%202018.pdf. (Last accessed 22 September, 2019).

The ECOWAS Court of Justice is an organ of the Economic Community of West African States (ECOWAS) a regional integration community of 15 member states in West Africa. Although ECOWAS was founded in 1975 by the Treaty of Lagos, the Court of Justice was not created until the adoption of the Protocol on the Community Court of Justice in 1991. Additionally, the ECOWAS Revised Treaty of 1993 established the Court of Justice as an institution of ECOWAS. The Protocol was amended twice; once in 2005, and again in 2006. The 2005 Supplementary Protocol expanded the Court's jurisdiction to include human rights claims by individuals[105], The ECOWAS Court has had five women out of 17 judgeships representing 29%.

The East African Court of Justice (the EACJ), is one of the organs of the East African Community established under Article 9 of the Treaty for the Establishment of the East African Community. Following the amendment of the Treaty establishing the East African Community that was carried out on 14th December, 2006 and 20th August, 2007, the Court was reconstituted to have two divisions, a First Instance Division and an Appellate Division.[106] To date, women have only accounted for four out of the 25 judgeships on the court, representing 16%.

It is noteworthy that the EACJ and the ECOWAS Court of Justice do not contain gender parity provisions in their founding documents and additional

---

105 Within the international arena, the turn of the twenty-first century ushered in a growing number of women appointed to serve on international courts such as the International Criminal Court (ICC),8 the African Court on Human and People's Rights (ACtHPR), the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and ad hoc tribunals such as the International Criminal Tribunals for Yugoslavia and Rwanda and, at a much slower pace, the International Court of Justice (ICJ). Among the elite group of women judges serving on these courts are prominent African women judges, drawn from across the continent, with a wide variety of judicial and professional experience. Notwithstanding these developments, much remains unknown about the roles and contributions that the pace-setting women who sit on these courts bring to international law. International Development Law Organization: 'Women Delivering Justice: Contributions, Barriers, Pathways' (2018), pg. 30. Available at; https://www.idlo.int/sites/default/files/pdfs/publications/IDLO%20-%20Women%20Delivering%20Justice%20-%202018.pdf. (Last accessed 22 September, 2019).

106 Available at; https://www3.nd.edu/~ggoertz/rei/reidevon.dtBase2/Files.noindex/pdf/e/eacj.pdf. (Last accessed 13 November, 2019).

protocols. This demonstrates the fact that while women have had some success being elected to the bench without gender quotas, setting aspirational targets may be a good strategy to sustain the desired gender parity outcomes.

It is important that the ACtHPR gender parity success should provide lessons for other regional courts in Africa especially the benches of the ECOWAS Court of Justice and the East African Court of Justice where women judges are underrepresented.[107] The gender parity gains at the ACtHPR can be linked to a combination of regional factors and mechanisms, such as activist agenda to achieve gender equality embodied in the Maputo Protocol and the sustained advocacy for women's equal participation in decision making, led by women's organisations such as Solidarity for African Women's Rights (SOAWR).

Commendable also, is the commitment of the Legal Affairs unit of the African Union in reviewing and rejecting nominations that do not contain the names of women, has proved instrumental in meeting the nomination requirements. Credit must also be given for the political will of the Assembly of Heads of State and Government to abide by the gender representation provisions in Article 12 (nominations) and Article 14 (elections) of the Protocol to the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol).[108]

4.4.2 The African Woman in International Judicial and Quasi-judicial Institutions

In March 2012, Justice Julia Sebutinde of Uganda made history as the first woman from the continent of Africa to be elected as one of the 15 permanent

---

107 Dawuni J.J, 'Beyond the Numbers: Gender Parity on the African Court on Human and Peoples' Rights- A Lesson for African Regional Courts?' (2018). Available at; https://ilg2.org/2018/08/28/beyond-the-numbers-gender-parityon-the-african-court-on-human-and-peoples-rights-a-lesson-for-africanregional-courts/. (Last accessed 29 October, 2019).

108 Dawuni (n123 above).
See, also, Dawuni J.J 'Vive La Diversité! A Roadmap to Gender Parity on African Regional Courts?' VÖLKERRECHTSBLOG (2017). Available at https://voelkerrechtsblog.org/vive-la-diversite/. (Last accessed 22 September, 2019).

judges of the International Court of Justice (ICJ).[109] As of February 2017, Justice Sebutinde is one of the only four women to have ever sat on the bench of the ICJ and the first African woman compared to fourteen African male judges. Justice Sebutinde's election to the ICJ follows the historic election in 1995 of Judge Rosalyn Higgins of the United Kingdom as the first woman to be elected to the court's bench. She then subsequently became the president of the court from 2006 to 2009. The ICJ's dismal record of electing women generally to the court has been attributed to factors such as the patriarchal nature of the international system, the gendered hierarchy in international law.[110] The vote trading during the appointment of international judges and the pool arguments advanced by appointing bodies.[111] Since the African woman faces multiple intersections of race, gender and class relations, these factors are then compounded to reinvent the wheel on her exclusion on international courts.

The coming into force of the International Criminal Court (ICC) in 2002 appears to have charted a new direction in attempts to address the underrepresentation of women in international courts. In 2003, the ICC elected the first cohort of 18 judges to the court, and out of this number seven were women, representing the highest number of women to have served on an international court since its inception. The number of women on the ICC bench increased from 38 percent in 2003 to 57 percent in 2013, and this increase caused the minimum voting requirements to be adjusted to ensure that a man would be elected in the 2014 elections. As of 2016, of the total number of forty-one judges who have served since the inception of the court in 2003, 15 have been women, making up 36% of the total number of judges. African women make up five of the 15, representing the highest number from

---

109 See, International Court of Justice, *All Members*, available at; http://www.icjcij.org/en/all-members.

110 See, Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' *Chicago Journal of International Law*, Vol

111 See, also, Terris D, Roman C, and Swigart L (2007), *The international judge: A n introduction to the men and women who decide the world's cases*, Waltham, MA: University Press of New England/Brandeis University Press.
See, also, Vauchez H, 'More women- but which women? The rule and the politics of gender balance at the European Court of Human Rights, *The European Journal of International Law*, 26(1), (2015), 195-221.

a single geographic region of the world.[112] The success of the ICC in achieving a near gender parity has been attributed to the Rome Statute's provision in Article 36(8) (iii) for a "fair representation of female and male judges."

Nonetheless, the gender composition of international courts remains a contested issue, with varying levels of success across existing international courts and tribunals.[113] The International Centre for Settlement of Investment Disputes (ICSID) is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID of the Washington Convention) with over one hundred and forty member States.[114] Since its establishment, women made up a mere 6 percent of individuals appointed to arbitrate disputes in ICSID.[115]

The World Trade Organization's Dispute Settlement Body (WTO DSB) has authority to establish dispute settlement panels, refer matters to arbitration, Appellate Body and arbitration reports, among others.[116] However, since its establishment, only 19 percent of Appellate Body members were women. Three of the four women who served on the Appellate Body since it was created sat on the bench in mid-2010. Women were appointed only 17 percent of the time to WTO arbitral panels in 2009. Women were appointed only 9 percent of the time to ICSID panels in 2009.

---

112 Dawuni J.J 'Race to the top? African women judges and international courts (2016). Available at; https://ilg2.org/2016/07/01/race-to-the-top-africanwomen-judges-and-international-courts/. (Last accessed 25 November, 2019).

113 Dawuni (n51 above), 447-448.
See, also, Mackenzie R, Malleson K, Martin P, and Sands P (2010), *Selecting international judges: Principle, process, and politics*, Oxford: Oxford University Press.
See, also, Chappell L (2015), *The politics of gender at the International Criminal Court: Legacies and legitimacy*, Oxford University Press.

114 Available at; http://www.yourarticlelibrary.com/organization/internationalcentre-for-settlement-of-investment-disputes-icsid/23535. (Last accessed 13 November, 2019)

115 Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' Vol.12 Issue 2, (2012) *Chicago Journal of International Law.*

116 Available at; https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm. (Last accessed 25 November, 2019).

The International Criminal Tribunal for Rwanda (ICTR) was formed to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. It was established by Security Council resolution 955 of 8 November 1994 in recognition of the grave violations of humanitarian law committed in Rwanda, which claimed the lives of 800,000 Rwandan Tutsis and moderate Hutus between the months of April and July 1994.[117] Since the ICTR's establishment, women constituted thirty six percent of *ad litem* judges and eighteen percent of all permanent judges.[120] Twenty percent of ICTR permanent judges were women, while 27 percent of *ad litem* judges were women in mid-2010. Historically, women made up fifteen percent and twenty percent of permanent and *ad litem* judges on the International Criminal Tribunal for the former Yugoslavia (ICTY).[118]

In general, men are over-represented when compared to their proportion of the population. However, Courts whose subject matter jurisdiction is limited to human rights and international criminal law are seen to possess the highest percentage of women judges, when both permanent judges and *ad hoc* or *ad litem* judges are included.[119] The representation of the African woman on the ACtHPR, ICJ and the ICC strongly suggests that there is a pool of qualified women judges from the continent of Africa to fill the positions on the benches of sub-regional, regional, and international courts.[120]

---

117 Available at; http://ictrcaselaw.org/ContentPage.aspx?cid=2. (Last accessed 13 November, 2019)

118 Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' Vol.12 Issue 2, (2012) *Chicago Journal of International Law.*

119 Grossman N, Achieving Sex-Representative International Court Benches, 110 AJIL 82-85, (2016). Available at; https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1961&context=all_fac. (Last accessed 20 September, 2019).

120 That there is a shallow pool of qualified female candidates is a poor explanation for the overrepresentation of men on international courts. The pool argument provides that women are found in lower numbers on courts without quotas

Diversity in international institutions is imperative because the background of the decision-maker influences the way she/he votes and jurisprudence, which in turn shapes the nature of international norms. In this case, diversity would most likely enrich African feminist discourse. It also establishes the legitimacy of an international judicial institution since international institutions exercise governmental power over people from all over the world thus ensuring effective enforcement and given the importance of political will of international law, legitimacy of procedure.

An example of the importance of the diversity on legitimacy of an international law institution can be given of African leaders recently adopting a strategy calling for the collective withdrawal from the ICC at the end of an African Union Summit in October, 2016. Countries like Uganda, Burundi and South Africa expressed their dissatisfaction. The then Information Minister of the Gambia described the ICC as an "International Caucasian Court for the persecution and humiliation of people of colour, especially Africans".[121]

5.0 Recommendations and Conclusion

Clearly, the African woman faces a disproportionate amount of discrimination in comparison to people of the same gender on the one hand and people of the same race on the other. It is vital to deconstruct these institutions and norms

because not enough qualified women are available to occupy these prestigious positions. Grossman argues that if the pool were the reason for the paucity of women judges, one might anticipate that the number of women on the bench would grow as women enter law schools, the diplomatic corps, and the legal profession in greater numbers. This is not the case for many international courts. A court is legitimate when it is possessed with justified authority. People (or states) are led to accept [its] authority because of a general sense that the authority is justified. The low numbers of women judges on international courts make empirical studies of the impact of women judges on international adjudication quite rare. The question evoked in this instance is whether a Court that lacks female African judges can be considered illegitimate?

[121] Judge Solomy Balungi Bossa from Uganda, one of the eighteen ad litem Judges elected by the General Assembly, was sworn in on 1 September 2003 to sit in on the Ndindabahizi trial. Available at; https://unictr.irmct.org/sites/unictr.org/files/news/newsletters/oct03.pdf. (Last accessed 13 November, 2019).

that often advertently or inadvertently discriminate against the African woman.

For example, the selection mechanism for judges/arbitrators to the highest courts/tribunals inhibit the African woman from ascending to the bench because, usually, judges are either selected by the legislature, by the executive, by the executive with the approval of the legislature, or by dividing the appointment of judges across multiple institutions which may be biased in favour of male arbitrators because the African woman was not represented at the making of such Rules.

This creates the need to revise the Rules governing such appointments and nominations. These institutions may also adopt affirmative action measures that encourage the African woman (and other minority groups) to apply to such Courts or tribunals. For example, international and regional institutions should adopt a quota system that sets a target to be met for the Court or tribunal to be considered legitimate.

Research has highlighted the phenomenon of "adverse incorporation" whereby women are included in the judiciary on unequal terms. For example, gender stereotypes influence women judges' assignments to positions in family or juvenile courts, while women are excluded from certain experiences and responsibilities, and thereby prevented from being groomed for leadership positions.[122] In such circumstances, women often do not "even realize this exclusion is taking place until it is too late; then without proper training, women find advancement in their careers very difficult."[123] Moreover, the referenced study identifies a "glass cliff syndrome" whereby women are given precarious projects within the court/tribunal.[124]

---

122 ICJ, 'Women and the Judiciary', pg. 17.

123 Virtue Foundation, 'Senior Roundtable on Women and the Judiciary', pg. 25.

124 International Development Law Organization: 'Women Delivering Justice: Contributions, Barriers, Pathways' (2018), pg.25. Available at; https://www.idlo.int/sites/default/files/pdfs/publications/IDLO%20-%20Women%20Delivering%20Justice%20-%202018.pdf. (Last accessed on 22nd September, 2019)

Since it has been established that international law privileges men, values and principles of international and regional legal systems should be deconstructed and subsequently reconstructed with the inclusion of the African woman. This guarantees that peculiar experiences of the African woman are recognised in international and regional instruments thus locating the African woman as more than just a victim in international law.

REFERENCES

Ahikire J, 'African Feminism in context: Reflections on the legitimation battles, victories and reversals' pg.12. Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/feminist_africa_journals/archive/02/features_-_african_feminism_in_the_21st_century_a_reflection_on_ugandagcos_victories_battles_and_reversals.pdf.

Anghie A, 'Finding the Peripheries: Sovereignty and Colonialism in NineteenthCentury International Law', 40 *Harvard International Law Journal* (1999).

An-Na'im A, 'The Rights of Women and International Law in the Muslim Context', 9 *WHITTIER L. REV.* (1987).

Ashcroft B., Gareth G. and Tiffin H. (2002) *The Empire writes back*, Routledge, London.

Ayeni O.V 'The impact of the African Charter and the Maputo Protocol in selected African states' (2016) *Pretoria University Law Press.* Available at; http://www.kelinkenya.org/wp-content/uploads/2016/07/DOC-20160718WA0005.pdf.

Bentham, J. (1789) *An Introduction to the Principles of Morals and Legislation*

Bond E.J, 'CEDAW in sub-Saharan Africa: Lessons in Implementation' Vol.241 *Michigan State Law Review* (2014), Available at; https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1077&context=lr

Bunting A, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies' in Bottomley A and Conaghan J (eds.) (1993) *Feminist Theory and Legal Strategy*.

Byrnes A, 'The Committee on the Elimination of Discrimination against Women', in Hellum & Aasen S.H (eds.) (2013) *Women's Human Rights: CEDAW in International, Regional and National Law*.

Chappell L (2015), *The politics of gender at the International Criminal Court: Legacies and legitimacy*, Oxford University Press.

Charlesworth H, 'Feminist Critiques of International Law and Their Critics', Vol 1 Article 1 (1994) *Third World Studies,* Available at; https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1033&context=twls

Charlesworth H, Chinkin C & Wright S, Feminist Approaches to International Law, 85 (1991*) AJIL* 613.

Collins H.P (2000) *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2nd edition) New York: Routledge. Available at; https://uniteyouthdublin.files.wordpress.com/2015/01/black-feminist-though-bypatricia-hill-collins.pdf.

Crawford J, The Criteria for Statehood in International Law, 48 *BRIT. Y.B. INT'L L.* 93, 98 (1976-77).

Dawuni J.J &Kang A, "Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa", (2015) *Indiana University Press.* Available at; https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1072&context=poliscifacpub.

Daw`uni J.J 'Vive La Diversité! A Roadmap to Gender Parity on African Regional Courts?' VÖLKERRECHTSBLOG (2017). Available at; https://voelkerrechtsblog.org/vive-la-diversite/.

Dawuni J.J, 'Beyond the Numbers: Gender Parity on the African Court on Human and Peoples' Rights – A Lesson for African Regional Courts?' (2018) *Voices on International Law, Policy, Practice.* Available at; https://ilg2.org/2018/08/28/beyond-the-numbers-gender-parity-on-the-africancourt-on-human-and-peoples-rights-a-lesson-for-african-regional-courts/.

Dawuni J.J, 'Matri-legal feminism: an African feminist response to international law' in Ogg K and Harris S (eds.) (2019) *Research Handbook on Feminist Engagement with International Law*, Edward Elgar Publishing.

Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at; https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mjil

Fagbongbe M.D, 'Reconstructing Women's Rights in Africa using the African Regional Human Rights Regime: Problems and Possibilities' (2010). *A thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Faculty of Graduate Studies (Law), University of British Columbia (Vancouver).* Available at; file:///C:/Users/user/Downloads/ubc_2010_fall_fagbongbe_mosope.pdf.

Fassbender B, Peters A (eds.) (2012), *Oxford Handbook of International Law*, Oxford University Press.

Fox H.G, 'The Right to Political Participation in International Law, Vol. 17(2), 1992, *Yale Journal of International Law.* Available at; https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1600&context=yjil.

Franzway S, Court D & Connell R, (1989) *Staking a claim.*

Gathii J.T, 'Rejoinder: TWAILing International Law' (2000) 98 *Mich. L. Rev.* 2066.

Gathii T.J, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' *Trade L. & Dev.* 26 (2011). Available at; https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1203&context=facpubs.

George E, *Feminism and the Future of African International Legal Scholarship*, Cambridge University Press.

Gibbings, S (2004), *Governing Women, Governing Security: Governmentality, GenderMainstreaming and Women's Activism at the UN*, MA Thesis, Toronto, York University.

Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' *Chicago Journal of International Law*, Vol 12(2) Article 9 (2012).

Grossman N, 'Sex representation on the bench: Legitimacy and international criminal courts', 11 *International Criminal Law Review* 453.

Grossman N, Achieving Sex-Representative International Court Benches, 110 AJIL 82-85, (2016). Available at;

https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1961&context=all_fac.

Grossman N, Shattering the Glass Ceiling in International Adjudication, 56 *VA. J. INT'L L.* 213 (2016).

Grosz E, 'A Note on Essentialism and Difference' in Gunew S (ed.) (1990) *Feminist Knowledge: Critique and Construct*, 342.

Ibrahim M.A, 'LGBT rights in Africa and the discursive role of international human rights law', Vo. 15 Issue 2 (2015) *African Human Rights Law Journal*. Available at; http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S19962096201500020003.

Levitt J (2015), Preface, in Levitt J (ed.), *Black women and international law: Deliberate interactions, movements and actions*, Cambridge: Cambridge University Press, xvi-xvii.

Lundberg H, 'Permanent Colonialism over Natural Resources? Tracing Colonialism in the Post-Colonial State' (2018). Available at; http://www.juriskandidatprogrammet.se/WEB.nsf/(MenuItemByDocId)/ID27D17AE5595F2E5AC1257D6300302F4A/$FILE/JUCN21%20VT18%20Essay%20Hugo_Lundberg.pdf

Mackenzie R, Malleson K, Martin P, and Sands P (2010), *Selecting international judges: Principle, process, and politics*, Oxford: Oxford University Press.

Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,' (2013). *International Institute for Democracy and Electoral Assistance*. Available at; https://www.idea.int/sites/default/files/publications/african-union-mechanismsto-foster-gender-mainstreaming-and-ensure-womens-political-participation.pdf.

Merry E.S, (2009) 2nd ed., *Human Rights and Gender Violence: Translating International Law into Local Justice*, 130.

Mickelson K, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 *Wis. Int'l L.J.* 362-368.

Mitharika P.A, 'The Role of International Law in the Twenty-First Century: An African Perspective', Vol. 18(5) (1994), *Fordham International Law Journal*. Available at; http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2566&context=ilj.

Mohanty C.T, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in *Feminism without borders: Decolonizing theory, practicing solidarity,* Durham& London: Duke University Press, 2003.

Mutua W.M, 'What is TWAIL?' *American Society of International Law Proceedings*, 94, 31, 2000. Available at; https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1559&context=articles

Mutua W.M, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', Vol 16(4) *Michigan Journal of International Law*. Available at; https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1522&context=mjil.

Nyarayan U, (1997) Dislocating Cultures: Identities, Traditions and Third-World Feminism, New York: Routledge.

O'Connor T, 'The UNSC & Women: On the Effectiveness of Resolution 1325' (2014), *Australian Institute of International Affairs.* Available at; http://www.internationalaffairs.org.au/news-item/the-unsc-women-on-theeffectiveness-of-resolution-1325/.

Ofodile E.U, *The past and future of African International law scholarship: International trade and investment law.*

Ogundipe-Leslie M, *Recreating Ourselves: African Women and Critical Transformations*, Trenton: Africa World Press, 1994.

Okafor O.O 'Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective' *Osgoode Hall Law Journal* Vol. 43 No. 1&2 (2005).

Oppenheim, I.L, *International Law: A Treatise* 4 (Arnold D. McNair ed., 4th ed. 1928).

Orakhelashvili A, 'The Idea of European International Law', Vol. 17(2) (2006), *The European Journal of International Law.* Available at; http://ejil.org/pdfs/17/2/77.pdf.

Otto D 'The Gastronomics of TWAIL's Feminist Flavourings: Some Lunch Time Offerings' *International Community Law Review* 9(4):345-352 (2007).

Otto D, 'Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women,' 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 371 (1993).

Otto, D 'A Sign of "Weakness? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325,' Vol. 13 (2006) *Michigan Journal of Gender and Law*.

Pratt, N & Richter-Devroe, S (2011) 'Critically Examining UNSCR 1325 on Women, Peace, and Security,' vol.13, no.4 *International Feminist Journal of Politics*.

Ramina L, 'TWAIL-"Third World Approaches to International law" and human rights: some considerations. Rev. Investing.
Const. vol.5 no.1 Curitiba Jan./Apr. 2018.
Rao A, The Politics of Gender and Culture in International Human Rights Discourse in Peters J &Wolper A (eds.) (1995) *Women's Rights, Human Rights: International Feminist* Perspectives.

