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ACKNOWLEDGEMENT

This Edition has been published in commemoration of the fifty years in existence of the Makerere Law Journal. It also marks the start of another fifty years of even more traction not only in publishing but also information sharing, influencing meaningful change in society and harnessing the skills of students at Makerere Law School.

Over the past fifty years, the journal has bred some of the greatest minds at law school and even thereafter. Going forward, it is intended that it continues to influence world decisions in the practice of law by highlighting the attitudes, needs, problems and feasible solutions in the legal field.

I would like to express my most immense gratitude to the former Editorial Boards of this esteemed journal and the great steps over the fifty years. It is on your broad shoulders that we stand today. I appreciate and recognize the effort of the Makerere Law School to support the workings of the journal. I am also most grateful to the 2021/22 Editorial Board, for being the most formidable team anyone could ever ask for. Your relentless devotion towards achieving the goals set at the start of the tenure is commendable.

Finally, I am grateful to you, the readers of the Makerere Law Journal. Your constant desire for knowledge on vast issues of legal and quasi legal relevance motivates us to give the journal our all. Needless to say, your constant submissions keep us busy.

Therefore, hope you delve into this edition and enjoy it, with all it bears. Thank you.

Mwebaze Julianne

EDITOR-IN-CHIEF,

MAKERERE LAW JOURNAL

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ANCIENT RELIC OR AGE OLD WISDOM? A REVIEW OF THE RELEVANCE OF CUSTOMARY LAW IN UGANDA

Daniel R. Ruhweza[*]

ABSTRACT

Owing to constant change and modernization, the African legal practitioner and in particular the Ugandan legal practitioner finds themselves at crossroads. This is in the face of the black letter of the law. With increasing codification of the law, the relevance of customary law as a source of law with the Ugandan legal system is besieged on either side by the doctrines of repugnancy and modernity. Cases have been decided outlawing cultural practices like the return of bride price after divorce. These practices have always been considered the core of our customs and cultures that came to be known as customary law. In the face of this onslaught, the author examines whether it is time to do away with customary law as a source of law or whether, despite the rapidly changing social economic and political needs, the customs of the different people of Uganda continue to inform the codification of law today.

1. INTRODUCTION TO CUSTOMARY LAW

1.1 HISTORICAL BACKGROUND

Uganda as a territorial unit is a creation of the colonial period. Its external boundaries were determined first by internal agreements and then by administrative convenience. As a result, Uganda contains forty different peoples who belong to one of four completely different major languages groups; the Nilotic people in the North, the Sudanese in the Northwest, the Nilo-Hamites in the North East and the Bantu who occupied the area in the South.[1] However, modern Uganda is governed as one sovereign state and republic whose official language is English[2] and capital, Kampala.[3] According to the

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[1] Henry Francis Morris & James S. Read, *Uganda: The Development of its laws and constitution*, (British Commonwealth Series, Vol. 13.) London: Stevens 1966

[2] Article 6(2) of the Constitution of the Republic of Uganda 1995

third schedule of the Constitution, Uganda had fifty six indigenous communities by 1926[4] and to date, these are the communities recognized by the government of Uganda.

As a result of the heterogeneous nature of the people of Uganda, customary law is not a single uniform set of customs prevailing throughout the state. Rather, it is largely tribal in origin and in effect.[5] Thus, there is no customary law common to the state as a whole because it is of local nature only. The supreme court of Uganda acknowledged this in the 2015 *Mifumi Vs. AG.*[6] The court noted that bride price had different meanings in different cultures across Uganda.

The Magistrates Courts Act defines civil customary law as 'the rules of conduct which govern legal relationship as established by custom and usage and neither form part of the common law nor are they formally enacted by Parliament.'[7] With such an ambiguous definition, the question present is, therefore, what is customary law within the context of the Ugandan legal system.

1.2 CUSTOMARY LAW WITHIN THE UGANDAN LEGAL SYSTEM

Customary law has certain features or characteristics which make it different from legislation or judicial precedent. Its salient features include the fact that it is unwritten in origin, capable of adjustment and unlike legislation, has no institutional legislatures, law schools, advocates, jurists or complicated and technical procedure. Customary law may exist and operate on its own or complementary to another different nature of law. It is established, accepted

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3 Article 5(4) of the Constitution of the Republic of Uganda 1995 as amended

4 Third Schedule of the Constitution of the Republic of Uganda 1995 as amended

5 Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters*(Routledge 2014) 83

6 *Mifumi (U) Ltd & Anor Vs Attorney General & Anor* [2015] Constitutional Appeal No. 02 of 2014

7 Magistrates Courts Act Cap. 16, s 1 (a)

and binding on a given society or tribe in their social relations. It may be uniform to a number of societies or tribes or it may vary from one another and from area to area.[8]

The existence of customary law is provided for in the constitution of Uganda 1995. Article 37 provides that "Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, tradition, creed or religion in community with others."[9]

Under Article 126 of the Uganda constitution 1995;

> "Judicial power is derived from the people and shall be exercised by the courts established under this law and with values, norms, and aspirations of the people".

Section 15(1) of the Judicature Act states that;

> "Nothing in this statute shall deprive High Court of the right to observe or enforce the observance of or shall deprive any person of the benefit of an existing custom which isn't repugnant to Natural Justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law"[10]

Section 10 (1) of the Magistrates Courts Act states -

> "Subject to this section, nothing in this Act shall deprive a Magistrate's court of the right to observe and to enforce the observance of or