Schmidt, Elizabeth. 1991. 'Patriarchy, Capitalism, and the Colonial State in Zimbabwe.' *Journal of Women in Culture and Society*

Shaw, M. (2008) *International Law*, p.1, Cambridge University Press, Cambridge. The Age of Rights, Columbia University Press, New York.

Skaine R (2008), Women Political Leaders in Africa, North Carolina: McFarland and Company Publishers.

Steady C.F, (2006) *Women and Collective Action in Africa: Development, Democratization, and Empowerment, with Special Focus on Sierra Leone,* New York: Palgrave Macmillan.

Steady C.F, 'African Feminism: A Worldwide Perspective' in Terborg-Penn R, Harley S, Rushing B.A (eds.), *Women in Africa and the Diaspora*, Washington, DC: Howard University Press, 1987.

Steiner H.J&Vagts D.F, Transnational Legal Problems, 3" ed (Mineola: The Foundation Press, 1986).

Taiwo O, 'Feminism and Africa: Reflections on the Poverty of Theory' in Oyewumi O, *African women and Feminism: Reflecting on the Politics of Sisterhood*, Trenton, NJ: Africa World Press, 2003.

Tamale S 'Women's sexuality as a site of control & resistance: Views on the African continent,' Keynote Address delivered at the International Conference on Bride price on 14 February 2004 at Makerere University, Kampala. Available at; https://mifumi.org/wp-content/uploads/2017/02/MIFUMI-Bride-PriceConference-2004-Women%E2%80%99s-Sexuality-as-a-Site-of-Control-ResistanceViews-on-the-African-Context-Sylvia-Tamale.pdf.

Tamale S, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' *Sex Matters* (2007). Available at; http://www.fahamu.org/mbbc/wp-content/uploads/2011/09/Tamale-2007Right-to-Culture.pdf.

Terris D, Roman C, and Swigart L (2007), *The international judge: A n introduction to the men and women who decide the world's cases*, Waltham, MA: University Press of New England/Brandeis University Press.

Tesón Fernando R. "Feminism and International Law: A Reply." *Virginia Journal of International Law* 33 (1992–1993)

Udegbe B, 'Portrayal of Women in Nigeria Media and the Psychological Implication' in Odejide A (ed.), Women and the media in Nigeria (Ibadan: Women's Research and Documentation Centre).

Vauchez H, 'More women- but which women? The rule and the politics of gender balance at the European Court of Human Rights, *The European Journal of International Law*, 26(1), (2015).

Vayrynen, T (2004) 'Gender and UN Peace Operations: The Confines of Modernity,'Vol.11 No.1, International *Peacekeeping*.

Whiteman W.M, *Digest of International Law*, Vol 1.

Willett, S (2010) 'Introduction: Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security,' vol.17, no.2, *International Peacekeeping*.

Wing A.K, Levitt J and Jackson C, 'An Introduction to the Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?' (2003) *Transnat'l L. & Contemp. Probs.* 1.

Zeleza P.T, (1997) *Manufacturing African Studies and Crises, Dakar:* CODESRIA Book Series, at Chapters 9 and 10.

MAKERERE LAW JOURNAL DECEMBER 2019

VOLUME 15 ISSUE 5

CELEBRATING THE CENTER FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD), A TEN YEAR OLD ADULT

J. Oloka-Onyango

RECOMMENDED CITATION:

J. Oloka-Onyango (2019), "Celebrating the Center for Health, Human Rights & Development (CEHURD), A Ten Year Old Adult" Volume 15 Issue 5, Makerere Law Journal.

KEY NOTE ADDRESS

CELEBRATING THE CENTER FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD), A TEN YEAR OLD ADULT

J. OLOKA-ONYANGO

MAKERERE UNIVERSITY

CONTENTS

CELEBRATING THE CENTER FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD), A TEN YEAR OLD ADULT[1]

Abstract

*Ten years in the life of a human rights organization is nearly a lifetime, a fact which is particularly true in the case of organizations in developing country contexts such as Uganda. Consequently, the 10th anniversary celebration of the Centre for Health, Human Rights and Development (CEHURD) should not be taken for granted. This is especially true given its pioneering work in the rather neglected area of promoting and protecting the right to health (RTH). At 10, CEHURD is a paragon of the 3Vs: a **V**ibrant, **V**ivacious and **V**igourous organization offering scholars and practitioners numerous points of reflection on the efficacy of protecting economic, social and cultural rights (ESCRs), against the backdrop of retreating state obligations, the onslaught of neoliberal economic policies and dealing with a judicial system only grudgingly accepting the justiciability of this often-neglected category of human rights.*

I. INTRODUCTION: THE MYSTERIOUS PARADOX OF THE TEN-YEAR OLD ADULT

Ten years in the life of a human being is not a very long period of time. Indeed, one would just be entering adolescence as they embark on the life of a teenager. On the other hand, ten years in the life of an organization is nearly a lifetime, a fact which is particularly true in the case of organizations in developing country contexts such as Uganda. Many have the stories been told of organizations that fail to hit the five-year mark. Several are lucky if they even make two. But there are also many 10-year old organizations that exist only on life-support; such organizations are clinically dead and should be accorded a decent burial.

[1] A version of this paper was given as a keynote address at the 10th Anniversary of CEHURD on November 7, 2019 by Prof. J. Oloka-Onyango.

CEHURD has been the leading advocate for health rights in Uganda and has been a litigant in a number of landmark rulings incidental to the right to health. Its ten year anniversary is a landmark occasion and a cause for serious reflection of the journey for health rights hitherto and their future in the next decade.

The Centre for Health, Human Rights and Development (CEHURD) at 10 is a paragon of the 3Vs: it is **V**ibrant, **V**ivacious and **V**igourous. It is very much alive and extremely accomplished. Even though I don't have an MB.ChB, I can safely declare that CEHURD's systolic and diastolic blood pressure readings are perfect; it has no chronic diseases and its prognosis is excellent! Moreover, CEHURD is marking this accomplishment as we enter the 3rd decade of the 21st century – a time when so much change and development is taking place all around the world. CEHURD is matching the pace. Consequently, we have a lot to celebrate at this 10-year anniversary of the organization.

But we also have a lot to critically reflect on as a result of the work that CEHURD has done and still intends to carry out. Thus the title "Celebrating CEHURD, the mysterious paradox of the 10-year old adult." On its website, CEHURD describes itself as**:** a non-profit, research and advocacy organization which is pioneering the justiciability of the right to health. The vision of the organization is: "Social Justice in health." Its four main areas of focus or mission are**:**

SOCIAL JUSTICE, EMPOWERMENT, HEALTH RIGHTS and LITIGATION.

Drawing from its full name, it is clear that CEHURD is devoted to three general areas of activist concern, *viz.*, Health, Human Rights and the broader quest for Development, and I want to talk about each of them and why they are of considerable relevance to Ugandans at large. In talking about them I will highlight both CEHURD's contribution to these issues as well as touch on broader questions of conceptualization, strategy, and politics.

Health, human rights and development are relevant for three main reasons:

(1) Health is important because Ugandans are suffering from a situation of collective and extended (but undiagnosed) post-traumatic stress disorder (PTSD), alongside a host of other mental and physical ailments. As the doctors will tell you, PTSD is a mental health condition triggered by either experiencing or witnessing a terrifying event. Over the 57 years of our independence we have collectively experienced and jointly borne witness to so many terrifying events, including military *coups d'etat*, armed conflict, extensive

sexual – and genderbased violence (SGBV), police brutality, life-term and age-limitless dictatorships and a variety of other calamities, human and natural. However, we have failed to receive adequate treatment for them. That lack of treatment partly explains the numerous social, political, economic and health problems that we today experience as a country.

(2) <u>Human rights</u> are important not so much because we recognize them in international instruments and in our Constitution, but because despite that recognition they continue to be violated. Moreover, the violation of human rights is not only by the State or the government. It is violations in the family, by the community, and by our most cherished institutions – educational, religious and social. It is also violations by supra-national and international organizations, including (and especially) transnational corporations (TNCs).

(3) <u>Development</u> is important because few other countries in Africa or elsewhere around the world have so embraced the Gospel of neo-liberal economics (NLE) as we have done in Uganda.[2] At core in Uganda's NLE is the privatization of public social services deregulation, reduced overall public funding and donor-dominated fiscal and economic planning. Ultimately, neoliberalism places an emphasis on individual accomplishment and capacity as opposed to the social protection of the community.[3] Consequently, the state abandoned measures designed to buffer the community from the vagaries of social upheaval or economic collapse. Today, there is nothing in Uganda which is not for sale; nothing is sacred. In short, Uganda sold its soul to the devil. In this case the devil is the market, which has been extolled as the key which will open every door, even the door to better healthcare.

However, let us not forget the Gospel according to Mark Chapter 8, verse 36:

---

[2] See Jörg Wiegratz, Giuliano Martiniello and Elisa Grecon, "Introduction: Interpreting change in neoliberal Uganda," in Jörg Wiegratz, Giuliano Martiniello and Elisa Grecon, *Uganda: The Dynamics of Neoliberal Transformation*, London: Zed Books, 2018.

[3] Sarah N. Ssali, "Neoliberal health reforms and citizenship in Uganda," in Wiegratz, *et al*, *ibid*, at 179.

What good is it for someone to gain the whole world, yet forfeit their soul? Uganda may have gained the world – indeed recent statistics from UBOS disclose that we are much richer as a country and individually than previously thought.[4] However, we have lost our soul in the extremes of economic inequality and material impoverishment for those at the lower end of the social hierarchy. That loss of soul has resulted in a combination of acute poverty, powerlessness and social exclusion, and in specific relation to the health sector, to elite control, urban-bias and economic incapacity.[5]

The scourge of PTSD, human rights violations and neo-liberalism helps us understand why the work of organizations such as CEHURD in promoting, protecting and fully implementing our varied human rights is so important. These ailments have had a particularly negative effect on our attempt to achieve the realization of the right to health. Unless we find a cure for our collective PTSD and address the trauma imposed on us by neo-liberalism Ugandans shall continue to have problems with the realization of the right to health. My message is therefore quite simple: we need to more effectively and comprehensively address the promotion and protection of marginalized rights such as the right to health, just as we challenge the highly deleterious effects of neo-liberalism. Otherwise, we are condemning a considerable section of our people to living only a partial and incomplete human existence.

II. THE RIGHT TO HEALTH AND ITS REALIZATION TODAY

International and regional law enshrines several provisions definitions on the right to health, ranging from Article 25 of the Universal Declaration of Human Rights, Article 12 of the ICESCR; several provisions of the Convention on the

[4] According to a recent report in the Observer, "Taking the 2018/19 figure ($33bn) for instance, it means that each Ugandan now is estimated to earn $891 or Shs 3.1m annually, up from $860 the previous year." See URN, "Ugandans Richer than previously thought," *The Observer*, October 11, 2019, at: https://observer.ug/news/headlines/62267-ugandans-richer-than-previouslythought-ubos

[5] Ssali, *op.cit.*, at 196.

rights of the Child (CRC); Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Articles 12 and 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Articles 16 and 18 of the African Charter of Human and Peoples' Rights, Article 25 of the Convention on the Rights of Persons with Disabilities, as well as numerous provisions of the protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, better known as the "Maputo Protocol." The policy environment has further recently been influenced by the Millennium Development Goals (MDGs) of 2000, which were followed by the Sustainable Development Goals (SDGs) formulated in 2012. Both contain several goals of critical relevance to the realization of the right to health.[6] At the national level there is the National Development Plan (NDP), now reaching the end of its second phase.[7] Even more targeted are the numerous plans released by the Ministry of Health, although the extent to which these are rights-sensitive is debatable.[8]

Although, there is no express right to health in the Bill of Rights of the1995 Constitution, it is quite clear that it is not only a right, but that it is justiciable.[9] I mention the word "justiciable" because there is some debate about whether – on account of the location of the right to health in the National Objectives and

---

[6] MDGs relevant to the realization of the right to health included: 1 (eradicate extreme poverty and hunger); 3 (promote gender equality and empower women); 4 (Reduce child mortality); 5 (improve maternal health), and 6 (combat HIV/AIDS, malaria and other diseases. For SDGs these include nos. 1 (No poverty); 2 (No hunger); 3 (Good health); 4 (Quality education); 5 (Gender equality); 6 (Clean water and sanitation), and 10
(Reduced inequalities). See UNDP, *Final Millennium Development Goals Report for Uganda 2015: Results, Reflections and the Way Forward*, https://www.ug.undp.org/content/uganda/en/home/library/mdg/final-millenniumdevelopment-goals-report-for-uganda-2015.html, and UNDP, *Roadmap for creating an enabling environment for delivering on SDGs in Uganda*, October 26, 2018, at:https://www.ug.undp.org/content/uganda/en/home/library/human_development/Roadmap_for_creating_an_enabling_environment_for_delivering_on_SDGs_in_Uganda. html.

[7] NPDII has prioritized five key growth drivers with the greatest multiplier effect as identified in the *Uganda Vision 2040* namely: Agriculture; Tourism; Minerals, Oil and Gas; Infrastructure; and Human Capital Development.
See: http://www.npa.go.ug/development-plans/national-development-plan-ndp/.

[8] https://health.go.ug/publications/strategic-plans.

[9] See Ben Kiromba Twinomugisha, *Fundamentals of Health Law in Uganda*, Pretoria: PULP, 2015, at 27-29.

Directive Principles of State Policy (NODPSP)—such rights can be the subject of judicial enforcement.[10] Indeed, one of CEHURD's main goals is to pioneer the justiciability of the right to health. At the 6th Annual Economic, Social and Cultural Rights Conference held at Makerere in September, this issue was of such prominence that participants called for a "new" Chapter Four which would comprehensively include ESCR rights such as the right to shelter/housing, food, health and water and move them out of the NODPSP.[11]

For the avoidance of doubt, and even though I was an early proponent of the same view,[12] it is now my considered opinion not only that the many economic and social rights in the NODPSP are justiciable, but also that this issue is now beyond debate.[13] Indeed, CEHURD's main contribution has been to ensure the full justiciability of the right to health by filing its landmark case on the issue of maternal health care.[14] Many of you will remember that the Constitutional Court initially attempted to run away from this issue by proclaiming the matter to be a

---

[10] Robinah Kaitiritmba, Moses Kirigwajjo, Aloysius Ssennyonjo & "The Right to Health in Uganda: Implications and Practical Steps to Achieving Universal Health Coverage," in Freddie Ssengooba, Suzanne N. Kiwanuka, Elizeus Rutebemberwa & Elizabeth Ekirapa-Kiracho (eds.), *Universal Health Coverage in Uganda: Looking Back and Forward to Speed Up the Progress*, Kampala: MUSPH, 2018 at 110.

[11] This has been a long-standing demand of human rights groups in Uganda, among others articulated at the most recent universal peer review (UPR) process at the UN Human Rights Council, Working Group on the Universal Periodic Review Twenty-sixth session 31 October-11 November 2016: Uganda, A/HRC/WG.6/26/UGA/3; para.22, at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/187/38/PDF/G1618738.pdf?OpenElement. See also Initiative for Social & Economic Rights (ISER), *Meaningful Access to Justice for Economic and Social Rights*, https://www.iseruganda.org/images/downloads/meaningful_access_to_justice_for_ESRs.pdf.

[12] J. Oloka-Onyango, *Economic and Social Human Rights in the Aftermath of Uganda's Fourth Constitution: A Critical Reconceptualization*, CBR Working Paper No.88/2004.

[13] Article 8A, 1995 Constitution

[14] *CEHURD and Others v Attorney General of Uganda*, [Constitutional Petition No.16 of 2011].

"political question" beyond court adjudication.[15] However, the Supreme Court appeal decision left no doubt over the issue.[1617] Chief Justice Bart Katureebe was unequivocal in declaring that, "… there is no matter done by the Executive or by the Legislature which may not be a subject of judicial review if it is not done in accordance with the provisions of the Constitution."[18] What this means in effect is that all the provisions in the NODPSP can be the subject of court adjudication.

Furthermore, through a creative reading of the right to life provision which is a foundational element of the Bill of Rights, many of the socioeconomic rights that are in the NODPSP can be given enforcement.[19] Countries like India, Nepal and Nigeria have creatively used these provisions even where they have been declared *non*-justiciable in the Constitution. Relatedly, other rights can also be invoked in order to protect the right to health, including, freedom from torture, the protection of bodily integrity and of human dignity. In short, there is no need for a revision of Chapter Four. Let us concentrate our efforts in this respect on forcing the Judiciary to abandon its lackadaisical approach to enforcing the rights in the NODPSP and becoming much more pro-active on them.[20]

Thus, what we should instead be debating is the *content* of the right to health and the appropriate mechanisms for its enforcement. Objective XX of the

---

[15] See ISER, *A Political Question? Reflecting on the Constitutional Court's Ruling in the Maternal Mortality Case (CEHURD and Others v Attorney General of Uganda*, https://www.iseruganda.org/images/downloads/ISER_Commentary_maternal_mortality_case.pdf.

[16] See *CEHURD and Others v Attorney General of Uganda*, [Constitutional Appeal No.13 of [17]], at 19-20, accessed at: https://www.escrnet.org/sites/default/files/caselaw/cehurd_and_others_v_attorney_general.pdf.

[18] *Ibid.,* judgment of Chief Justice Bart Katureebe.

[19] See Berihun Adugna Gebeye, "The Potential Role of Directive Principles of State Policies for Transformative Constitutionalism in Africa," *Africa Journal of Comparative Constitutional Law*, Vol.1, No.1 (2017): 1-34, esp. 29-33.

[20] Christopher Mbazira, "The State of ESCR in Uganda Today: Reality or a Myth: Rights to Health, Education and Housing," in *Makerere Law Journal*, (2014): 184-193, at 188189.

NODPSP states, "The state shall take all practical measures to ensure the provision of basic medical services to the population." This provision very clearly points to the most essential element of the right to health. However, one can also add on Objectives V (adequate resources for institutions protecting and promoting human rights); VII (the aged); XIV (omnibus clause on health services); XVI (PWDs); XIX (protection of the family), XXI (clean and safe water) and XXII (Food security and nutrition). Indeed, the broadness of this last provision, stipulating the mandatory obligation that the State *shall*, "… (c) encourage and promote proper nutrition through mass education and *other appropriate means* in order to build a *healthy* State" opens up numerous possibilities for social action in achieving this goal.

In my view, the human right to health means that everyone has the right to the highest attainable standard of physical and mental health. This includes access to all medical services, sanitation, adequate food, decent housing, healthy working conditions, and a clean environment. Access to health also involves four key elements, *viz.*, non-discrimination, physical accessibility, economic accessibility, and information accessibility. Health facilities and services should be accessible to everyone, especially the most vulnerable in society without discrimination on any prohibited ground. Beyond **A**ccess, we also need to speak about **A**vailability (**infrastructure** (e.g. hospitals, community health facilities, trained health care professionals), **goods** (e.g. drugs, equipment), and **services** (e.g. primary care, mental health) must be available in all geographical areas and to all communities; **A**ffordability; **A**cceptability and **D**ignity. Thus, Healthcare institutions and providers must respect dignity, provide culturally appropriate care, be responsive to needs based on gender, age, culture, language, and different ways of life and abilities, and they must respect medical ethics and protect confidentiality). Finally, there is the question of **Q**uality (All healthcare must be medically appropriate and of good quality, guided by quality standards

and control mechanisms, and provided in a timely, safe, and patient-centered manner).[21]

Of particular concern in this discussion is the gendered character of the violations to the right to health, especially in relation to sexual and reproductive health and rights (SRHRs), an area in which CEHURD has done much work.[22] There is no doubt that women get a raw deal when it comes to the protection and enforcement of this right. Recent stories about Obstetric Violence – several mothers detained in a hospital for the failure to clear their debts,[23] and of another who died because she lacked UGX.50,000/= for an operation[24] - graphically reveal the gendered dimensions of not only "giving life", but of facing the consequences for new mothers of doing so: how can we stoop so low as to punish our mothers, sisters and daughters for performing the one function that is solely responsible for our existence on earth?

Why is healthcare a human right?

There are a number of reasons why healthcare and medical services (alongside other ESCRs) were initially ignored by lawyers and human rights activists. Historically, civil and political rights were prioritized because the rights to associate, to assemble and to speak were considered as more important rights for the elite and the ruling classes. On the other hand, ESCRs were of much lesser concern because the elite were either able to afford them, or they could

[21] See further ICESCR Committee General Comment No.14 on the Right to the Highest Attainable Standard of Health, Adopted on August 11, 2000, at: https://www.refworld.org/pdfid/4538838d0.pdf, and Joe Oloka-Onyango, "NGO Struggles for Economic, Social, and Cultural Rights in UTAKE: A Ugandan Perspective," in Makau Mutua (ed.), *Human Rights NGOs in East Africa: Political and Normative* Tensions, Philadelphia: University of Pennsylvania Press, 2009, at 93.

[22] Beth Main Ahlberg & Asli Kulane, "Sexual and reproductive health and rights," in Sylvia Tamale (ed.), *African Sexualities: A Reader*, Cape Town/Dakar/Nairobi & Oxford: Pambazuka, 2011 at 313-339.

[23] See Anthony Wesaka, "Monitor reader bails out four mothers detained by hospital," *Daily Monitor*, October 15, 2019 at 3.

[24] Rosemary Nakaliri, "Abasawo bagaanye okumulongoosa lwa mitwalo 5 n'afiira mu kuzaala," *Bukedde*, October 15, 2019 at 7.

use their privileged positions in the state or in the economy in order to access them. Needless to say, groups which have experienced a more marginal existence – women, young people, ethnic minorities and indigenous peoples among them – are in much greater need of the recognition of ESCRs.[25]

Human rights are inter-related, inter-connected and mutually-reinforcing.[26] Thus, while addressing one category of rights, we must always remember its links to the others. It doesn't matter if you have the right to vote if you are too hungry or too sick to get to the polling station. Freedom of Speech and Worship are important civil and political rights, but both of them have a clear linkage to the fundamental right to the highest attainable state of mental health. Being able to worship whom you want gives you peace of mind, and thus acts to secure you a better overall mental situation. In the same way, being muzzled from saying something, or conversely, being forced to say something you would rather not can obviously have a deleterious impact on the state of your mental health. Good health is intricately linked to respect for civil and political rights, such as freedom of expression, the right to associate, assemble and protest; freedom from torture, the rights to human dignity (*Ubuntu*), to a fair hearing and ultimately to life. Good health is also clearly determined by other basic ESCRs including access to safe drinking water and sanitation, nutritious food, adequate housing/shelter, education and safe working conditions.[27] The basic principle underlying recognition of the right to health is that no one should get sick and die simply because they are poor, or because they cannot access the health services they need.

---

[25] Oloka-Onyango, *op.cit.*, at 81-82.

[26] This formulation goes back to the 1993 Vienna Declaration, which proclaimed that "All human rights are universal, indivisible and interdependent and interrelated."

[27] National Economic and Social Rights Initiative (NESRI), *What is the Human Right to Health and Health Care?* https://www.nesri.org/programs/what-is-the-human-rightto-health-and-health-care

Other very important rights are the right to equality of all individuals, coupled with the freedom from discrimination and the right to access information. As Ahlberg and Kulane point out, it is imperative to underscore the indivisibility of all categories of rights because it,

> *…recognises that individual women and men cannot, however, realize their sexual and reproductive health and rights without also realizing their broader human rights. The right to choose the number and spacing of their children cannot, for example, be realized unless they can also afford transport and user fees for services, such as family planning. Moreover, they must be free from poverty, and must have access to information and education and also be free from violence, whether from their partners (especially in the case of women) or from the state*.[28]

In short, without food, shelter or adequate health care you are not able to effectively exercise any of your so-called first generation rights. Not only is there a close connection between the different kinds of rights, but it is essential that if we are genuinely to consider ourselves persons concerned about human rights, we should strive to break down the barriers between them. It is ridiculous to imagine that you can be a whole human being if only one category of your rights is being satisfied.

The human right to health guarantees a system of health protection for all. Everyone has the right to the healthcare they need, and to living conditions that enable us to be healthy. But in order to achieve this goal, the design of a healthcare system must also be guided by the following *procedural principles*, which apply to all human rights, viz., ***non-Discrimination***; ***Transparency***; ***Participation*** and ***Accountability***. At the end of the day the issue of accountability is the most important of all as it "… converts passive beneficiaries into claims holders, and identifies the state and other actors as duty bearers,

[28] Ahlberg & Kulande, *op.cit.*, at 313.

who may be held to account for their policies, programmes and strategies to provide universal access to healthcare."[27] CEHURD's focus on litigation, social justice and empowerment is a critical factor in ensuring that greater accountability is realized in the arena of healthcare.

Assessing CEHURD's contribution through Litigation

Aside from Health Rights, CEHURD's three other areas of focus are Litigation, Social Justice and Empowerment. Litigation has been a particularly important strategy adopted by the organization and indeed, I believe that there is no other human rights group in the country which has so extensively deployed the tool. Hence, over the course of the ten years in which it has been in existence CEHURD has pursued a total of 35 strategic litigation cases covering a wide range of areas, summarized in Table 1 below:

TABLE 1 SUMMARY OF CEHURD's STRATEGIC LITIGATION CASES

CATEGORY	FOCUS	PENDING	COMPLETE
1. Ban on Sexuality Education	**RTI:** information accessibility	**1**	
2. Plant variety protection	**RTF: N/A**	**1**	
3. Mental health	**RTH:** non-discrimination	**6**	**4**
4. Access to free rabies vaccines	**RTH:** economic accessibility	**1**	
5. Theft of newborns	**RTH:**	**2**	
6. Access to information	**RTI:** information accessibility	**1**	**2**
7. Right to clean and healthy environment	**ENV:** General	**2**	

[27] John Mubangizi & Ben K. Twinomugisha, "The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?" *African Human Rights Law Journal*, Vol.10, No.1 ((2010):105-134, at 128: http://www.ahrlj.up.ac.za/index.php/mubangizi-j-c-twinomugisha-b-k

8. Quality of care	**RTH:** economic accessibility	**1**	
9. Termination of pregnancy	**RTH:** nondiscrimination	**1**	
10. Availability of adequate health care services for autistic children	**RTH:** nondiscrimination	**1**	
11. Disconnection of supply of electricity in public health facilities	**RTH:** physical accessibility	**2**	
12. SGBV and discriminatory penalties in sexual offenses	**RTH:** nondiscrimination	**2**	
13. Access to medicines	**RTH:** nondiscrimination	**1**	
14. Discrimination while accessing health care	**RTH:** nondiscrimination	**1**	
15. Constitutionality of the Venereal Diseases Act	**RTH:** nondiscrimination	**1**	
16. Professional conduct	**RTH:** nondiscrimination		**1**
17. Detention of patient in a health facility	**RTH:** economic accessibility		**1**
18. Tobacco Control	**RTH:** information accessibility		**1**
19. Sexual offenses	**RTH:** General		**1**
20. Workers' rights	**RTW:** nondiscrimination	**1**	
TOTALS		**25**	**10**

Key: ENV: right to a clean and healthy environment; RTF: right to food; RTH: right to health; RTI: right to information

A great deal can be said about this impressive record of litigation. First of all, it covers a wide range of issues extending from tobacco control to access to information to care services for autistic children. Secondly, not all the cases are on constitutional matters, which although important are rather esoteric. A good

number of the cases are on issues of accessibility, non-discrimination and healthcare infrastructure which are basic questions that not only affect large numbers but also the most vulnerable individuals in society. Lastly, the highest number of cases (6) has been on mental health, representing a major achievement in an area that has long been neglected. Indeed, in a landmark decision brought by CEHURD, the Constitutional Court declared as derogatory and unconstitutional several provisions of the Penal Code and the Trial on Indictments Act which not only discriminated against persons with mental health ailments, but also used derogatory language and outmoded methods of intervention in order to treat them.[29] The court even went further to order appropriate reformulations of the provisions in question.

Needless to say, the data also reveals several problems with the use of litigation as a strategy of empowerment or social justice. First of all, only 28% of the cases filed have reached final resolution. Moreover, that resolution is not always satisfactory or in favour of CEHURD. Some of the decisions are mixed. This fact points to two broad issues, the first with the use of litigation as a mechanism for achieving respect for rights, and the second with the institution within which that mechanism is deployed, i.e. the courts of law. Litigation is tedious, drawn-out, time-consuming and (depending on the issue) expensive. Moreover, some of the benefits of taking a matter to court may not be immediately obvious. There is also no guarantee of success which means that there is a need to be especially careful and tactical in pursuing litigation as a strategy.

A close reading of some of the cases filed by CEHURD reveals that sometimes the strategy employed was the wrong one, or they suffered from significant procedural mistakes in the preparation and packaging of the case and even over the basic questions of the forum in which it should be filed. Some of the pleadings

[29] *CEHURD & Iga Daniel v. Attorney General*, [Constitutional Petition No.64 of 2011].

and the tactics used have also come up for criticism by the Bench.[30] These are the expected mistakes of a ten-year old, and betray the fact that acting like an adult is more difficult than actually being one.

Of course, the courts themselves are sometimes part of the problem. Many of them are still very conservative and have not yet come round to the belief that healthcare is indeed a justiciable human right. Others among them are so deferential to the Executive and fear to pass judgment on these issues out of an inordinate (but confused) respect for the doctrine of Separation of Powers.[31] While our courts are becoming more familiar with the Structural Interdict as a useful mechanism in compelling Executive compliance with directions and orders from the judiciary – as in the *Amama Mbabazi* and *James Muhindo* cases[32] —one senses a lingering reluctance to use it, a hesitation clearly demonstrated in the recent maternal case re-hearing by the Constitutional Court where the learned justices queried whether such a remedy was of any utility given the poor response of the Executive to the orders.[33] It is also clear that our courts sometimes issue judgments in complete ignorance of the law.

In the recently-decided case that CEHURD brought dealing with the provision of anti-rabies vaccines, the learned judge in the case invoked the "Political Question Doctrine" citing as authority the Constitutional Court decision which had been overturned by the Supreme Court over a year prior![34]

---

[30] See judgment in the case of *CEHURD & Ors v. Nakaseke District Local Administration*, Civil Suit No.111 of 2012.

[31] See, for example *The Institute of Public Policy Research (IPPR) (Uganda) v. The Attorney General*, (Miscellaneous Application No.592 of 2014, arising from Miscellaneous Cause No.174 of 2014).

[32] See *Amama Mbabazi v. Y. K. Museveni* (Presidential Election Petition No.1 of 2016) on electoral law amendments, and *Muhindo James & ors. v. The Attorney General* (ordering government to formulate eviction guidelines and report back to the court within seven months thereof).

[33] See Anthony Wekesa & Juliet Kigongo, "Maternal deaths case: Lawyers give submission," *Daily Monitor*, October 1, 2019 at 4.

[34] See *CEHURD & 3 Ors. v. Wakiso District Local Government*, Civil Suit No.170 of 2015, at 19-20.

Does this mean that CEHURD should abandon litigation as its main strategy? I don't think so, but it certainly means that CEHURD needs to devote much more energy going forward to both refining and improving its litigation strategy, on the one hand, and also engaging with the Judiciary, on the other. Furthermore, the use of courts needs to be linked to broader social struggles in terms of addressing political and economic issues. This also means that CEHURD should explore other options such as cross-sectional mobilization, advocacy and direct action in more detail. Not all of CEHURD's eggs should be put in the litigation basket.

Beyond the substantive issues which have been taken up in litigation, it is also necessary to examine the different duty-bearers against whom CEHURD has petitioned. These are summarized in the following table:

TABLE 2 CEHURD RESPONDENTS

RESPONDENT	NUMBER OF CASES
Attorney General	17
Local governments	8
Government hospitals	5
Statutory bodies	4
Medical personnel	4
Private hospitals	4
Private organizations	3
Individuals	2
Church hospitals	2
Doctor's rights	1

Source: CEHURD data, October 2019

The data in the table above reveals a good deal of interesting information. The Attorney-General, as representative of the central government, is respondent in the largest number of cases (17). Local governments are next on the list (8), followed by government hospitals (5), while statutory bodies, medical personnel and private hospitals each have four (4). Private organizations, Church hospitals and individuals come next (3). In one instance (on tobacco control) CEHURD and

the Attorney General joined hands to petition against the lead tobacco manufacturer in the country, while in another CEHURD supported the Uganda Medical Association (UMA) in pursuing improved conditions of work. These last two cases demonstrate that CEHURD has found common ground with government on a particular issue and also that medical personnel (doctors and nurses) are not always on the receiving end of their litigation. I will return to this point after making some reflections on the broader conceptual issues implicated by the litigation work in which CEHURD has been involved. I link them to the implications of addressing human rights deficits as an instrument in the struggle for Social Justice – the second element of CEHURD's mission.

III. HUMAN RIGHTS AS A MECHANISM OF SOCIAL JUSTICE

There are several broader conceptual issues of human rights concern which are implicated in the work done by CEHURD but for the current purposes I will only consider two, *viz.*, the focus on the state as the primary actor in the violation, realization and enforcement of the right to health, and secondly, the need to understand the realization of human rights as a product of struggle, political, economic and social. Linked to this latter point is the question of whether "human rights" is the most appropriate tool to deploy within a context of governmental dismissal of human rights criticism; the very poor levels of enforcement of court orders and the lingering problem of the failure to fully implement laws and policies on health services.

Regarding the issue of the State, it is quite clear that private actors have gained a significant position in the health sector, whether alone or more frequently in partnership with government. The critical question then is the extent to which appropriate mechanisms are in place in order to ensure that such private actors do not undermine the realization of the right to health. Already issues of concern relating to public-private-partnerships (PPPs) have emerged in the arena of

education[35] and infrastructure which are also manifesting in the health sector.[36] The recent debacles over private pharmacies in government hospitals[37] and the concerns expressed about the unhealthy recourse to caesarean-(C)-section births in private hospitals is just the tip of the ice-berg.[38] Indeed, the reaction of the government is to focus on the symptoms and not the causes of a much larger problem.[39] PPPs need much more critical scrutiny, especially because one "P" is conspicuously missing from this formula, i.e. the People, especially those who are in the lower income strata of society.[40] As Philip Alston points out with respect to the manner in which poor people are treated by officialdom:

> *Low-income people are often sidelined, blamed and objectified, even by those who are ostensibly their advocates and well-intentioned policymakers. This is on top of the endeavours of many politicians to shamelessly scapegoat those facing hardship, and especially those who have been historically marginalised. Too often, officials and policymakers are happy to remain ignorant of the immense challenges that families and individuals face, of the harms and indignities that accompany unemployment and low pay, and of the actual wishes of poor people for pragmatic, systemic change.* [41]

---

[35] ISER, *A Threat or Opportunity: Public-Private Partnership in Education in Uganda*, August 2016.

[36] ISER, *Achieving Equity in Health: Are Public-Private Partnerships the Solution?* August 2019.

[37] Brian Arinitwe, "About the directive to close privately owned pharmacies in govt hospitals," *New Vision*, October 11, 2019 at 16.

[38] See Lilian Namagembe, "C-section births: Govt accuses hospitals of greed," *Daily Monitor*, October 14, 2019 at 5, and Carol Natukunda, "Fear, money fuelling Csections," *New Vision*, October 20, 2019 at 6.

[39] For the debate on the issue of pharmacies, see, *inter alia*, Cecilia Okoth, "President's directive on pharmacies to hurt patients, stakeholders say," *New Vision*, October 11, 2019 at 9

[40] Uganda Consortium on Corporate Accountability, *Business and Human Rights in Uganda: A Resource Handbook on the Policy and Legal Framework on Business and Human Rights in Uganda*, September 218 at 60.

[41] Philip Alston, "Much Ado About Poverty: The Role of a UN Special Rapporteur," *Journal of Poverty and Social Justice*, Vol.27, No.3, (2019): 1–7, at 2, at: http://docserver.ingentaconnect.com/deliver/fasttrack/tpp/17598273/jpsj-d-

The above quotation points to a critical problem. Although the "Public" in the PPP formula ostensibly represents the interest of the People, it is quite clear that this is not necessarily always the case. Civil society and popular movements have been largely excluded from the discussions and agreements which have resulted from this new mode of doing business, and the dangers involved are self-evident. Given the conflicting interests between "public" healthcare provision and the profit-oriented private enterprises, the resultant PPP synergy cannot possibly be healthy!

In a bid to become more engaged with the developments in PPP in the health sector, CEHURD could borrow from the Brazilian model of the *conselhos de saúde* (health councils) which operate at the municipal, state (district) and national level.[42] These councils include civil society actors, health workers, local government representatives and health bureaucrats who come together on a regular basis to approve health plans and to audit health spending. They propose initiatives that can be adopted and also offer constructive criticism about the sector.[42] In this respect they have evolved a kind of *co*-governance which mandates popular participation in the management of health services, rather than leaving it exclusively to the bureaucrats and the privateers.[43] CEHURD can build on its initiatives in the Tobacco control case in order to reach out to state functionaries to push for the creation of an alliance of different forces pushing for a common beneficial goal of improved attention to the right to health and also move control over the sector out of elite capture. These measures will greatly bolster CEHURD's efforts in the arena of social justice.

1900041_uploaded_17092019_1568707425523.pdf?expires=1570894336&id=guest&che cksum=9EC7C77C1055CA46CCD8C5BD96B3FA96.

[42] Andrea Cornwall, Silvia Cordeiro and Nelson Giordano Delgado, "Rights to health and struggles for accountability in a Brazilian municipal health council," in Peter Newell & Joanna Wheeler (eds.), *Rights, Resources and the Politics of Accountability*, London/New York: Zed Books, 2006, at 144-162. [42] *Ibid.*, at 155.

[43] *Ibid.*, at 145-147.

But more importantly, as CEHURD pushes into its next decade, it needs to build stronger alliances with other civil society groups working on human rights and social justice issues across the board. CEHURD cannot afford to remain focused on only its traditional work – and by implication the work of similarly-situated organizations. If they do, there will be little impact on wider society and the realization of the goals of social justice. CEHURD needs to critically examine the way in which it relates to other actors across the board, and to revisit the issue of solidarity within civil society vs. the compartmentalization of social, economic and political struggles. Ultimately, forging such linkages will bolster the achievement of CEHURD's last mission goal, that of development.

IV. DEVELOPMENT AS AN INSTRUMENT OF EMPOWERMENT

Although the last moniker in CEHURD's title is "development" it is the least developed of the four mission-goals of the organization. I would like to suggest that given all the developments which have taken place in the economy, the key question that should be asked is the extent to which economic developments in society at large are improving the livelihoods of the poor and the marginalized. In this respect we need to get beyond and challenge the hegemony of Neoliberalism which has afflicted Ugandan society for the last several decades.[4445] The unchallenged notion that the private sector is superior to the public sector needs to be seriously questioned, as does the idea that the government should take a backseat in the regulation of services such as health, education and water.

In my humble view, the key question in the quest for development is not riches or resources (GDP) alone, but how those riches are utilized and distributed. And there is no doubt that the manner in which we have distributed our riches so far leaves a great deal to be desired. How can you decide to spend over half a billion

[44] Nicholas F. Stump, "Critical Explorations of Human Rights: Recent and Selected Works," *Legal Reference Services Quarterly*, (2019), DOI:
[45] .1080/0270319X.2019.1656458.

dollars on a single hospital project such as the one at Lubowa when the same amount of money can create and equip numerous health centres around the country? The question of prioritization aside, the lack of transparency around the project—graphically demonstrated by the barring of the line minister, her permanent secretary and members of Parliament from the construction site – points to a serious problem.[46]

The issue of development is fundamentally an issue of both accountability and of empowerment.[47] Seen from this perspective, involvement in the politics and economics surrounding development interventions is inevitable. Although couched in technocratic terms, the issue of development is essentially a political one. In this respect, development needs to be critically unpacked and considered as an instrument of empowerment.

How, therefore, do we unpack development? I would like to suggest that the first point of intervention needs to be the fiscal or budgetary arrangements around which different governmental activities are organized. I believe we need to start with the budget, the basic contours of which are summarized in the table below:

TABLE 3 COMPARATIVE BUDGET OVERVIEW, 2020/2021

SECTOR	2019/2020				2020/2021		
	UGX	%TAGE	RANK	UGX	%TAGE	RANK	%CHANGE
1. Agriculture	1.05 trillion	4.62	7	950 billion	5.21	7	+0.59
2. Energy	3.00 trillion	13.21	4	2.46 trillion	13.50	3	+0.29
3. Security	3.62 trillion	15.94	2	2.06 trillion	11.31	4	-4.63
4. Works & Transport	6.40 trillion	29.19	1	5.05 trillion	27.73	1	-0.46
5. Health	2.58 trillion	11.36	5	1.55 trillion	8.51	5	-2.85

[46] Cissy Kagaba, "Exercise transparency in Lubowa hospital dealings," *The Observer*, August 14-20, 2019 at 26.

[47] Sam Hickey, "Beyond the Poverty Agenda? Insights from the New Politics of Development in Uganda," *World Development*, Vol.43, March 2013, Pages 194-206, at: https://www.sciencedirect.com/science/article/pii/S0305750X12002215.

6. Education	3.39 trillion	14.93	3	3.28 trillion	18.01	2	+3.08
7. Water & Environment	1.09 trillion	4.80	6	1.30 trillion	7.13	6	+2.33
8. Public Administration	970 billion	4.27	8	956 billion	5.25	8	+0.98
9. Electoral Commission	229 billion	1.00	9	229 billion	1.25	9	+0.25
10. Tourism	193 billion	0.85	10	193 billion	1.05	10	+0.20
11. Judiciary	181 billion	0.79	11	181 billion	0.99	11	+0.20
	22.703 trillion	**100.00**		**18.209 trillion**	**100.00**		

Source: Moses Kyeyune, "Govt names top targets for 2020/2021 budget funding," *Daily Monitor*, October 15, 2019 at 6.

A great deal can be said about the figures above, but let us only focus on those which relate to the Health sector. Although the general budget for 2020/2021 is less than the 2019/2020 projection by nearly UGX4.5 trillion, on the face of it, things don't look too bad for the Health Sector. First of all, Health retains its rank at 5th out of the eleven sectors. While it should ideally be in the top-three, one would not be inclined to quibble too much over its present ranking.

However, the positioning of Health conceals more insidious developments which may not be immediately obvious at first glance of the data. In the first instance Health is only one of three sectors (the others being Security and Works and Transport) which will witness a reduction in its budgetary percentage. This represents a drop of 2.85 percentage points on the 2019/2020 outlay. All the other eight sectors will get a boost in their funding, ranging from 0.20% on the lower end for Tourism and the Judiciary, to Education at the top that will see its budget rise by 3.08%. Hence, the allocation to Health will drop from 11.36% in the 2019/2020 budget to 8.51% in 2020/2021, a proportion comparable to the

2014/2015 situation.[48] Secondly, this reduction is a further step away from the 15% commitment reflected in the Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases.[49] Thirdly, with the numerous problems facing the sector such as the funding of essential drugs, poor health facilities and underpaid medical personnel, the projected budgeting reflects a veritable slap in the face to the poor of the country.[49] At the end of the day, any reduction to the general budget of the health sector will have individual (life-altering) implications for the ordinary Ugandan as the *per capita* allocation will likewise be reduced.

However, the most problematic aspect of the proposed budget is one of conceptualization. One of the basic principles underlying the protection of ESCRs under International Law is that states should endeavour to *progressively realize* the rights they have committed to observe in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 8A of the 1995 Constitution stipulates that the NODPSP – including the right to health – are mandatory. Whichever way the proposed reduction is packaged, it represents a regression from these commitments. In sum, the proposals graphically underscore the point made by the Centre for Economic and Social Rights, "… we don't live in a world of scarcity, but one where resources are distributed in a grotesquely unfair way, failing to reach those who need them the most."[50] The implications for the proposed budgeting on the Health sector are thus fairly clear, and should be taken up by CEHURD with vigour. And there are two dimensions to this struggle; the first to ensure that the percentage allocation given to the Health sector either remains the same or is increased, and secondly, to review the allocations within the sector in order to ensure that the interests of the most marginalized members of society are fully catered for. We need to avoid the

[48] Ssali, *op.cit.*, Figure 9.2, at 185.

[49] https://www.eldis.org/document/A19768. [49] See Mbazira, *op.cit.*, at 189-191.

[50] CESR, *The SDGs and Gender Equality: Empty Promises or Beacon of Hope?*, at: http://www.cesr.org/sdgs-and-gender-equality-empty-promises-or-beacon-hope.

further *Lubowarization* of the sector, i.e. a situation in which the resources of the sector are skewed mainly to benefit the affluent (or state-connected) minority.

V. ONWARDS TO THE NEXT TEN

Given the tribulations involved in ensuring the implementation of the right to health in such a challenging socioeconomic environment what should CEHURD be doing in the next ten years of its life – the time when it will assume full and genuine adulthood? As should have been made clear from the preceding analysis, CEHURD needs not only to think outside the box in which it has been operating, the box itself needs to be re-thought through an approach which is multifaceted. In the first instance, CEHURD needs to become much more critically engaged with the policy debate over right to health issues.[51] Among them are improved health and rights literacy, the former for the public at large,[52] and the latter for the members of the health profession.[53] Ultimately, there is also a need to consider more activist interventions. It needs to also turn attention to the issue of drug supply, drug use, and drug distribution – symptomatic of the overprescription and medicalisation of health treatments – and all its varied dimensions and implications for the full realization of the right to health. CEHURD needs to reinvigorate the debate about issues of enforcement, and to design new strategies in order to get the Executive to respond to legitimate court orders, for example by resorting to the mechanism of private prosecutions of state officials when faced with recalcitrance or impunity. I also note that CEHURD has not demonstrated much interest in the alternative domestic avenues through which the RTH can be pursued such as the Equal Opportunities

---

[51] A leaf with respect to policy engagement that CEHURD could borrow can be taken from the example of ISER, *Shortchanging social and economic rights: Why Parliament should not pass the Public Finance Bill, 2012 in its current form*, at: https://www.iseruganda.org/images/downloads/ISER_Policy_Advocacy_Note_on_Public_Finance_Bill_2 012.pdf.

[52] Nata Menabde, "Health Literacy and the SDGs," in United Nations Association—UK (UNA-UK), *Sustainable Development Goals: From Promise to Practice*, London, 2017, at 30-31.

[53] Moses Baguma, The Law as an answer to health-related conundrums," *Makerere Law* Journal, (2015): 1-6, at 4.

and Human Rights commissions, nor the regional bodies such as the East African Court of Justice and the African Commission on Human and Peoples' Rights, let alone the very many international mechanisms that are available.

Although Uganda has not yet adopted the optional protocols to the ICESCR or CEDAW which would permit individual petitions, it has done so on the Convention on the Rights of Persons with Disabilities (CRPD), and on the Children's Rights Convention (CRC).[54] CEHURD should join in solidarity with the campaigns on ratification being pursued by other human rights organizations, and also explore using some of the international mechanisms which can address some of the bottlenecks they have faced in the realization of the right to health domestically. I also notice that CEHURD has been conspicuously silent on the issue of the rights of sexual minorities. Sex workers, men-who-have-sex-with-men, lesbians, and transgender persons need special attention from a right-to-health perspective as do prisoners and refugees, especially with respect to addressing the varied impacts of HIV/AIDS.[55] CEHURD thus needs to be more sensitive to vulnerabilities within the vulnerabilities. It has done well with respect to gender and class. But how about age, sexual orientation, disability and ethnic minority status?

CEHURD will also need to improve its engagement with the policy-making processes in the sector in order to ensure that the appropriate right-to-health considerations are taken into account. Human Rights Audits (HRAs) or Human Rights Impact Assessments (HRIAs) should be designed in order to provide a sieve for all future policy and legislative interventions which may be designed. For example, CEHURD's voice would have been critical in the ongoing debate

[54] United Nations Human Rights Office of the High Commissioner, *UN Treaty Body Database*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=182&Lang=EN.

[55] Global Commission on HIV and the Law, *Risks, Rights and Health*, New York, UNDP (July 2012), at 26-61.

about the National Health Insurance Bill.[56] As the premier organization which provides a perspective that marries Law and Public Health, going forward CEHURD should position itself as the most important civil society actor/think tank to provide a critical input into all these areas which are of crucial relevance to the realization of the right to health in Uganda.

Finally, CEHURD also needs to give some consideration to its professional and employment profile, summarized in the tables below:

TABLE 4

GENDER AND PROFESSIONAL PROFILE OF CEHURD BOARD

POSITION	GENDER	PROFESSION
CHAIR	Male	Lawyer
VICE-CHAIR	Male	Psychiatrist
TREASURER	Male	Health Economist
DIRECTOR No.1	Female	Public Health specialist
DIRECTOR No.2	Female	Trade/fiscal specialist

Source: CEHURD data, October 2019

Although the Board is fairly representative of the interests which are involved in healthcare in the country, consideration should be given to including a mainstream medical doctor both on the Board and among its staff, given that the interests of the mental health community are well represented and even well reflected in the litigation caseload CEHURD has taken up. It would also be useful to recruit a public policy specialist given that this kind of engagement will be critical going forward.

[56] See Jordan Tumwesigye, "A Review of the National Health Insurance Bill and its potential impact on the access to health services," *Makerere Law Journal*, (2018): 107120, and Moses Walubiri, "Legislators start scrutinizing 2019 Health Insurance Bill," *New Vision*, October 2, 2019 at 7.

On its part, the makeup of CEHURD's staffing is summarized in the table below:

TABLE 5

SUMMARY OF CEHURD EMPLOYEE PROFILE

PROFESSION	**NUMBER**		
	FEMALE	**MALE**	**TOTAL**
Lawyer	9	5	14
Social Worker	3	1	4
Business Administrator	3	1	4
Journalist	1	1	2
Public Health Specialist	0	2	2
Accountant	1	1	2
Trained Medical Nurse	0	1	1
Trained Teacher	1	0	1
Information Technology Specialist	0	1	1
Computer Engineer	0	1	1
Professional Driver	0	1	1
Economist	1	0	1
Communication Expert	0	1	1
Security Officer	0	1	1
Office Cleaner	0	1	1
Teacher	0	1	1
Graphics Designer	1	0	1
TOTAL	**20**	**19**	**39**

Source: CEHURD data, October 2019

CEHRUD scores well on the plane of gender parity, however, some reform needs to be carried out with respect to the professional cadres that are in control of the organization. Hence, out of 39 members of Staff, the preponderance (35%) is made up of lawyers. In contrast, only 8% can be described as Health-related professionals. As is the case with the Board, there is no public policy individual

on the Staff. Going forward, there is a need to reduce the preponderance of lawyers and expand the pool of personnel who have qualifications in the Health sector.

VI. CONCLUSION

I hate to use clichés, but sometimes they are the most useful tool to explain a particular situation. Since we are talking about Health, the most appropriate cliché in this instance is: *Prevention is MUCH better than cure*. I don't know how many people in this audience have ever suffered from cholera, dysentery or typhoid, but we all know that it is much better never to have been a victim of these diseases than to look forward to being cured of them. Hence it is quite clear that more effort should be placed on methods of preventing violations of the right to health as opposed to looking for cures to them. Unfortunately, the law and the legal mechanisms we have highlighted such as litigation and which CEHURD has concentrated on are only part of the cure. Moreover, they are a blunt cure. Sometimes they work. However, many times they may lead to more frustration, more delay and less satisfactory results especially if the court action is not followed by concerted government intervention. As CEHURD moves into the next decade of its existence it needs to supplement its heavy focus on legal remedies with a multi-pronged approach to addressing the multiple complexities that characterize this area of human livelihood and rights-protection.

MAKERERE LAW JOURNAL NOVEMBER 2019

VOLUME 15 ISSUE 4

CHANGE WITHOUT PROGRESS: PRESIDENTIAL ELECTION DISPUTE RESOLUTION AND ELECTORAL REFORM IN POST-2010 KENYA

Busingye Kabumba

RECOMMENDED CITATION:

Busingye Kabumba (2019), "Change without Progress: Presidential Election Dispute Resolution and Electoral Reform in Post–2010 Kenya" Volume 15 Issue 4, Makerere Law Journal.

CHANGE WITHOUT PROGRESS: PRESIDENTIAL ELECTION DISPUTE RESOLUTION AND ELECTORAL REFORM IN POST-2010 KENYA

Busingye Kabumba[*]

'*Plus ça change, plus c'est la même chose'* (The more things change, the more they remain the same) ~ Jean-Baptiste Alphonse Karr (1849)

Abstract

This article assesses the continuities and discontinuities that have attended electoral law reform in Kenya since the enactment of the 2010 Kenya Constitution. Using the presidential elections of 2013 and 2017 as main frames of reference, the article examines the extent to which the vision of electoral justice established under Kenya's transformative Constitution has been realized in law and in practice. Ultimately, it suggests that beneath the legal contestations which periodically emerge during electoral cycles, lie important socio-political struggles which have their roots in the history and

[*] Lecturer, School of Law, Makerere University. A substantial portion of the information presented in this article was obtained over the course of a three-month period of residence in Nairobi, from September to November 2017. A number of Kenyan colleagues provided significant assistance in clarifying various points of Kenyan electoral law, including, in no particular order: Walter Ochieng Khobe, Waikwa Wanyoike, Collins Odote, Jackson Awele, Duncan Okubasu, Roseline Njogu, Eric Liyala and Kevin Nyenyire. My deep thanks to you all. Discussions with Amanda Serumaga also greatly helped to guide my thinking around the nature and purpose of law in resolving political contestation. I am similarly indebted to Joe Oloka Onyango, for his valuable and insightful comments, which significantly improved the form and substance of this work. My thanks also to the editors of the Makerere Law Journal (MLJ) for helpful feedback on earlier versions of this article, and to the African Development Law Institute (ADLI) for critical institutional support provided. Finally, I am grateful to the Africa Oxford Initiative (AfOX) and the Faculty of Law of the University of Oxford, for awarding me the inaugural AfOx-Law Visiting Fellowship for the period October to November 2018; and to St. Anne's College, Oxford, for the award of a Plumer Visiting Fellowship covering the same duration. These Fellowships provided a much needed opportunity for clarifying and refining the thoughts presented in this article. My deep thanks, in this regard, to Jonathan Herring, Kevin Marsh, Anne

Makena, Nomfundo Ramalekana, Liora Lazarus, Imogen Goold, Antonios Tzanakopoulos, and many others too numerous to mention individually. All errors and omissions in the article, of course, remain solely mine. In addition, the views expressed herein do not necessarily reflect those of the individuals and institutions I have mentioned. The laws and politico-legal developments analyzed are as they stood on 15 December 2018.

structure of the post-colonial Kenyan state. It is these broader, and more fundamental, political questions which must be addressed if true electoral justice is to be achieved in Kenya.

1. Introduction

Few expected the Kenyan judiciary to annul the results of the August 2017 presidential election. This was not because of any great belief that the poll had been free and fair. Instead, this was mainly due to the fact that a judicial annulment of a presidential election was entirely unprecedented in Kenya, and had few precedents anywhere else in the world.[1] The Supreme Court's annulment of the election on 1 September 2017, therefore, came as a shock to many in Kenya and around the world.

This article seeks to revisit this significant moment in African judicial history in a bid to understand its implications for the judicial resolution of high-stakes political disputes. It starts with a brief historical account of the socio-political conditions that informed the 2010 Constitution, and the subsequent electoral legislation enacted thereunder. It then proceeds to an assessment of trends in legal reform and electoral justice in Kenya, having particular regard to the presidential elections of March 2013 and August and October 2017, and the resolution, by the Supreme Court, of disputes arising therefrom.

2. Understanding the 2010 Constitutional Framework for Electoral Integrity

Kenya's post-independence journey followed the trajectory of many other African countries, with an early descent into single party rule and limited political and other freedoms. A consequence of this would be the use of political power to

[1] The rare examples of annulment of presidential election results include the 2004 decision in *Yuschenko vs Yanukovych* (Ukraine) and the 2010 decision in *Gbagbo vs Ouattara* (Cote d'Ivoire) – see J. Oloka Onyango, 2017, *When Courts do Politics: Public Interest Law and Litigation in East Africa* pp.256-257.

enhance economic power, which enhanced ethnic and other divisions that had preceded the establishment of the post-colonial state.[2] A step towards a return to democracy was made with the restoration of multipartyism in December 1991 and gathered more momentum with each successive election in 1992, 1997, and 2002.

Given this history, the 2007 elections were expected to consolidate and enhance the country's democratic gains. However, allegations of electoral injustice in those elections sparked a wave of ethnically-charged violence which left at least 1,000 people dead and more than 700,000 displaced.[3] After prolonged mediation by various national, regional and international actors, on 28 February 2008 then-incumbent President Mwai Kibaki and opposition challenger Raila Odinga signed an agreement spelling out terms for a coalition government, with the latter to hold the newly created position of Prime Minister. The agreement was effected by the passage in March 2008 of the Constitution of Kenya Amendment Bill, constitutionally establishing the positions of Prime Minister and Deputy Prime Minister. Furthermore, steps towards a coalition government were taken with the naming in April 2008 of an inclusive cabinet of 40 ministers and 50 assistant ministers. The longer-term resolution of the deep-seated grievances, which had led to the 2007-2008 postelection violence, was addressed by a Truth and Justice Commission (TRJC), chaired by Bethuel Kiplagat and by an Independent Review Commission (IREC), chaired by South African Justice Johann Kriegler. A key observation of the IREC would be that the 2007 elections had been based on an extremely problematic voter registration process.[4] The Electoral Commission of Kenya (ECK) used a manual register, the so-called 'Black Book', which had left

---

[2] See, generally, E. S. Atieno Odhiambo 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya', 2002, 61 *African Studies Review* pp. 223249.

[3] D. K. Maraga 'Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence'* p. 244, at Footnote 10.

[4] Independent Review Commission Report, 2008, *The 2007 General Elections in Kenya* at p. 32.

room for manipulation of the electoral roll.[5] A major recommendation of the IREC, therefore, was the deployment of electronic means of voter registration, and the compilation of a single national register for all voters in Kenya.[6]

At the same time, the violence provided fresh impetus for a new constitutional order. The push for a new constitution had been made as far back as the early 1990s, and had culminated in a draft Constitution (the 'Bomas Draft') in 2004. After substantial amendments to this draft, the new version (the 'Wako Draft') was itself rejected, following intensive mobilization against the instrument led by Raila Odinga and the putative Orange Democratic Movement (ODM). The 2007-2008 post-election violence led to a more serious and concerted process of constitution-making led by a committee of experts, resulting in the adoption of a new constitution of Kenya in 2010. The 2010 Constitution must, therefore, be understood as a politico-legal document drafted, and adopted, as a direct response to deep historical cleavages, exposed most powerfully by the 20072008 electoral violence.

In this regard, the 2010 Constitution contains several provisions aimed at enhancing electoral justice in the country. Apart from guaranteeing the sovereignty of the Kenyan people (Article 1), it elaborately articulates the political rights of citizens, including the freedom to make political choices and the right to free, fair and regular elections based on universal suffrage, which must be guaranteed to all without unreasonable restrictions (Articles 38 and 83). The constitution also establishes a number of broad principles to ensure electoral justice, which include the freedom to exercise political rights; the requirement that no more than two-thirds of any elective public bodies be composed of persons of the same gender; fair inclusion of persons with disabilities; as well as universal suffrage and free and fair elections (Article 81). These are buttressed by the stipulation of a set of national values and principles of governance, which

[5] As above.
[6] As above.

include: national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, equality, human rights, good governance, integrity, transparency and accountability (Article 10). In addition, the Independent Electoral and Boundaries Commission (IEBC) is established, with certain significant safeguards to ensure its credibility. For instance, a person is not eligible for appointment as a member of the IEBC if the person has, at any time within the preceding five years, held office, or stood for election as a member of parliament or of a county assembly, or a member of the governing body of a political party; or holds any state office (Article 88). In the specific context of a presidential election, the constitution requires strict compliance with its provisions and those of statutory electoral law (Article 136) and enables *any person* to challenge the results of the poll (Article 140).

Evidently care was taken, in the design of the 2010 Constitution, to craft a system that would ensure electoral justice for Kenyans. In this way, the framers of the constitution sought to avoid a repeat of the electoral injustices which triggered the 2007-2008 conflict. Furthermore, and just as importantly, the constitutional framework seems to have been deliberately designed to ensure that those entrusted with state power obtained that mandate through a transparent, credible and legitimate process. Such a government would be well placed to handle broader and more entrenched historical concerns beyond the immediate issues and differences arising from electoral contests. Indeed, as Sihanya has observed, 'the Constitution of Kenya 2010 is a transformative and progressive constitutional text and is a good basis for electoral justice'.[6]

[6] B. Sihanya, 2017, 'Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms' available at http://www.innovativelawyering.com/attachments/ElectoralJusticeInKenyaEdited.pdf (last accessed 15 December 2018). See, further, E. Z. Ongoya, 'The Legal Framework on Resolution of Electoral Disputes in Kenya' in G. Musila (ed.), 2013, *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* at p. 42; H. Evelyn and W. Wanyoike, 'A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections*

3. The 2013 Presidential Election Dispute: A First Test for the Post-2010 Supreme Court

In compliance with, and to further the vision for electoral justice elaborated in, the 2010 Constitution, laws relevant to the conduct of elections were enacted in 2011. These included the Independent Electoral and Boundaries Commission Act;[7] the Elections Act;[8] and the Supreme Court Act.[9] In addition, in exercise of its powers under Section 109 of the Elections Act, the IEBC enacted a number of regulations, including: the Elections (General) Regulations, 2012 and the Elections (Registration of Voters) Regulations, 2012. Similarly, in exercise of power under Section 31 of the Supreme Court Act, then-Chief Justice Willy Mutunga enacted the Supreme Court (Presidential Elections) Rules, 2013.

Together with the 2010 Constitution, the above primary and secondary legislation would form the major pillars of the legal architecture under which the 2013 elections were conducted.[10] It was thus under this framework that on 4 March 2013, Kenya held its first general election following the enactment of the 2010 Constitution.

The March 2013 elections were the first in Kenya wherein electoral technologies were employed to facilitate the process. These technologies were: Biometric Voter Registration (BVR), used during voter registration; Electronic Voter Identification (EVID), employed on the polling day itself; and the Results

in Kenya and the Emerging Jurisprudence at pp. 90-97 and F. Ang'ila Aywa, 'A Critique of the Raila Odinga vs IEBC Decision in Light of Legal Standards for Presidential Elections in Kenya' in C. Odote and L. Musumba (eds), 2016, Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence at pp. 56-60.

[7] No. 9 of 2011.

[8] No. 24 of 2011.

[9] No. 7 of 2011.

[10] The Public Procurement and Disposal Act, Cap 412(C) was also critical, especially in terms of establishing the rules for procurement of requisite electoral material.

Transmission System (RTS), used during the tallying and transmission of the results. On 9 March 2013, then-chairperson of the IEBC, Issack Hassan announced Uhuru Kenyatta as winner of the presidential election with 6,173,433 out of a total of 12,338,667 votes cast.

Following that announcement, three petitions were filed before the Supreme Court to challenge the results of the presidential election, which were consolidated as *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others*.[11] In that consolidated case, a number of issues were canvassed, including: (i) the procurement and use of technology in the electoral process; (ii) institutional independence, discharge of public responsibility and exercise of discretion; (iii) voter registration; (iv) the meaning of 'votes cast'; and (v) the meaning of a 'fresh election'. Crucially, the court had to consider the threshold for the assessment of a presidential election, and indeed this matter was canvassed, albeit not at great length.[12] According to the Supreme Court, the test for annulment was: '… [d]id the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent?'.[14] In the end, applying this threshold, the Supreme Court upheld the election in favour of Kenyatta. Although the Supreme Court upheld the presidential poll, it faulted the IEBC in a number of instances. The main challenges identified related to the credibility of the Electoral Management Body (EMB), the use of technology and the transmission of results.

As Evelyn and Wanyoike have noted, the test for annulment articulated by the court, and its implications for the interpretation of Section 83 of the Election

[11] [2013] eKLR.

[12] Evelyn and Wanyoike (n 7 above) at p. 99 (noting that the Supreme Court '[did] not explicitly rely on Section 83 of the Elections Act, but instead mix[ed] the standard for a valid election with the required standard of proof'. [14] Judgment of the Supreme Court, at Para 304.

Act made it 'an insurmountable task to challenge a declared winner of an election' and essentially protected 'someone who may have benefited from a deficient (and unconstitutional) electoral process against a court challenge'.[13] It is noteworthy, in this regard, that in a 2016 book chapter written in his personal capacity, Chief Justice David Maraga – while not commenting directly on the 2013 decision on this point – adopted an interpretation of Section 83 which pointed towards a lower threshold for annulling a presidential election. In his view, that section provided for 'two *disjunctive* situations' under which an election could be voided: (i) failure to carry out an election in accordance with the principles laid down in the constitution; and (ii) where there was noncompliance with any written law relating to an election which affected the result of the election.[14] In a view that would later be reiterated in the September 2017 Supreme Court decision to overturn the August 2017 Presidential Election, Maraga further noted that an election went 'beyond simple arithmetic'.[15] This suggested that a quantitative test – which emphasized numbers of votes obtained – was not, by itself, a sufficient guide for a court assessing the validity of an election. It had to be complemented by a more qualitative enquiry into the nature of the electoral process and, in particular, a consideration as to whether this process was consistent with the requisite constitutional and statutory standards. Indeed, Maraga appeared to suggest that it was the latter test, rather than the former, which was critical. According to him, the qualitative test was 'the major determinant of a free and fair election' and an electoral outcome was 'affected when the violation of qualitative factors fundamentally undermine[d] the integrity of the electoral process'.[18]

[13] Evelyn and Wanyoike (n 7 above) at p. 101.
[14] Maraga (n 3 above) at p. 270.
[15] Maraga (n 3 above) at p. 271, citing *James Omingo Magara v Manson Onyongo Nyamweya and 2 Others* [2014] 5 KLR (EP) 292.
[18] Maraga (n 3 above) at pp. 271-272.

There was, therefore, significant unease with the Supreme Court's ratio for its 2013 decision, especially in terms of its conceptualization, and application, of the threshold for evaluation of a presidential election.

4. Electoral Reform Ahead of the August 2017 Presidential Poll

Given the significant and varied issues raised by the 2013 poll, efforts were made to respond to the identified challenges. Those efforts culminated in the establishment, in 2016, of a Joint Parliamentary Select Committee (JPSC) with membership drawn from both the Senate and the National Assembly. The JPSC invited, and received, submissions from a range of key stakeholders from across the country. These views informed important amendments that were made to the electoral framework, including: (i) the Elections Laws (Amendment) Act 2016;[16] (ii) the Election Offences Act (2016)[17] and the Elections Technology (Regulations) 2017.

Section 44(1) of the Elections Act (as amended by the 2016 law), established the Kenya Integrated Electoral Management System (KIEMS) to enable biometric voter registration, electronic voter identification and electronic transmission of results. A crucial pillar of the KIEMS was its combination and consolidation of the various technology streams that had been employed, with limited success, during the 2013 elections; such as the Biometric Voter Registration system (BVR), the Electronic Voter Identification Devices (EVID) and the Results Transmission System (RTS). The IEBC was required to develop a policy on the progressive use of technology in the electoral process,[18] and was also mandated to ensure that the KIEMS was simple, accurate, verifiable, secure, accountable and transparent.[19]

[16] Act No. 36 of 2016; assented to on 13 September 2016, and in force on 4 October 2016.
[17] Act No. 37 of 2016; assented to on 13 September 2016, and in force on 4 October 2016.
[18] Section 44 (2) of the Elections Act (as amended).
[19] Section 44 (3) of the Elections Act (as amended).

In addition, under Section 44(4)(a) and (7)(b) of the Elections Act (as amended in 2016), the technology to be used in the election was required to be procured at least 8 months before the general elections. Furthermore, under Section 44(a) of the Elections Act (as amended), the IEBC was required to test, verify and deploy such technology at least sixty days before the general elections.

Another important amendment to the Elections Act was the introduction of Section 39(1C) under which, for the purpose of a presidential election, the IEBC was obliged to: (i) electronically transmit, in the prescribed form, the tabulated results of an election for the president from a polling station to the constituency tallying centre and to the national tallying centre;[20] (ii) tally and verify the results received at the national tallying centre;[21] and (iii) publish the polling result forms on an online public portal maintained by the commission.[22]

There was a further amendment to the Elections Act in January 2017, by the terms of the Elections Laws (Amendment) Act.[26] Among other things, that amendment introduced a new Section 44(a) in the Elections Act, which required the IEBC to put in place a complementary mechanism for the identification of voters and the transmission of election results. Under the same provision, such a complementary system was required to be simple, accurate, verifiable, secure, accountable and transparent, in compliance with Article 38 of the constitution. In addition, in 2017, the IEBC enacted the Elections (Technology) Regulations, aimed at further enhancing the framework for the use of technology in the ascertainment of the true will of the voter.

For its part, the Supreme Court prepared to deal with any disputes that might emerge from the presidential election through the enactment by the Chief Justice

[20] Section 39 (1c) (a), Elections Act (as amended).
[21] Section 39 (1c) (b), Elections Act (as amended).
[22] Section 39 (1c) (c), Elections Act (as amended). [26]
Act No.1 of 2017.

of the Supreme Court (Presidential Election Petition) Rules of 2017.[23] It was under this greatly amended legal framework, therefore, that on 8 August 2017, Kenya held its second general election under the 2010 Constitution.

5. The August 2017 Presidential Election Dispute and Resurgent Judicial Power

For many, the August 2017 election constituted yet another opportunity to progress, however haltingly, towards a more democratic and just order. Voting was largely peaceful; indeed, the preliminary views of some election observers, that the poll had been largely free and fair, appear to have been based on the absence of significant election-related violence.[24]

On 11 August 2017, the Chairperson of the IEBC, Wafula Chebukati, announced Uhuru Kenyatta as winner of the election, with 8,203,290 votes received. After some hesitation, Raila Odinga and Stephen Kalonzo Musyoka, the candidates of the National Super Alliance (NASA) coalition, opted to file a petition before the Supreme Court, to challenge the results as declared. The petition was filed on Friday 18 August 2017, within seven days of the announcement of the results of the election, as required by Article 140 (1) of the 2010 Constitution of Kenya.[25] The petitioners alleged that the election fell short of the requisite constitutional and legal standards. In particular, the petitioners impugned the process of transmission and tallying of results, which, in their view, had tainted the credibility and validity of the results announced.

---

[23] Legal Notice No.113.

[24] See 'Kenya Election 2017: AU and Commonwealth say Poll Credible' *BBC News,* 10 August 2017, available at https://www.bbc.com/news/world-africa-40887129 (last accessed 15 December 2018).

[25] *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No. 1 of 2017.

In a majority decision rendered on Friday 1 September 2017,[26] the Supreme Court concluded that the election had not been conducted in accordance with the requisite constitutional and statutory requirements[27] and directed the IEBC to organize a fresh election 'in strict conformity' with the applicable law, within 60 days from that date, as required by Article 140(3) of the constitution.[32] In its full reasoned decision, released on 20 September 2017,[28] the Supreme Court rendered an authoritative interpretation of Section 83 of the Elections Act, to the effect that it established a disjunctive, rather than conjunctive, test for the annulment of a presidential election.[29] According to the majority (Chief Justice David Maraga, deputy Chief Justice Philomena Mwilu and Justices Smokin Wanjala and Isaac Lenaola), an election could be set aside either for qualitative deficiencies in terms of non-compliance with fundamental constitutional principles, or based upon a more quantitative assessment of the effect of any illegalities upon the electoral outcome.

In the event, based on a review of the evidence before it, the court found that the election had not been conducted in accordance with the constitution and the statutory law, and on that sole ground, set it aside.[30] The minority (Justices Njoki Ndung'u and Jackton Ojwang) would have favoured the approach adopted by the

---

[26] *Raila Odinga and Another v IEBC and 2 Others*, summary decision of the Supreme Court, available at http://kenyalaw.org/caselaw/cases/export/140478/pdf (last accessed 15 December 2018).

[27] At Para 2. [32]

At Para 3.

[28] *Raila Odinga and Another v IEBC and 2 Others*, full decision of the Supreme Court, available at http://kenyalaw.org/caselaw/cases/export/140716/pdf (last accessed 15 December 2018).

[29] At Paras 171-212.

[30] At Para 303 ('For the above reasons, we find that the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, *inter alia*, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to Section 83 of the Elections Act, we have no choice but to nullify it').

Supreme Court in 2013, which accorded greater deference to the poll results as the manifestation of the popular will.

6. The Aftermath of the Supreme Court's September Decision

In Kenya, the court's decision of 1 September was criticized and applauded in equal measure. This was perhaps only to be expected, coming as it did in the thick of a contentious political process, moreover, one characterized by significant ethnic undertones. As might be expected, supporters of the UhuruRuto ticket condemned the court decision as a glaring example of judicial overreach. On the other hand, many other Kenyans appreciated the decision as an instance of the court defending the constitution and popular will, from those who had sought to subvert democracy.

The response from the Uhuru-Ruto campaign was mixed. On the day of the court decision, President Uhuru appeared to accept the decision, noting that while he disagreed with it, he would abide by it. However, his tone would soon change from one of uneasy accommodation to outright hostility. In an address to supporters a few days later, Uhuru described the Chief Justice and members of the court, who had rendered the opinion, as *wakora* (a Swahili term for 'thugs') and vowed to 'revisit' the matter once the political dust had settled.[31] There are also indications that certain members of the Supreme Court came under intense pressure in the days following the decision,[32] apparently in an

[31] M. Fick, 'Kenyan President, Election Overturned by Court, Attacks Judiciary', *Reuters World News,* 2 September 2017, available at https://www.reuters.com/article/uskenya-election/kenyan-president-election-overturned-by-court-attacks-judiciaryidUSKCN1BD0ES (last accessed 15 December 2018).

[32] For instance, a few days to the fresh presidential election of 26 October, Deputy Chief Justice Philomena Mwilu's driver was shot and seriously wounded – see C. Ombati, 'Deputy CJ Philomena Mwilu's Driver shot in an Attack along Ngong Road', 24 October 2017, *Standard Media,* available at: https://www.standardmedia.co.ke/article/2001258320/deputy-cj-philomena-mwilu-sdriver-shot-in-an-attack-along-ngong-road (last accessed 15 December 2018). It is also

effort to ensure a much more restrained court, in the event of a renewed challenge of the results of the repeat presidential poll.

Besides the threats and direct intimidation of the judges, the Kenyatta government engaged in a process of 'revisiting' the electoral framework which had facilitated the court's September 2017 decision. That goal was achieved through a raft of legislative amendments pushed through parliament in November 2017, a process boycotted by the opposition. The main legislative response to the Supreme Court's annulment of the August 2017 election was the passage and gazettement of the Election Laws (Amendment) Act, 2017. This law was gazetted on 2 November 2017 and, by virtue of its Section 1, took effect on that same day. It introduced a number of significant amendments to Kenyan electoral law. For instance, the importance of technology in the electoral process was diminished; and the IEBC Chairperson was vested with the power to announce final results of the election, prior to receiving results from all the constituencies, if satisfied that the results not yet received would not affect the final result. However, perhaps the most critical amendments introduced by this law were those related to the legal threshold for invalidating a presidential election. In particular, the word 'or' in Section 83 of the Elections Act, to which the Supreme Court had attached great importance in the September 2017 decision, was replaced with 'and'. The effect of this particular amendment was that the test for annulment was changed from a disjunctive one, to a conjunctive one. The amendment also added the word 'substantially' to the provision, further raising the bar for the annulment of presidential elections in Kenya. As a result, under Section 83 of the Elections Act (as amended), the Supreme Court could only invalidate an election where it was determined that the election was not

curious that, a day to the fresh elections, the Supreme Court was unable to realize a quorum required to consider a petition seeking to delay the poll – see K. Muthoni, 'Case to Block Election Affected by lack of Supreme Court Quorum', 26 October 2017, *Standard Media,* available at: https://www.standardmedia.co.ke/article/2001258419/case-to-block-electionaffected-by-lack-of-supreme-court-quorum (last accessed 15 December 2018).

conducted in accordance with the principles laid down in the constitution and in other written law *and* that such non-compliance *substantially* affected the result of the election.

Through the above two measures, the executive and parliament in effect overturned the legal precedent which had been set by the Maraga Court in September 2017. Henceforth, before annulling a presidential election, the Supreme Court would have to be satisfied not only that there had been irregularities in the conduct of the election, but further that these irregularities had had a substantial effect on its results. As I have noted elsewhere, the use of 'and' (which establishes a conjunctive test) and 'substantially' together make it very difficult for apex courts to invalidate the results of presidential elections.[33] Therefore, for all intents and purposes, the most potent tool in the hands of the Kenyan judiciary for setting aside a flawed election had been fundamentally fettered by the amendments. It was, of course, still technically possible for the court to annul the results of the repeat presidential election, but the path to such a conclusion had been made distinctly more difficult.

For his part, having achieved this emasculation of the judiciary, President

---

[33] See B. Kabumba, 'How do you Solve a Problem like "Substantiality": The Supreme Court and Presidential Elections in Uganda', book chapter in J. Oloka-Onyango and J. Ahikire (eds), 2016, *Controlling Consent: Uganda's 2016 Elections,* Kampala: Africa World Press. See, also, F. Ssempebwa, E. Munuo, L. Tibatwemwa-Ekirikubinza and B. Kabumba,
2016, *A Comparative Review of Presidential Election Court Decisions in East Africa,* Kampala: Fountain Publishers. Examples of challenges rendered unsuccessful by such a high threshold include: *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni* Presidential Election Petition No.1 of 2001, [2001] UGSC 3, 21 April 2001, Uganda; *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006, [2007] UGSC 24, 30 January 2007, Uganda; Amama Mbabazi v. Yoweri Kaguta Museveni, Electoral Commission and the Attorney General Presidential Election Petition No.1 of 2016, [2016] UGSC 3, 31 March 2016, Uganda; Mbowe v. Eliufoo, 1967, EA 240, Court of Appeal (Tanzania); Ibrahim v. Shagari& Others, 1985, LRC (Const.) 1, Nigeria; Buhari v. Obasanjo, 2005, CLR 7K, Nigeria; General Muhammadu Buhari v. Independent National Electoral Commission & 4 Ors, 2008, 12 S.C. (Pt. I) 1, Nigeria; Abubakar v. Yar'Adua, 2009, ALL FWLR (Pt 457) 1 SC, Nigeria; In Re Election of First President – Appiah v. The Attorney General, 197, 2 G&G 2d 1423, Ghana; Nana Addo Dankwa Akufo-Addo& 2 Others v. John Dramani& 2 Others, Presidential Election Petition Writ No. J1/6/2013, Ghana; and Anderson Kambela Mazoka and 3 Others v. Levy Patrick Mwanawasa and 3 Others, Presidential Petition No. SCZ/01/02/03/2002 (Zambia).*

Kenyatta now distanced himself from the legal amendments.[34] He did so in the probable knowledge that political mileage could be claimed from declining to assent to the Bills in question, while still being poised to enjoy the benefit of the legal framework they would establish. This was particularly the case given the nature of Kenya's legal framework, whereby the Bills could come into effect notwithstanding his non-assent to them.

Taken together with the harsh political rhetoric directed against the court, this changed legal landscape would make a repeat annulment unlikely, notwithstanding Chief Justice Maraga's stated commitment, in the September 2017 decision, to a sustained judicial oversight role. Indeed, this reality may have informed the decision by Raila Odinga not to challenge the results of the repeat election before the court. Nevertheless, the issue as to the validity of that repeat election would again be placed before the Supreme Court by a number of parties. It bears noting, in this regard, that unlike the case in a number of other jurisdictions, Article 140(1) of the Kenyan constitution grants the right to challenge the results of an election to 'any person' as opposed to restricting it to the candidates who took part in the impugned election. On the other hand, for example, Article 104(1) of the 1995 Constitution of Uganda limits this right to 'any aggrieved candidate'.

[34] In his first speech to the nation after being declared winner of the fresh poll, Kenyatta claimed that he did not necessarily support the amendments: 'I listened to all voices regarding rules of engagement in the run-up to the elections and decided not to sign the document because the law should be reasoned based on principles' – see W. Mwangi, 'Election Amendment Bill becomes Law despite Uhuru's "failure" to Assent' *The Star,* 3 November 2017, available at: https://www.the-star.co.ke/news/2017/11/03/election-amendment-bill-becomes-lawdespite-uhurus-failure-to-assent_c1663813 (last accessed 15 December 2018).

7. Resolving the Dispute over the October 2017 Repeat Presidential Election: A Temporary Settlement Amidst a Continuing Jurisprudential Dispute

The challenge to the results of the repeat election was fashioned largely along the lines of the August 2017 petition. The petitioners[35] alleged that there had been non-compliance with the requisite constitutional and legal standards and asked the Supreme Court to, once more, annul the election. On their part, the respondents argued that the election had been conducted in substantial compliance with the requisite law, and that, in any case, any irregularities that had attended the process could not be said to have materially affected the overall outcome of the election.

An important consideration for the court – upon which the fate of the petitions hinged – related to the legal effect of the amendments to the electoral law which had been passed following the court's September 2017 decision. The Supreme Court had to consider whether to apply the standard under the old Section 83 (which used the word 'or') or that under the new Section 83 (which employed the word 'and', plus a further threshold test of 'substantiality'). Given their significance for the adjudication of presidential election disputes, among other things, the post-September 2017 amendments had been challenged, before the High Court of Kenya, by the Katiba Institute and the Africa Centre for Open Governance (Africog), on 2 November 2017. An expedited hearing and determination of this case might have been useful in terms of settling the legal question in advance of the Supreme Court's determination of any petitions challenging the results of the repeat presidential election. However, by the time these petitions were heard, the hearing of the Katiba/Africog petition had been postponed to 5 December 2017. As such, the issue as to the legal threshold to

[35] *Harun Mwau and 2 Others v IEBC and 2 Others*, Presidential Election Petition Nos. 2 & 4 of 2017 (Consolidated Petition).

be applied in determining the validity of the October 2017 presidential election remained unresolved at the time the petitions against that process and its outcome were challenged before the Supreme Court.

In the end, on 20 November 2017, the Supreme Court of Kenya dismissed both petitions,[36] noting that it had chosen to uphold the repeat presidential election after '... having carefully considered ... the Constitution and the applicable laws.'[37] Following an emerging trend of courts dealing with similarly sensitive political questions, the decision of the court was a unanimous one.[38] Unanimity in such circumstances allowed the court to send a powerful signal of legal legitimacy, important in terms of calming the significant political tensions in Kenya at the time.

Although the November 2017 summary decision provided finality to the immediate legal issue presented to the Supreme Court – the validity of the repeat presidential election – the question as to the legal standard applicable to this determination remained contentious. Indeed, the full reasoned of the Supreme Court, rendered on 11 December 2017, revealed that while the court had been unanimous as to the final decision, there was less consensus regarding the reasons for the decision and especially, the legal standard applicable to the resolution of presidential election disputes.[39] All six justices of the court were of the opinion that the petitioners had presented claims which were 'of such a

[36] *Harun Mwau and 2 Others v IEBC and 2 Others*, summary decision of the Supreme Court, available at http://kenyalaw.org/caselaw/cases/export/143813/pdf (last accessed 15 December 2018).

[37] At Para 4.

[38] See, for instance, the unanimous decisions in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR (Supreme Court of Kenya) and *Amama Mbabazi v Yoweri Kaguta Museveni, Electoral Commission and the Attorney General* Presidential Election Petition No. 1 of 2016, [2016] UGSC 3 (31 March 2016) (Supreme Court of Uganda).

[39] *Harun Mwau and 2 Others v IEBC and 2 Others*, full decision of the Supreme Court, available at http://kenyalaw.org/caselaw/cases/export/145261/pdf (last accessed 15 December 2018).

generic order as to lend only feeble grounds' for a departure from the presumption of the 'legitimacy and credibility' of the presidential poll.[40] It was the unanimity on this point which had allowed the court to present a united front in its summary decision, rendered on 20 November 2017, to dismiss the petitions. However, with respect to the applicable legal threshold, the schism of the September 2017 decision remained. The majority of the court (Chief Justice Maraga, deputy Chief Justice Mwilu and Justices Wanjala and Lenaola, now joined by Justice Ojwang) were of the opinion that the amendments to Section 83 had no retroactive application and, therefore, that the legal threshold for determining the validity of the election remained that under the old Section 83.[41] Having reached this determination, the majority of the court further declined the invitation to consider the constitutionality of the amendments to Section 83, on the basis that this was the subject of a pending matter before the High Court – the *Katiba/Africog* case.[42] For her part, Justice Ndung'u (who, along with Justice Ojwang, had dissented from the majority decision in September 2017) recalled that the old Section 83 had been 'an integral part' of the majority's September decision.[43] In her opinion, that circumstance, taken together with the post-September 2017 legislative amendments to that provision, placed Section 83 'at the centre of any determination by an election court' and that provision had to be the 'determinate vector' for the court.[44] In her view, therefore, the Supreme Court had the jurisdiction, and the duty, to determine the constitutionality of the post-September 2017 amendments to Section 83, since this was central to any comprehensive determination of the validity the repeat presidential election.[45] To do otherwise would be to leave 'main issues unresolved', create 'a lacuna in the application of the law' and render only 'a partial determination' of

[40] *Harun Mwau and 2 Others v IEBC and 2 Others*, Presidential Election Petition Nos. 2 & 4 of 2017 (reasoned decision of the court), at Para 407.
[41] At Paras 381-384.
[42] At Paras 385-389.
[43] Opinion of Justice Ndung'u at Para 449.
[44] At Para 451.
[45] At Paras 452-457.

the dispute placed before the court.[46] On these premises, upon her review of the law, she departed from the majority's view that the amended Section 83 was not applicable to the dispute before the court. According to her, the amendments, in so far as they related to the legal threshold for the determination of a presidential election dispute, were not retroactive.[47] As the amendments had taken effect before the filing of the election petitions before the Supreme Court, the court had to apply the legal threshold established under the new Section 83.[48] In the same vein, she was of the opinion that amendments to Section 83 were constitutional and valid, being a legitimate and deliberate exercise of legislative power.[49]

A comparison of the majority opinion and that of Justice Ndung'u reveals that deep ideological cleavages in the Supreme Court remain, the brief demonstration of unity on 20 November 2017 notwithstanding. The crux of the matter remains the legal threshold for determining the validity of a presidential election, and this politico-legal issue remains very much alive. For instance, four months after the release of the Supreme Court's full reasoned decision in December 2017, the High Court's decision in the *Katiba/Africog* case was eventually delivered, on 6 April 2018.[50] In it, Judge Mwita found most of the electoral amendments (including those to Section 83 of the Elections Act) to have been unconstitutional, and declared them invalid on this basis. In terms of the amendments to Section 83 (the attempt to replace 'or' with 'and', and the inclusion of the word 'substantially') in particular, he found them to be inconsistent with the constitutional values relating to the holding of free, fair and transparent elections.[51] He noted that the majority of the Supreme Court in the December

---

[46] At Para 458. See also Paras 462 ('…this court cannot shy away from determining conclusively all the issues relating to constitutional interpretation and application that arise within a presidential election…') and 463 ('Failure, by this court, to determine an issue that is integral to the petition would have the effect of leaving part of the dispute between the parties unresolved. In terms of Section 83, it would have the effect of leaving undetermined, the fulcrum of the election cause itself').

[47] At Para 473.

[48] As above.

[49] At Paras 474-496.

[50] *Katiba Institute and 3 Others v Attorney General and 2 Others* [2018] eKLR.

[51] At Paras 106-119.

2017 decision had deferred to the High Court's jurisdiction in this respect,[52] and that, in the circumstances, the opinion by Justice Ndung'u on this point did not bind him.[53] As might be expected, this High Court decision has been appealed to the Court of Appeal. A hearing date for the appeal is yet to be fixed, but there is, thus far, no stay or suspension of the High Court decision pending appeal. As such, for the moment, Judge Mwita's decision stands, and the old Section 83 remains the law of the land in Kenya.

8. General Observations on Trends in Kenyan Electoral Legal Reform

The provisions in the Kenyan constitution relating to electoral justice are borne out of a very specific, long and painful national history. The constitutional framework, and the legislative framework crafted out of it, was aimed at bridging those historical fault lines through ensuring, among other things, free and fair elections. In this regard, a number of issues are implicated concerning the broader architecture of electoral justice in Kenya: (i) the role of dominant political actors (and communities) in achieving electoral equity; (ii) the place of the Kenyan Supreme Court (and the judiciary in general) as a mediator in highstakes political disputes; and (iii) instrumentalization of the law, and courts, as part of broader socio-political struggles. We consider each of these in turn.

8.1 The Role of Dominant Political Actors (and Communities) in Achieving Electoral Equity

The response by President Kenyatta to the 1 September 2017 Supreme Court decision was initially moderate although it later took a sharper turn. The most decisive response appears to have been legislative reform which mainly took the form of a diminution of the role of technology in the electoral process, and raising the threshold for annulling presidential elections. Both of these were reactive

[52] At Para 118.
[53] At Para 119.

measures that amounted to an erosion of the democratic gains that Kenya had made following the enactment of the 2010 Constitution.

On the other hand, there were already early signs of a hardening of the political stance of the opposition under the National Super Alliance (NASA). NASA and their allies seemed to be increasingly more willing to test the limits of the law – including the very foundations of the constitution itself. The most visible expression of this reaction was the announcement of a 'Peoples' Assembly' with a roadmap for the adoption, working with county assemblies, of a new constitutional compact.[54] The trend was momentarily halted by an order by High Court Judge Lilian Mutende, issued in Kitui County on 21 November 2017, following an application by an entity known as Counties Development Group. The order restrained county assemblies from passing or implementing resolutions for the establishment of a Peoples' Assembly. It was, however, only an interim order, aimed at preserving the *status quo*, pending the hearing of the substantive case, which was scheduled for January 2018. In any case, it was liable to be set aside, if successfully appealed before the Court of Appeal. Nonetheless, the High Court order demonstrated that the courts could be used to restrain, even if temporarily, some of the political momentum on the part of the opposition.

However, there remained little doubt that the more significant political contestation would occur outside, and not in, the Kenyan courtrooms. If NASA could continue to mobilize the disaffection and disillusionment of its adherents, there was no telling how disruptive this could be for Kenya's tenuous political fabric. In any case, in the event NASA were successful in their efforts at political

[54] See 'Raila NASA issues roadmap to people's assembly, no turning back' *Kenya Today* 8 December 2017 available at https://www.kenya-today.com/politics/breaking-railanasa-issues-roadmap-peoples-assembly-no-turning-back (last accessed 15 December 2018).

revolution, the Kenyan courts would very likely legitimize any such legal – or even illegal – victory.[55]

The limits of legal contestation being evident – the stage continued to be set for a much larger clash between the dominant political actors and those ethnic groups which did not see any viable path to political inclusion through the ballot. This remained the larger issue that the Kenyan legal and political class would have to contend with following the politically inconclusive repeat presidential election. There have already been a number of telling developments in this regard. To this end, a very public rapprochement between Uhuru and Raila began with a handshake between the two at a meeting at Harambee House on 9 March 2018; and continued on to a now famous hug at a National Prayer Breakfast held on 31 May 2018. It remains to be seen whether and how this détente will continue to play out – in the context of Kenya's highly complex politico-ethnic configurations – in the run up to the next scheduled election in 2022.

8.2 The Judiciary as a Mediator in High-stakes Political Disputes

[55] There is global judicial precedent for the notion that certain extra-legal actions, where they succeed in overthrowing previously established legal orders, might thereafter be deemed legally valid. The most prominent theory in this regard is that of the 'revolution in law' advanced by Professor Hans Kelsen – see H. Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1961). This theory has received judicial affirmation in a number of cases such as: *State v Dosso* (1958) P.L.D. S. Ct. 533 (Pakistan); *Uganda v Commissioner of Prison, Ex Parte Matovu* (1966) E. Afr. L.R. 514 (Uganda); *Madzimbamuto v Lardner-Burke* [1968] 3 All E.R. 561, 573-74, 578 (P.C.) (English Privy Council, acting as Appellate Court for present-day Zimbabwe, minority decision of Lord Pierce); *Valabhajiv v Controller of Taxes* Civil Appeal No.11 of 1980 (Seychelles); *Mitchell v. Director of Public Prosecutions* (1986) LR.C. Const. 35 (Grenada); *Mokotso v. King Moshoeshoe II* (1989) L.R.C. Const. 24 (Lesotho) and *Matanzima v President of the Republic of Transkei* [1989] 4 S. Afr. L.R. 989 (Transkei). Other theories, to the same effect, include the doctrine of necessity – upheld in *Bhutto v. Chief of Army Staff* 1977 P.L.D. S. Ct. 657 (Pakistan) and *Mitchell v. Director of Public Prosecutions* (1986) LR.C.
Const. 35 (Grenada); and the 'political question' doctrine.

Related to the role of dominant political players in ensuring electoral justice is the place of the judiciary in overseeing electoral management and resolving high-stakes political disputes.

In the 2013 presidential election dispute, the Supreme Court appeared to be extremely sensitive to its relatively weak position as compared to the more political branches of government (executive and parliament). In this respect, the court noted that the matter before it was not 'the most complex case' in terms of the relevant facts and the law applicable, but that the petition was, nevertheless, 'of the greatest importance' in so far as it required the court 'to consider the vital question as to the integrity of a presidential election'.[56] It was also 'the first test', since the enactment of the 2010 Constitution, 'of the scope available to [the court] to administer law and justice in relation to a matter of the expression of the popular will' in no less a matter than the election of the President.[57]

According to the court, the office of President was 'the focal point of political leadership', 'a critical constitutional office', and 'one of the main offices … constituted strictly on the basis of majoritarian expression'.[58] The court further noted that '[t]he whole national population [had] a clear interest in occupancy of [that] office' and that it was this entire population which determined this occupancy 'from time to time, through the popular vote'.[64] In these circumstances the court felt that '[a]s a basic principle, it should not be for the court to determine who comes to occupy the presidential office', provided that the court 'as the ultimate judicial forum' was required to 'safeguard the electoral process and ensure that individuals accede to power in the presidential office, only in compliance with the law regarding elections.'[59]

---

[56] Judgment of the Supreme Court of Kenya (2013), at Para 177.
[57] As above.
[58] Judgment of the Supreme Court of Kenya (2013), at Para 298. [64]
As above.
[59] Judgment of the Supreme Court of Kenya (2013), at Para 299.

The court's emphasis on the majoritarian nature of the presidential mandate as compared to its own non-majoritarian authority signalled the court's concern not to assert, too early in its life under the 2010 Constitution, its authority too strongly. The court seemed to be particularly sensitive to the implications of a limited judicial branch setting aside the results of a major political exercise, in which millions of Kenyans participated.

By contrast, the majority of the Supreme Court justices who rendered the 1 September 2017 decision appeared to have swung to the opposite end of the spectrum, in terms of their understanding of the power of the court, relative to the nature of the presidential election as a significant political exercise. The court notably observed that: '… elections are not about numbers as many, surprisingly even prominent lawyers, would like the country to believe … [e]lections are not events but processes.'[60] The court stressed that, by its decision, it had 'settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election' and, further, that it had shown that 'contrary to popular view, the results of an election in terms of numbers [could] be overturned if a petitioner [could] prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law'.[61] The court was also of the view that the word 'or' had never been given a meaning as powerful as it had just done, and justified this approach on the basis of the obligation of the institution to uphold the constitution without fear or favour.[62] According to the court, the legislature had 'in its wisdom chose[n] the words in Section 83 of the Elections Act' and the court did not have the discretion to 'alter, amend, read into or in any way affect the meaning to be attributed to that

[60] Judgment of the Supreme Court of Kenya (2017), at Para 224.
[61] Judgment of the Supreme Court of Kenya (2017), at Para 389.
[62] Judgment of the Supreme Court of Kenya (2017), at Paras 389-390.

Section'.[63] In its view, it could not 'to placate any side of the political divide' do otherwise than to give that word – 'or' – its ordinary meaning, even if this had significant, far-reaching and unprecedented legal and political implications.[70]

In addressing the notion that the court had to ensure that it did not undermine the will of the people, the court observed that it was itself 'one of those to whom that sovereign power [had] been delegated under Article 1(3)(c) of the same constitution'. [64] According to the court, '[a]ll its powers including that of invalidating a presidential election [were] not self-given nor forcefully taken, but [were] donated by the people of Kenya'.[72] In such circumstances the court felt that it would be a 'dereliction of duty' if it were to ignore constitutional violations brought to its attention.[65]

To this end, unlike the 2013 court which appeared painfully aware of its institutional limitations and keen to avoid a clash with the more politically powerful branches, the 2017 court appeared confident in its own constitutional authority and to actually invite the annoyance of the more majoritarian branches. The attitude of the 2017 court was perhaps best exemplified by this, rather immodest, declaration of the virtue of its decision:

> Therefore, however burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant.[66]

---

[63] Judgment of the Supreme Court of Kenya (2017), at Para 390. [70]
As above.
[64] Judgment of the Supreme Court of Kenya (2017), at Para 399. [72]
As above.
[65] As above.
[66] As above.

It is evident that the September 2017 Supreme Court decision was much bolder than the 2013 one. In the 2017 decision the court variously justified its authority on the basis of the delegation of power conferred on it by the people of Kenya, as well as in terms of its faithful application of the law as enacted by the 'the Legislature in its wisdom' to assert a much more ambitious vision of judicial power in the context of presidential election dispute resolution.

Later, following the intense pressure it faced from the executive branch after its September 2017 decision, there were many signs that the Supreme Court headed by Chief Justice Maraga would move towards the more deferential attitude of the 2013 Supreme Court headed by Chief Justice Mutunga. One of the most prominent of these signs was the approach by the Supreme Court in the course of the hearing of the November 2017 challenges to the results of the fresh presidential election – with the court striking out NASA as a respondent, and expunging a number of IEBC internal Memos, among other interlocutory orders.[67]

That said, the September and November 2017 decisions of the Supreme Court of Kenya were both important in terms of advancing the achievement and understanding of electoral democracy in Kenya and the rest of the world. The decision of 1 September 2017, as unexpected as it was, was an important signal to the Kenyan political establishment of the court's capacity to decisively intervene as an arbiter of high-stakes political disputes. In so doing, the court

[67] During the Pre-Trial Conference held on 14 November 2017, among other things, the Supreme Court upheld an application by Uhuru Kenyatta, to strike out several IEBC internal memos, sought to be relied upon by the petitioners. It had been argued, on Uhuru's behalf, that the memos had been illegally obtained, and that allowing them in evidence would be a violation of the confidentiality envisaged under Section 27 (2) of the IEBC Act. The Court also upheld Uhuru's application to have the opposition coalition, NASA struck out as a respondent – See P Vidija 'IEBC memos expunged from presidential election petition' *The Star* 14 November 2017 available at https://www.thestar.co.ke/news/2017/11/14/iebc-memos-expunged-from-presidential-electionpetition_c1669845 (last accessed 15 December 2018).

introduced a much-needed element of uncertainty as to an apex court's reaction when faced with flawed elections. Until that point, the expectation – almost to the point of certainty – was that no court, particularly in Africa, could be bold enough to set aside the results of a presidential election, notwithstanding the nature or gravity of the flaws in that process. By invalidating the election, therefore, the Supreme Court struck at the heart of this assumption. All else aside, this was a major contribution to electoral jurisprudence and discourse, one with effects for jurisdictions beyond Kenya. Henceforth, in Kenya and elsewhere, electoral management bodies (EMBs) and other key actors in electoral processes would have to contend with the possibility of a judicial body doing 'a Maraga' and annulling the results of an election. Such knowledge should be an important mechanism for checking impunity and improving electoral integrity.

For its part, the decision of 20 November 2017 showed that the Supreme Court had the capacity to respond to political and economic realities when necessary. It was evident that the political process had, by that time, been tested to near breaking point. The repeat election had been successfully boycotted by the Raila faction and there was no guarantee that future elections would fare any better. In economic terms, too, there was little appetite for another election. The August 2017 general election had cost USD 480 million; while the repeat election of October 2017 was estimated to cost an additional USD 117 million.[68] The uncertainty triggered by the long political impasse slowed domestic economic activity and dampened foreign direct investment. In sum, there was generally little to be gained, politically or economically, from yet another election, on the one hand, and much to be lost, on the other.

The Supreme Court had done its part in the September decision. It could hardly be faulted, at this point, for shelving the tools at its disposal and allowing the fundamentally political stalemate to be ultimately resolved by the principal

[68] See https://qz.com/1074031/elections-in-kenya-2017-presidential-election-re-run-inoctober-will-cost-117-million/ (last accessed 15 December 2018).

political actors in question. The myth of inevitable judicial deference to high-stakes political disputes had been fundamentally challenged by the September 2017 decision. Having achieved this, the decision of November 2017 to uphold the repeat presidential election neither diminished the court's standing, nor affected the utility or validity of the precedent it had established in September 2017. In its most substantial aspects, the September 2017 decision continues to stand as a warning to political actors around the world regarding the consequences of arranging flawed elections. In a similar vein, it also stands as a guide post for courts around the world as to the possibilities open to judiciaries faced with umpiring not just presidential elections but other high-stakes political disputes.

Kenya has come a long way from the time its apex court was so deferential to executive power that, at least on two occasions, presidential petitions were dismissed on technicalities rather than being heard and disposed of on their substance. [69] In the wake of resurgent judicial power under the 2010 Constitution of Kenya, the Supreme Court is, and will likely continue to be, an important actor in the resolution of high-stakes political disputes.[70]

8.3 Instrumentalization of the Law and Courts as Part of Broader Socio-political Struggles

[69] *Kenneth Stanley Matiba v Daniel Arap Moi* (1993) and *Mwai Kibaki v. Daniel Arap Moi* (1999).
[70] This trend is not restricted to Kenya, but is part of a global drift towards the judicialization of politics – See R. Hirschl, 2004, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*; R. Hirschl 'The New Constitution and the Judicialization of Pure Politics Worldwide' 75 *Fordham Law Review*, 2006, at p. 721 available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4205&context=flr (last accessed 15 December 2018); Oloka Onyango (n 1 above)*;* H. Kwasi Prempeh 'Comparative Perspectives on Kenya's Post-2013 Election Dispute Resolution Process and Emerging Jurisprudence' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* at pp. 150-151; C. N. Tate and T. Vallinder (eds), 1995, *The Global Expansion of Judicial Power* and M. Shapiro and A. S. Sweet, 2002, *On Law, Politics, and Judicialization*.

The 2010 Constitution heralded a new era for democratic reform in Kenya, and was meant to act as a bridge between the country's problematic past and a new future in which the collective dreams of Kenyans could be realized. Among other things, it laid a strong foundation for robust public interest litigation which, it was hoped, would go a long way towards realizing the promise of that document – including the promise of electoral justice. In many ways, Kenyan citizens and lawyers have lived up to this task, and a number of cases have helped to articulate and define key constitutional principles. Through litigation, for instance, the following were determined: the date of the first elections under the 2010 Constitution;[71] that presidential election results should be the first to be announced;[72] that the Supreme Court has jurisdiction to hear appeals from decisions of the Court of Appeal in electoral disputes (notwithstanding the silence of the Constitution and the Elections Act in this regard);[73] that Section 83 of the Elections Act should be read disjunctively;[74] that the term 'votes cast' in Article 138 (4) has to be read as 'valid votes cast';[75] that an election is a process, rather than an event, with the quality of that process being as significant as the numerical results thereof;[76] that the Supreme Court has exclusive jurisdiction relating to presidential elections;[77] as well as that presidential results announced by Returning Officers at constituency level are final and not subject to alteration

---

[71] *John Harun Mwau and 3 Others v Attorney General and 2 Others* [2012] eKLR (High Court), to the effect that the elections take place within sixty days from the date on which the National Coalition was dissolved. The date set by the IEBC, of 4 March 2013, was subsequently affirmed by a Court of Appeal decision in *Centre for Rights Education and Awareness and 2 Others v John Harun Mwau and 6 Others* [2012] eKLR.

[72] *IEBC v Maina Kiai and 5 Others* CA No. 105 of 2017.

[73] *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others* Supreme Court Petition No.2B of 2014 [2014] eKLR; *Hon Lemanken Aramat v Harun Meitamei Lempaka* Supreme Court Petition No.5 of 2014 and *Anami Silverse Lisamula v IEBC and 2 Others* Supreme Court Petition No.9 of 2014.

[74] *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No.1 of 2017.

[75] *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR and *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No.1 of 2017.

[76] *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No.1 of 2017.

[77] *International Centre for Policy and Conflict and 5 Others v Attorney General and 5 Others* [2013] eKLR.

by the IEBC Chairperson (and thus that Section 39 of the Elections Act and Regulation 83 (4) of the Elections (General) Regulations) were inconsistent with Articles 86 and 138 of the constitution).[78]

On the other hand, especially in respect to electoral matters, the sheer scale of litigation presents a real test for both the judiciary and the IEBC. For instance, in the wake of the August 2017 elections: 35 petitions were lodged arising from county gubernatorial positions;[79] 15 in relation to senator positions;[80] 12 regarding women representatives;[81] and 98 for National Assembly seats.[82] In addition, the Political Parties Disputes Tribunal (PPDT), established under the Political Parties Act, handled over 560 disputes relating to either party primaries[83] or party lists.[84] Similarly, in 2013, the IEBC Dispute Resolution Committee handled over 2000 disputes relating to party lists and over 200 disputes relating to party nominations.[85] The law and dispute resolution bodies in Kenya seem to have become important mechanisms and fora for contestation and 'lawfare'[86] through which litigants have extended political struggles into the legal arena. Good examples of such lawfare include the litigation over the IEBC's

---

[78] *IEBC v Maina Kiai and 5 Others* CA No. 105 of 2017. See also *Hassan Ali Joho v Suleiman Said Shahbal and IEBC* Supreme Court Petition No.10 of 2013.

[79] http://kenyalaw.org/kl/index.php?id=7647(last accessed 15 December 2018).

[80] http://kenyalaw.org/kl/index.php?id=7650(last accessed 15 December 2018).

[81] http://kenyalaw.org/kl/index.php?id=7651(last accessed 15 December 2018).

[82] http://kenyalaw.org/kl/index.php?id=7657 (last accessed 15 December 2018).

[83] http://kenyalaw.org/kl/index.php?id=7522(last accessed 15 December 2018).

[84] http://kenyalaw.org/kl/index.php?id=7523(last accessed 15 December 2018).

[85] C. Odote and L. Musumba 'Introduction' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* p. 7, at footnote 45, citing the IEBC Dispute Resolution Committee Case Digest (2013).

[86] I use this term in the sense initially envisaged by Carlson and Yeomans who, in criticizing the Western legal tradition, noted that: 'The search for truth is replaced by the classification of issues and the refinement of combat. Lawfare replaces warfare and the duel is with words rather than swords' – see J. Carlson and N. Yeomans, 'Whither Goeth the Law – Humanity or Barbarity' in M. Smith and D. Crossley (eds), 1975, *The Way Out: Radical Alternatives in Australia* at p. 155. For a more recent conceptualization of the term, see C. J. Dunlap Jr 'Lawfare Today: A Perspective', 3 *Yale Journal of International Affairs,* 2008, at p. 146 (defining it as 'the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective'. See also, generally, O. F. Kittrie, 2016, *Lawfare: Law as a Weapon of War.*

decision to award the contract for the printing of presidential ballot papers[87] as well as that over the appointment of returning officers for the fresh presidential election.[88] In both instances, through litigation, the electoral process was almost brought to a standstill – a circumstance which would have had significant economic, political and social consequences.

9. Conclusion

From the preceding account, it is clear that the courts of law have a critical role to play with respect to the realization of electoral democracy. However, there is a need for caution. As Kwasi Prempeh has noted, a legal challenge to an electoral outcome does not necessarily diminish the 'inherently political character and context' of the dispute in question.[89] An electoral petition remains essentially 'a partisan [and] political fight that has spilled over into the courtroom.'[90] This seems to have been the experience in Kenyan electoral litigation and jurisprudence since 2010.

A survey of Kenya's electoral history and the legal framework developed for the management of electoral disputes reveals that while the actors may differ, the issues at play have been substantially the same. The struggle has been, and

[87] On 7 July 2017, the High Court rendered a decision nullifying the award of the tender to AI Ghurair, on the ground of the lack of public participation in the same – see *Republic v IEBC Ex Parte NASA and 6 Others* [2017] eKLR. This decision would be overturned by the Court of Appeal on 20 July 2017, citing, among others, the strict electoral timelines under the Constitution – see *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR.

[88] On 25 October 2017 the High Court held that the appointment of Constituency and Deputy Constituency Returning Officers was illegal for failure to follow the prescribed procedures – see *Republic v IEBC Ex Parte Khelef Khalifa and Hassan Abdi Abdille* Judicial Review Miscellaneous Application No.628 of 2017. On the evening of the same day, the Court of Appeal set aside the declaration of the High Court, pending the determination of an appeal lodged by the IEBC.

[89] Kwasi Prempeh (n 78 above) at p. 153.

[90] As above. See also, generally, Oloka Onyango (n 1 above).

continues to be, towards the achievement of an electoral system which is fair, transparent and accountable. A comparison of the issues raised in the 2013 and 2017 petitions, for instance, reveals that voter registration, voter identification and transmission of results remain key challenges. As Sihanya has observed, legal challenges to electoral outcomes in Kenya have reflected 'numerous recurring themes', including the quality of the electoral process, the jurisdiction of the court, the actions of the various political players and the role of the body charged with conducting the election.[91] The recurrence of particular themes in electoral litigation suggests that the Kenyan polity faces deep foundational tensions, which legal and institutional reform alone may not be able to resolve.

Notwithstanding the enactment of the 2010 Constitution, the elephant in the room of electoral justice remains the challenge of crafting a governance architecture which can allow for more equitable access to, and sharing of, political power within the diverse ethnic communities of Kenya. This single issue, however variously presented or framed, remains at the root of the harsh political conflict played out during the country's electoral cycles. It remains perhaps the most critical agenda item for politico-legal consensus and reform in Kenya.

In addition, in the immediate and medium-term, it is important that, going forward, an agenda for electoral legal and institutional reform be articulated which, in the first instance, is progressive rather than regressive – in terms of implementing the recommendations made by the Supreme Court in its 2013 and 2017 decisions, rather than diminishing them through legislation. Secondly, it should support the IEBC in its electoral management role, again through following the guidance provided by the Supreme Court's post-2010 decisions. Finally, it must enhance the capacity of the Supreme Court and the entire judiciary to ensure the peaceful resolution of high-stakes political disputes.

---

[91] B. Sihanya 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process' in G. Musila (ed.), 2013, *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* at p. 42.

REFERENCES

Ang'ila Aywa, F., 'A Critique of the Raila Odinga vs IEBC Decision in Light of Legal Standards for Presidential Elections in Kenya' in Odote, C. and Musumba, L., (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence,* pp. 46-77

Atieno Odhiambo, E. S., 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya', 2002, 61 *African Studies Review* pp. 223-249

Carlson, J. and Yeomans, N., 'Whither Goeth the Law – Humanity or Barbarity' in Smith, M. and Crossley, D., (eds), 1975, *The Way Out: Radical Alternatives in Australia* at pp. 155-162

Dunlap Jr, C. J., 'Lawfare Today: A Perspective', 3 *Yale Journal of International Affairs,* 2008, at pp. 146-154

Evelyn, H., and Wanyoike, W., 'A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* at pp. 78-113

Fick, M., 'Kenyan President, Election Overturned by Court, Attacks Judiciary', *Reuters World News,* 2 September 2017, available at https://www.reuters.com/article/uskenya-election/kenyan-president-election-overturned-by-court-attacks-judiciaryidUSKCN1BD0ES

Hirschl, R., 'The New Constitution and the Judicialization of Pure Politics Worldwide' 75 *Fordham Law Review*, 2006, at pp.721-753.

Hirschl, R., 2004, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* Cambridge: Harvard University Press

Kabumba, B., 'How do you Solve a Problem like "Substantiality": The Supreme Court and Presidential Elections in Uganda', book chapter in J. Oloka-Onyango and J. Ahikire (eds), 2016, *Controlling Consent: Uganda's 2016 Elections,* Kampala: Africa World Press, pp.477-501

Kelsen, H., *General Theory of Law and State* (Anders Wedberg trans., 1961)

Kittrie, O. F., 2016, *Lawfare: Law as a Weapon of War* Oxford: Oxford University Press

Kwasi Prempeh, H., 'Comparative Perspectives on Kenya's Post-2013 Election Dispute Resolution Process and Emerging Jurisprudence' in Odote, C. and Musumba, L. (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* at pp. 149-176

Maraga, D. K., 'Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence'* at pp. 243276

Muthoni, K. 'Case to Block Election Affected by lack of Supreme Court Quorum', 26 October 2017, *Standard Media,* available at https://www.standardmedia.co.ke/article/2001258419/case-to-block-electionaffected-by-lack-of-supreme-court-quorum

Mwangi, W., 'Election Amendment Bill becomes Law despite Uhuru's "failure" to Assent' *The Star,* 3 November 2017, available at https://www.thestar.co.ke/news/2017/11/03/election-amendment-bill-becomes-law-despite-uhurusfailure-to-assent_c1663813

Odote, C. and Musumba, L., 'Introduction' in C. Odote and L. Musumba (eds), 2016, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* at pp.1-18

Oloka Onyango, J., 2017, *When Courts do Politics: Public Interest Law and Litigation in East Africa* New York: Cambridge Scholars Publishing

Ombati, C., 'Deputy CJ Philomena Mwilu's Driver shot in an Attack along Ngong Road', 24 October 2017, *Standard Media,* available at https://www.standardmedia.co.ke/article/2001258320/deputy-cj-philomena-mwilus-driver-shot-in-an-attack-along-ngong-road

Ongoya, E. Z., 'The Legal Framework on Resolution of Electoral Disputes in Kenya' in Musila, G., (ed.), 2013, *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* at pp.96-150

Shapiro, M. and Sweet, A. S., 2002, *On Law, Politics, and Judicialization* Oxford: Oxford University Press

Sihanya, B., 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process' in Musila, G., (ed.), 2013, *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* at pp. 22-56

Sihanya, B., 2017, 'Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms' available at http://www.innovativelawyering.com/attachments/ElectoralJusticeInKenyaEdited.pdf

Ssempebwa, F., Munuo, E., Tibatwemwa-Ekirikubinza, L., and B. Kabumba, 2016, *A Comparative Review of Presidential Election Court Decisions in East Africa* Kampala: Fountain Publishers

Tate, C. N. and Vallinder, T. (eds), 1995, *The Global Expansion of Judicial Power* New York: New York University Press

Vidija, P., 'IEBC memos expunged from presidential election petition' *The Star* 14 November 2017 available at https://www.the-star.co.ke/news/2017/11/14/iebcmemos-expunged-from-presidential-election-petition_c1669845

MAKERERE LAW JOURNAL JANUARY 2020

VOLUME 16 ISSUE 1

WITHOUT THEIR CONSENT: UNRAVELING THE CONUNDRUM SURROUNDING RAPE IN UGANDA

Dominic Adeeda

RECOMMENDED CITATION:

Dominic Adeeda (2020), "Without Their Consent: Unraveling the Conundrum Surrounding Rape in Uganda" Volume 16 Issue 1, Makerere Law Journal.

WITHOUT THEIR CONSENT: UNRAVELING THE CONUNDRUM SURROUNDING RAPE IN UGANDA

Dominic Adeeda

Always take "no" for an answer. Always stop when asked to stop. Never assume "no" means "yes." If her lips tell you "no" but there's "yes" in her eyes, keep in mind that her words, not her eyes, will appear in the court transcript[1]

Abstract

Sexual violence is an emergent problem in Uganda today and it leaves an enduring and devastating impact on the survivors. Rape is one of the most pressing issues under the broader genus of sexual violence. It desecrates the very core of the victim's esteem, dignity and integrity and it is mostly perpetrated by men. Although originally this type of crime was not openly discussed, research has provided a greater understanding of the offence and its devastating effects to survivors. This article therefore contributes to this scholarship by demystifying the whole notion of rape in Uganda while looking at the legal regime that governs the offence, national crime statistics and prosecution of the offence. The article thus makes an overall appeal to curb rape through a multi – disciplinary approach and undertaking necessary reforms in the law that governs the offence.

1.0 INTRODUCTION

Sexual violence is a rising pervasive social problem in Uganda today. It takes various forms, from sexual assaults to despicable acts of rape and defilement. Rape is one of the most severe of all forms of sexual violence and according to the Uganda Bureau of Statistics (UBOS) statistical abstract 2018, the number of rape crimes has been increasing in the past few years.[2] Rape causes multiple

[1] Asa Baber, The Stud Muffin Quiz, PLAYBOY, June 1992, at 36, 36. See also; Remick, Lani Anne. "Read Her Lips: An Argument for Verbal Consent Standard in Rape." University of Pennyslavia Law Review 141, no.3 (1993): 1103-151

[2] For instance taking a period from 2013, rape cases have increased from 1042 to 1580 by 2018 and these figures are just a tip of an ice berg for the many unreported cases.

long-term negative effects to the victim[3], families and society at large. Such effects to victims include but are not limited to Post Traumatic Stress Disorder (PTSD), depression and physical health problems among other complications.[4] For women and girls, it can lead to both genital and non-genital physical injury such as traumatic fistulas and chronic incontinence.[5] The issue of sexual violence has been a polarizing one since, if not prior to, its recognition as a crime and destructive form of victimization.[6] Although originally this type of crime was not openly discussed, research has provided a greater understanding of the offence, its devastating effects, and the social forces that continue to create an ecosystem where it can thrive.[7] This ecosystem exists as a place where a considerable number of people are sexually assaulted, survivors often feel silenced, and when they do speak, their voices often fall on deaf ears. Thus the topic of rape is a difficult one for many reasons. Rape is undeniably widespread and happens in various parts of the country. It is mostly perpetrated against women and with its contemporary escalation, its ruinous effects continue to manifest in society. Rape in whatever form is a grave attack on the physical and mental integrity as well as the sexual autonomy of the survivor. It constitutes in itself a violation of a plethora of human rights and thus impedes the full

[3] The use of the term victim is problematic. Most practitioners in the area of protection and gender based violence prefer the term 'survivor' in order to contribute to the post act social healing. Survivor does imply a sense of empowerment and emphasizes not the Ordeal but the continuation of life, but still scripts the woman or man in terms of his or her experience. For purposes of this article, both survivor and victim shall be used interchangeably.

[4] Kilpatrick, D. G., & Acierno, R. (2003). Mental health needs of crime victims: Epidemiology and outcomes. Journal of Traumatic Stress, 16, 119–132.

[5] WHO (World Health Organization) 2003, Guidelines for Medico-Legal Care for Victims of Sexual Violence, Geneva. Pg 12; See also, Uganda Law Reform Commission, Development of a Model Law for Accountability and Redress for Victims of Sexual Violence in Conflict in Uganda, Draft Issues Paper November, 2014

[6] Kristine Kilanski, Changing Definitions of Rape and Citizenship, CLAYMAN INST. FOR GENDER RES. Available at: http://gender.stanford.edu/news/2016/changingdefinitions-rape-and-citizenship

[7] Mary Graw Leary, Affirmatively Replacing Rape Culture with Consent Culture, 49 Tex. Tech L. Rev. 1 (2016)

enjoyment of such other human rights, for instance the right to life[8], physical and mental health, personal security, equality within the family[9] and before the law regardless of gender and gender identity[10], the right to be free from discrimination and torture and other ill treatment[10], amongst others.[11] Rape is more devastating today than ever before not only because of its prevalence but also the multiple barriers in accessing justice and redress, including harmful gender stereotypes, misconceptions of what sexual violence is, victim-blaming, credibility questioning and inadequate support, among other impediments towards survivors.

This therefore has created an urgent need to take action to prevent and protect women and girls from this emergent scourge, to re – examine our humanity and beliefs and to punish all acts of rape, as well as to provide transformative reparation to victims. Such deliberate efforts must go beyond individual victims and should instead seek to transform laws, policies and attitudes that are the root causes of sexual violence crimes.[12] Therefore, this article while taking cognizance of the fact that all sexual violence, regardless of the sex, gender or gender identity of the victim, is important as a human rights issue, focuses on rape in Uganda and demystifies the notion of consent as used in rape cases and goes on to make recommendations to counter this emergent scourge, so as to advance women rights since they are statistically disproportionately affected by this violation.[13]

2.0 RAPE IN UGANDA

Rape is a major legal, social and academic concern because of how atrocious it is – an invasion of one's bodily autonomy and an assault on their dignity. Rape

---

[8] Article 22, 1995 Uganda Constitution

[9] Article 31 [10]
Article 21

[10] Article 24

[11] All rights are not exhaustive; Article 45

[12] Special Rapporteur on violence against women 2010 report, UN Doc A/HRC/14/22, 23 April 2010

[13] Most rape victims according to the 2018 annual police crime report are women

attacks the foundations of what it is to be human, treating the individual and his or her body as mere objects. Rape is a serious criminal act that denies a woman the right to choose when, if and whom to have sex with. The Act of rape is a gross violation of a woman's body, abhorrent whomever the perpetrator and her relationship to him.[14] It can have an enduring impact on the lives and health of victims, their families and communities. Rape occurs in many other contexts perpetrated (mostly) by men of every socio – economic class, from the manual laborers up the top echelons of white collar executives, in villages and in cities, in the poorest of slums and the wealthiest of exclusive neighborhoods. Verily, this assertion is premised on the statistical figures which put the number of prisoners convicted for rape at 100% male.[15] An analysis of the statistics shows that in 2017, 1335 cases of rape were reported and only 396 were prosecuted which translates to a paltry 29.66 percent of the total number of reported crimes.[16] In 2018, 1580 cases of rape were reported, these are 1580 victims! Of these 644 were taken to court, 16 cases secured convictions, one case was dismissed, 620 are pending in court and 618 are under investigations.[17][18] These statistics correspond with those in the 2018 Uganda Police annual crime report. According to the police annual crime report, the crime distribution of rape stands

[14] Porter, Holly (2013) After rape: justice and social harmony in northern Uganda. PhD thesis, The London School of Economics and Political Science (LSE) at pg 122, Available at; http://etheses.lse.ac.uk/717/

[15] UBOS statistical abstract, Table 2.6.17, at page 61 Available at; https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.ubos.org/wpcontent/uploads/publications/05_2019STATISTICAL_ABSTRACT_2018.pdf&ved=2ahUKEwi_o4ysxO7mAhVlmVwKHfS2Bx8QFjAAegQIBBAB&usg=AOvVaw3xCcTekvtiaciWbFZgApd

[16] Ibid, at pg 193

[17] Uganda police annual crime report 2018 at Pg 37 Available at: https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.upf.go.ug/wpcontent/uploads/2019/05/annual-crime-report-

[18] ..pdf&ved=2ahUKEwjJ4s62_OrmAhUyQEEAHU8kBaEQFjAAegQIBRAB&usg=AOvVaw2ap7u6Tff7YURveDufjeiR

at 811 incidences in rural areas as compared to the 730 cases in urban areas.[19] This clearly underscores the severity and escalation of acts of rape today. A summary of these statistics of the cases reported in contrast with those prosecuted across various years is illustrated below.

Figure 1:

Table showing rape statistics from the year 2014 to 2018

YEAR	CASES OF RAPE	PROSECUTED
2018	1,580	644
2017	1,335	396
2016	1,454	614
2015	1,099	564
2014	1,042	676

Source: Uganda Police Force and UBOS

2.1 DEFINITION OF RAPE

The term rape is imbued with diverse legal meanings and there are also varying interpretations of what should be classified as an act of forced or coercive carnal knowledge. Historically, '*raptus'* the generic term of rape was to imply 'violent theft', applied to both property and person in Roman culture.[20] This etymology comes as no surprise to the adoption of a force based definition of rape by most penal statutes, because of the element of force or violence that is usually expended in the commission of the offence.

By definition, rape, under international criminal law regime, refers to the nonconsensual [invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim

[19] Ibid

[20] Jiloha R C. From rape to sexual assault: Legal provisions and mental health implications. Indian J Soc Psychiatry 2015 [accessed on January 20 2020];31:9-18. Available at: http://www.indjsp.org/text.asp?2015/31/1/9/161992

with any object or any other part of the body.[21] In ***The prosecutor v John Paul Akayesu[22]***, rape was defined widely as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. This definition did not just limit rape to just penile-vaginal penetration and is broad enough to cover penetration by foreign objects.

Under common law, in ***DPP V Morgan,*** Lord Hailsham defined rape as;

> *"Rape consists in having unlawful sexual intercourse with a woman without her consent and by force... It does not mean there has to be a fight or blows have to be inflicted. It means there has to be some violence used against the women to overbear her will or that there has to be a threat of violence as a result of which her will is over borne."*[23]

According to Ugandan penal law, rape is embodied in the Penal Code Act[24] under crimes against morality. The Penal Code Act, hereinafter referred to as the PCA, defines rape as;

> '*Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the Act, or in the case of married woman, by personating her husband commits the felony termed rape.*[25]

---

21 Article 7(1)-(g)1(1): International Criminal Court, Elements of Crimes, PCNICC/2000/1/Add.2 (2000). The International Criminal Court's Elements of Crimes further refer to such an invasion having been "committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking

22 The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." (Article 7(1)-(g)1(2))

23 DPP v Morgan & 3 Ors (1976) AC 182; Cited in Uganda v Kahooza Julius HCT – 01 – CR – CS – 020 – 2013

24 Cap 120 Laws of Uganda 2000

25 PCA, Chapter XIV, Section 123

This definition of rape under the PCA comes short in so far as not including penetration by foreign objects when a strict application of the section is taken and further uses less gender neutral language "…*carnal knowledge of a woman or girl…"* oblivious of the fact that men/boys too can be raped, albeit in rare circumstances. The section also does not provide for marital rape as it only makes mention of a person "…personating the husband…" but not the spouse. Notwithstanding the above shortcoming, it flows from the above definition that consent lies central to the offence of rape. This notion of consent will be substantively dealt with in the subsequent section. Nonetheless, it is worth observing beforehand that the rationale for consent lies in the fact that women have full rights to their bodies and have the choice as to when and with whom they may want to have sexual intercourse.[26] Courts in Uganda have on various instances weighed in on this subject of rape in regards to it being an encroachment on women rights. In ***Uganda v Lomoe Nakoupuet***[27], Court decried the continued treatment of women and girls as mere sex commodities or possessions, associated stereotypes as well as the practice of not treating women and girls as full human beings. Court observed that rape is a brutal and backward culture promoting violence against women. It [court] asserted that rape is a form of torture, a cruel, inhuman and degrading treatment which is outlawed by our Constitution.[28] Under the constitution, the prohibition of any form of torture or cruel, inhuman and degrading treatment or punishment is sacrosanct and needs no expounding. This prohibition is further made non – derogable under Article 44 of the Constitution. Besides, Clause (2) of article 32 of the Constitution is equally instructive in regards to cultural rape and is directly against any form of sexual violence propped by customs and traditions.

It provides:-

[26] Uganda v Byarugaba Erikando Kabigabwa, Criminal Session Case No.361 of 2013
[27] High court Criminal Case No. 109 of 2016
[28] Article 24, 1995 Uganda Constitution

> *"Laws, cultures or traditions which are against the dignity, welfare or interest of women or any marginalized group…. or which undermine their status, are prohibited by this Constitution"*

This article therefore postulates that the continued infraction of these constitutional rights cannot be condoned and as such rape must be fought from all fronts. Rape threatens a woman's physical safety and denies her freedom of sexual choice and, at the same time, weakens the security and morality of society.[29] This ultimately calls for a more deliberate approach to make all spaces safe for the women in Uganda. A critical examination of statistics of rape indicates that the rates of reporting and prosecution of rape cases within Uganda are low.[30] The inability to prosecute denies women, who have experienced assault, their right to justice within the formal legal system and allows perpetrators to go unpunished.[31] The patriarchal society further makes it hard for the women to come out since there are stereotype connotations that surround the victims once they choose to speak up against their aggressors. Gender stereotyping, a practice of ascribing specific attributes, characteristics or roles to a man or woman by reason of her or his being a man or woman is still entrenched in society and this is not making matters any easier.

3.0 CONSENT IN RAPE CASES

Sexual violence too often occurs when someone's ability to express unwillingness is impaired, whether by fright, intimidation, alcohol, or drugs.[32] The debate

---

[29] Towards a consent standard in the law of rape, Available at; https://www.google.com/url?sa=t&source=web&rct=j&url=https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi%3Farticle%3D3887%26context%3Duclrev&ved=2ahUKEwi_voWmwe3mAhUTolwKHdgRAGYQFjAAegQIARAB&usg=AOvVaw2QAf1VyMg8XvIe6UCX96H

[30] See Figure 1, at pg 5

[31] Holmes, Caren, "The Justice-Seeking Power of Women who Experience Sexual Violence in Uganda" (2015) Independent Study Project (ISP) Collection 2173 https://digitalcollections.sit.edu/isp_collection/2173

[32] Stephen J. Schulhofer,Reforming the Law of Rape, 35Law & Ineq.335 (2017). Available at: https://scholarship.law.umn.edu/lawineq/vol35/iss2/11

surrounding what amounts to consent in rape cases is therefore highly charged and is further complicated by the absence of an express statutory definition of consent. The absence of consent is a pivotal ingredient in the proof of an act of rape. It is important to note that what may ordinarily pass for consent, on closer scrutiny, could have been brought about by fear or fraud and may not have been given freely or voluntarily. Thus, a question arises as to whether the law in this respect, as contained in the Penal Code and interpreted by the courts, is sufficient, or whether a statutory definition could afford greater protection to women, particularly in cases where the threat is not of physical harm. This article suggests that a statutory definition of consent should be included in the Penal Code highlighting the key components of consent. This apparent lack of a definition of consent has aroused massive practical and scholarly convolution. This esoteric phenomenon obfuscates a rather simple matter that 'No means No'. It is worth observing that in sexual offences like rape, the absence of consent renders unlawful an otherwise lawful activity.

3.1 CONSENT DEFINED

There is no statutory definition of consent in Uganda's Penal Code and as such, the meaning of what amounts to consent varies, and is subject to debate. Consent simply connotes the voluntary permission given by a competent person[33], acquiescing to undertake or indulge in sexual activity. This definition however is just an attempt to simplify a relatively complex phenomenon. In order to unravel the complexity, consent must be examined in twofold; as it relates to the purpose of criminal law and secondly in context as part of a larger multidisciplinary constellation of measures to address sexual assault.[34] For purposes of criminal law, consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances.[35] It

[33] Black's law dictionary, 8th Edn, at page 919

[34] Mary Graw Leary, Supra FN 7

[35] M.C. v Bulgaria (2003) ECHR 651, paras 163. See also Vertido v The Philippines, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii). See

must be given as a voluntary and ongoing agreement to engage in a particular sexual activity, and can be rescinded at any time.[36] Developments in international criminal law have led to the recognition that consent can be given freely and genuinely only where the free will of one the consenting parties is not overpowered by coercive circumstances, and when the person is capable of consenting.[37] On the other hand, as a measure to address sexual assault, consent must at all times be solicited and given prior to any sexual interaction by whomever is involved. Quite many people express a level of trepidation about what amounts to consent? Questions like; Can a woman who is drunk give consent? Can a woman withdraw her consent at any time during the sexual activity? and so on, linger in the minds of many people. To clear these questions, consent can only be given freely. This means the consent must be independent of any undue influence, and must be given by a person capable of giving consent. In Uganda, the age of consent is 18 years[38] and sexual activity with a person below the age of 18 is defilement. Some scholars refer to it as statutory rape, essentially because it is rape save for the fact that it is meted out on a minor who is incapable of giving consent. Closely related to capacity to consent, is the notion of intoxication that incapacitates the person's cognitive faculties thus rendering them incapable of giving valid consent. It follows therefore that when anyone takes advantage of a woman in this state, the offence of rape is committed without question. This situation was seen in the case of ***Uganda v Wadri***

---

also Istanbul Convention, art 36 (2); CEDAW Committee, General Recommendation 35, para 33; UN Handbook for Legislation on Violence against Women, 2012, p 24.

[36] This has been affirmed in a number of commonwealth judgments, for example, by the High Court of Justice of England and Wales in R v DPP and "A" [2013] EWHC 945 (Admin), available at: www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Judgments/f-vdpp-judgment.pdf.

[37] See International Criminal Court, "Elements of Crimes" (2011), Elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)1, p 8, and the war crime of rape in international and non-international armed conflicts under art 8(2)(b)(xxii)-1 (p 28) and article 8(2)(e)(vi)-1, pp 36-37. See also International Criminal Court, "Rules of Procedure and Evidence", UN Doc ICC-ASP/1/3 (2002), Rule 70(a), (b) and (c).

[38] Under Article 31(1)

Farouk.[39] In this case, alcohol was brewed at the home of the complainant until late in the evening. Some customers who came to buy the alcohol bought some for the complainant as a result of which she became intoxicated. At around 10.00 pm she retired to the veranda of her house from where she soon fell asleep. She awoke much later to find herself in a bush about forty meters away from her home with a man lying on top of her having sexual intercourse with her. Justice Stephen Mubiru found that by virtue of her intoxication, the victim was not capable of giving consent thus the act of rape had taken place.

Equally important in understanding consent is that it can be rescinded at anytime. This flows from the fact that since it is given freely, so should the person retain the right to rescind such consent. Thus, there should be no assumption in law or in practice that a victim gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether or not the perpetrator threatened to use or used physical violence.[40]

3.2 MARITAL RAPE

Closely related to the notion of consent is marital rape. The purpose of this subsection is to discuss marital rape in terms of the traditional view that upon marriage, the woman gives her irrevocable consent to the husband to indulge her at whatever occasion for carnal pleasure.[41] Marital rape is often a broader pattern of spousal abuse. It is also a manifestation of sexual violence and in this context treated as a related emergent issue. It has significant public health concern worldwide that has existed for a long time and has remained mostly hidden and understudied because of the nature of the offence - it often takes

[39] High Court Criminal Sessions Case No. 0039 of 2014

[40] Right to Be Free From Rape; Overview of Legislation and State of Play in Europe and International Human Rights Standards, Available at: https://www.amnesty.org/en/documents/eur01/9452/2018/en/

[41] This principle was established by Lord Chief Justice Hale in 1736 when he decided that "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract" See also; Barton JL, The story of Marital Rape. Law Q Rev. 1992; 108:36-7.

place in private marital spaces.[42] In this article, marital rape connotes nonconsensual carnal knowledge occurring between spouses within the institution of marriage.[43] It is a common form of sexual violence, yet underreported because of the belief that sex is a right within marriage. This contemptible practice is mostly perpetrated by men who exercise power through coercion in their marital relationships and usually consider their wives as sexual objects.[44] It is presumed that by virtue of marriage, they (men) have acquired rights to have sex with their wives in the guise of exercising their conjugal rights, regardless of whether they consent or not. Disclosures in this genre of rape, like most sexual offences, are hard to come by because of gender stereotypes in society among other socio-cultural issues.

Marital rape violates women's rights and has a profound effect on the overall social well-being of individual families as it corrodes the very basic unit of society – family. Previously marital rape was given little attention and in the statute books it was neither recognized nor criminalized. In fact under common law, consent was presumed to be given at marriage and as such there was no such a thing as marital rape. However this position came under scrutiny in the case of ***Uganda v Yiga Hamidu and Ors***.[45] Court in this case observed that existence of a valid marriage no longer constituted a good defence against a charge of rape after the promulgation of the Constitution of the Republic of Uganda, 1995. The court expounded on a number of constitutional provisions for instance Article 33.

> *Article 33*
>
> *(1) Women shall be accorded full and equal dignity of the person with men.*
>
> ……

[42] Mengo, C., Okumu, M., Ombayo, B., Nahar, S., & Small, E. (2019). Marital Rape and HIV Risk in Uganda: The Impact of Women's Empowerment Factors. Violence Against Women, 25(15), 1783–1805. https://doi.org/10.1177/1077801218821444

[43] Ibid

[44] Ibid

[45] High Court Criminal Session Case 005 of 2002

> ……
>
> *(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution*

Indeed court came to the conclusion that the presumption of consent, even where a man and woman are validly married, were wiped out by the provisions of the 1995 Constitution. Husband and wife enjoy equal rights in marriage. They enjoy equal human dignity. No activity on the party of any of the two which is affront to those rights in relation to the other, can be sustained by a court of law. It thus appears that although not expressly criminalized in penal statutes, marital rape is a crime as expounded by the learned judge in the aforesaid case.

4.0 PROSECUTION OF RAPE CASES

Rape prosecution is a complex, multistage process, and few cases make it all the way through the criminal justice system.[46] According to the 2018 UBOS statistical abstract, the actual number of crimes prosecuted is way lower than the number of crimes reported. This proves that fewer cases make it to court. How these [legal] system interactions unfold can have profound implications for victims' recovery. When victims reach out for help, they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help.[47] However, despite the law and policies being unequivocal on paper, the rape scourge persists. Courts have given progressive judgments to fit the contemporary situation but a lot still needs to be done. Victims often decide not to pursue legal routes as they are aware of the length of the legal process and are unwilling to put themselves through years of uncertainty and

[46] Bouffard, J. (2000). Predicting type of sexual assault case closure from victim, suspect and case characteristics. Journal of Criminal Justice, 28, 527–542

[47] Rebecca Campbell, The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems, Available at; https://www.researchgate.net/publication/23478485_The_psychological_impact_of_rape_victims?enrichId=rgreq-ba48d4b4ca578494897ec21ec6ad520f-XXX&enrichSource=Y292ZXJQYWdlOzIzNDc4NDg1O0FTOjM4ODU3OTY4MDM3NDc4NEAxNDY5NjU2MDIzMzcy&el=1_x_3&_esc=publicationCoverPdf

secondary traumatisation. The knowledge that one has to remember the minute details of their assault for years to come, for a day in court in several years' time (if they are "lucky" enough to get one at all), while trying to heal and move on, can be a significant barrier for victims.[48]

The main issue under prosecution of sexual violence cases in court relates to corroboration[49]. Corroboration is important not only to prove the act of sexual intercourse but also that the accused committed the offence. Previously, victims' testimonies were treated with suspicion and a higher need to ascertain their veracity was attached. The supreme court of Uganda in this regard has set the mark on the issue of corroboration. In ***Ntambala Fred v Uganda***[50], Justice Ekirikubinza averred that a conviction can be based on the testimony of the victim of an offence even when he/she is a single witness, since the Evidence Act does not require any particular number of witnesses to prove any fact[51] and "what matters is the quality and not quantity of evidence." The learned judge however emphasized that this must be as true in a sexual assault prosecution as it is in other offences. The learned Judge took cognizance of the fact that historically courts were, as a matter of practice, required to warn themselves of "the danger" of acting on the uncorroborated evidence of a complainant in a sexual assault case.[52] If no such warning was given, the conviction would normally be set aside unless the appellate court was satisfied that there had been no failure of justice. Thus by this judgment, the matter of corroboration was clarified and hence a binding precedent set. The learned Justice reasoned that it

---

[48] Right to Be Free From Rape, Op cit See FN 40

[49] Corroboration is defined as independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed it. See also; Osborne's Concise Law Dictionary 5th Edn at pg 90

[50] Supreme Court of Uganda Criminal Appeal No. 34 of 2015

[51] Evidence Act, Cap 6, section 133

[52] The reasons historically given for the need for corroboration of evidence in a sexual assault prosecution was that women are by nature peculiarly prone to malice and mendacity, and are particularly adept at concealing it. See also; Lillian TibatemwaEkirikubinza, Criminal Law in Uganda: Sexual Assaults and Offences Against Morality (2005) Fountain Publishers, Kampala at pg 381

is a statistical fact that the majority of victims of sexual assaults are women, therefore the effect of applying the cautionary rule on corroboration in sexual offences affects way more women than it does men. The Supreme Court in this regard guided that the evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied to such evidence is that it must be cogent. From the above it can be deduced that the law on corroboration is now settled and this goes a long way to ensure that the survivors are not weighed down by an unnecessary burden of proving a crime that often occurs in the covers of the dark and in secluded places.

Equally intriguing is the usual need to prove force or its resistance thereof. In Uganda, from the definition of rape, it can be deduced that the PCA takes a force based definition of rape. This ingredient of force perhaps has roots in distrust of the complainant's credibility which creates an insistence on evidence of resistance.[53] In fact resistance also points to the non consensual nature of the sexual activity since often victims meet their aggressors with some gust of force. On this very issue, the European Court on Human Rights weighed in by establishing in its landmark ruling that lack of violence does not mean consent. It averred that the decisive factor to establish the crime of rape was the lack of consent rather than proof of force and resistance of the survivor.[54] It went on to give the reasoning behind this holding stating that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished thus jeopardizing the effective protection of the individual's sexual autonomy". This article agrees with this reasoning because force has many faces and rape does not at all times inherently involve aberrant physical brutality.

---

[53] Aviva Orenstein, Special Issues Raised by Rape Trial , 76 Fordham L. Rev. 1585 (2007). Available at: https://ir.lawnet.fordham.edu/flr/vol76/iss3/11

[54] M.C. v Bulgaria, No. 39279/98, ECHR 2203XII

Therefore, in courts of law, for one to successfully prove the offence of rape, the following ingredients must be satisfied beyond reasonable doubt.[55]

i) That there was unlawful Sexual Intercourse with the complainant. There has to be evidence of sexual intercourse between a male and female in which there is at least some slight penetration of the woman's vagina by the man's penis[56] and/or other object.

ii) That the complainant did not consent to that Sexual Intercourse. Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence

iii) That it was the accused who had the unlawful Sexual Intercourse with the complainant. Ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime[57]

In conclusion about the prosecution of rape cases, court looks into the adduced evidence and the cogent testimony of the single witness tested, against the ingredients of the offence and the accused is convicted if the evidence meets the criminal standard of proof [beyond reasonable doubt] or exonerated if such evidence comes short. Thus prosecution of rape cases illustrate how criminal law interacts with particulars of the crime so as to administer much sought after justice to the victim/survivor of rape.

5.0 CONCLUSION AND RECOMMENDATIONS

Criminal law should identify rape and other sexual violence as crimes against the physical and mental integrity, as well as sexual autonomy of the victim, rather than just as crimes against morality, public decency or honour.[58] By

[55] Woolmington v Dpp (1935) AC 462; Miller versus Minister of Pensions [1947] 2 All ER 372

[56] Uganda v Kizito Rogers High court Criminal Sessions Case No. 0092 of 2016

[57] Ibid

[58] See CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 33; See also, Handbook for Legislation on Violence against Women. United

constructing rape within the discourse of morality, the Penal Code places emphasis on a subjective ethical notion while pushing the violent aspects of the crime to the margins.[59] Criminal law should enable the effective prosecution of any perpetrator for acts of sexual violence, and there should be no exemptions for certain perpetrators (such as a marital rape exemption which assumes that married women automatically consent to sexual contact with their husbands at all times and under all circumstances).[60] Further, the definition of rape should include a broad range of coercive circumstances where consent cannot be freely given, while outside such circumstances, it should require proof by the accused, of steps taken to ascertain whether the complainant/survivor was consenting.[61] The existing provisions in the Penal Code fail to address many of the "grey areas" inherent in sexual relations, thereby ignoring the many complicated aspects of sex. Female and male survivors of rape should be provided with prompt, wide-ranging and confidential services, including medical and psychosocial support, legal assistance, and social reintegration and rehabilitation services, in order to enhance and speed up their recovery. In Uganda there has been some progress in efforts to support survivors; however the overall lack of comprehensive support services for victims of Sexual

---

Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24, available at: www.unwomen.org/en/digital-library/publications/2012/12/handbookfor-legislation-on-violence-against-women

[59] Sylvia Tamale, Women's Sexuality as a Site of Control & Resistance: Views on the African Context, Available at: https://www.google.com/url?sa=t&source=web&rct=j&url=https://mifumi.org/wpcontent/uploads/2017/02/MIFUMI-Bride-Price-Conference-2004-Women%25E2%2580%2599s-Sexuality-as-a-Site-of-Control-Resistance-Views-on-the-African-Context-Sylvia-Tamale.pdf&ved=2ahUKEwjUqOWiyO7mAhWSh1wKHeb7AvUQFjAAegQIARAB&usg=AOvVaw0mnS2aWeN5yH7KBThdFC4r

[60] See Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24, available at: www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislationonviolence-against-women; See also: SW v United Kingdom, Decision on merits, App No. 20166/92, A/355-B, IHRL 2596 (ECHR 1995), 22 November 1995, European Court of Human Rights, para 44. See also PACE Resolution 1691 (2009), para 5.4, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17784&lang=en.

[61] Vertido v The Philippines, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii)

Violence Crimes like rape remains a serious weakness, especially in rural and remote areas where most of these crimes take place.[62]

Awareness campaigns about this endemic crime must be intensified so as to counter and ameliorate the impact of gender stereo types and other impediments that discourage victims/survivors from coming up against their aggressors. This is so because many women fear coming forward about their experiences because sexuality is highly stigmatized within their communities. Women are taught both directly and indirectly that they should keep quiet about issues surrounding their own sexual behavior and health.[63] By this measure, it will go a long way to preserving family which is extremely important as it is the cornerstone for production and reproduction of society and all its norms.[64]

By way of conclusion, rape in Uganda is an emergent issue that needs immediate attention. Perpetrators of this crime must be brought to book and survivors should be given the necessary support. That way, this egregious attack on women and their bodies will be kept in check and all spaces will be safe for women to fully express themselves without fear of being raped or sexually assaulted.

---

[62] Uganda Law Reform Commission, Development of a Model Law for Accountability and Redress for Victims of Sexual Violence in Conflict in Uganda, Draft Issues Paper November 2014

[63] Holmes, Caren, "The Justice-Seeking Power of Women who Experience Sexual Violence in Uganda" (2015).Independent Study Project (ISP) Collection. 2173. Available at: https://digitalcollections.sit.edu/isp_collection/2173

[64] Politics of putting asunder, The Family, Law and Divorce in Uganda (2017) Fountain Publishers, Kampala at pg 10

REFERENCES

Asa Baber, The Stud Muffin Quiz, PLAYBOY, June 1992

Aviva Orenstein, Special Issues Raised by Rape Trial, 76 Fordham L. Rev. 1585 (2007). Available at: https://ir.lawnet.fordham.edu/flr/vol76/iss3/11

Barton JL, The story of Marital Rape. Law Q Rev. 1992; 108:36-7.

Bouffard, J. Predicting type of sexual assault case closure from victim, suspect and case characteristics (2000) Journal of Criminal Justice, 28, 527–542

CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010)

Constitution of the Republic of Uganda, 1995

DPP v Morgan & 3 Ors (1976) AC 182

Garner, Bryan A and Henry Cambell Black, *Black's Law Dictionary*. St Paul, MN: Thomson/West

Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, available at: www.unwomen.org/en/digital-library/publications/2012/12/handbook-forlegislation-on-violence-against-women

Holmes, Caren, "The Justice-Seeking Power of Women who Experience Sexual Violence in Uganda" (2015) Independent Study Project (ISP) Collection 2173 https://digitalcollections.sit.edu/isp_collection/2173

International Criminal Court (ICC) *Rules of Procedure and Evidence*, UN Doc ICC-ASP/1/3 (2002)

International Criminal Court (ICC), *Elements of Crimes* (2011)

International Criminal Court (ICC), Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes, 2 November 2000, PCNICC/2000/1/Add.2

Jiloha R C. From rape to sexual assault: Legal provisions and mental health implications. Indian J Soc Psychiatry 2015 Available at: http://www.indjsp.org/text.asp?2015/31/1/9/161992

Kilpatrick, D. G., & Acierno, R. (2003). Mental health needs of crime victims: Epidemiology and outcomes. Journal of Traumatic Stress, 16, 119–132.

Kristine Kilanski, Changing Definitions of Rape and Citizenship, CLAYMAN INST. FOR GENDER RES. Available at: http://gender.stanford.edu/news/2016/changingdefinitions-rape-and-citizenship

Lillian Tibatemwa-Ekirikubinza, Criminal Law in Uganda: Sexual Assaults and Offences Against Morality (2005) Fountain Publishers, Kampala

M.C. v Bulgaria (2003) ECHR 651

Mary Graw Leary, Affirmatively Replacing Rape Culture with Consent Culture, 49 Tex. Tech L. Rev. 1 (2016)

Mengo, C., Okumu, M., Ombayo, B., Nahar, S., & Small, E. (2019). Marital Rape and HIV Risk in Uganda: The Impact of Women's Empowerment Factors. Violence Against Women, 25(15), 1783–1805. https://doi.org/10.1177/1077801218821444

Miller v Minister of Pensions [1947] 2 All ER 372

Ntambala Fred v Uganda Supreme Court of Uganda Criminal Appeal No. 34 of 2015

Politics of putting asunder, The Family, Law and Divorce in Uganda (2017) Fountain Publishers, Kampala

Porter, Holly (2013) After rape: justice and social harmony in northern Uganda. PhD thesis, The London School of Economics and Political Science (LSE) at pg 122, Available at; http://etheses.lse.ac.uk/717/

R v DPP and "A" [2013] EWHC 945 (Admin), available at: www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Judgments/f-vdpp-judgment.pdf.

Rebecca Campbell, The Psychological Impact of Rape Victims' Experiences With the

Legal, Medical, and Mental Health Systems, Available at; https://www.researchgate.net/publication/23478485_The_psychological_impact_of_rape_victims?enrichId=rgreq-ba48d4b4ca578494897ec21ec6ad520f-XXX&enrichSource=Y292ZXJQYWdlOzIzNDc4NDg1O0FTOjM4ODU3OTY4MDM3NDc4NEAxNDY5NjU2MDIzMzcy&el=1_x_3&_esc=publicationCoverPdf

Remick, Lani Anne. "Read Her Lips: An Argument for Verbal Consent Standard in Rape." University of Pennyslavia Law Review 141, no.3 (1993): 1103-151

Right to Be Free From Rape; Overview of Legislation and State of Play in Europe and International Human Rights Standards, Available at: https://www.amnesty.org/en/documents/eur01/9452/2018/en/

Special Rapporteur on violence against women 2010 report, UN Doc A/HRC/14/22, 23 April 2010

Stephen J. Schulhofer,Reforming the Law of Rape, 35Law & Ineq.335 (2017). Available at: https://scholarship.law.umn.edu/lawineq/vol35/iss2/11

Sylvia Tamale, Women's Sexuality as a Site of Control & Resistance: Views on the African Context, Available at: https://www.google.com/url?sa=t&source=web&rct=j&url=https://mifumi.org/wpcontent/uploads/2017/02/MIFUMI-Bride-Price-Conference-2004-Women%25E2%2580%2599s-Sexuality-as-a-Site-of-Control-Resistance-Views-onthe-African-Context-Sylvia-Tamale.pdf&ved=2ahUKEwjUqOWiyO7mAhWSh1wKHeb7AvUQFjAAegQIARAB&usg=AOvVaw0mnS2aWeN5yH7KBThdFC4r

The Evidence Act (Cap 6)

The Penal Code Act (Cap.120) Laws of Uganda

The Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998

Towards a consent standard in the law of rape, Available at;

https://www.google.com/url?sa=t&source=web&rct=j&url=https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi%3Farticle%3D3887%26context%3Duclrev&ved=2ahUKEwi_voWmwe3mAhUTolwKHdgRAGYQFjAAegQIARAB&usg=AOvVaw2QAf1VyMg8XvIe6UCX96H

UBOS statistical abstract, Table 2.6.17, Available at; https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.ubos.org/wpcontent/uploads/publications/05_2019STATISTICAL_ABSTRACT_2018.pdf&ved=2ahUKEwi_o4ysxO7mAhVlmVwKHfS2Bx8QFjAAegQIBBAB&usg=AOvVaw3xCc-TekvtiaciWbFZgApd

Uganda Law Reform Commission, Development of a Model Law for Accountability and Redress for Victims of Sexual Violence in Conflict in Uganda, Draft Issues Paper November, 2014

Uganda police annual crime report 2018 at Pg 37 Available at: https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.upf.go.ug/wp-content/uploads/2019/05/annual-crime-report-2018..pdf&ved=2ahUKEwjJ4s62_OrmAhUyQEEAHU8kBaEQFjAAegQIBRAB&usg=AOvVaw2ap7u6Tff7YURveDufjeiR

Uganda v Byarugaba Erikando Kabigabwa, Criminal Session Case No.361 of 2013

Uganda v Kahooza Julius HCT – 01 – CR – CS – 020 – 2013

Uganda v Kizito Rogers High court Criminal Sessions Case No. 0092 of 2016

Uganda v Lomoe Nakoupuet High court Criminal Case No. 109 of 2016

Uganda v Wadri Farouk High Court Criminal Sessions Case No. 0039 of 2014

Uganda v Yiga Hamidu and Ors High Court Criminal Session Case 005 of 2002

UN committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017 Victims of Sexual Violence, Geneva.

WHO (World Health Organization) 2003, Guidelines for Medico-Legal Care for

Woolmington v Dpp (1935) AC 462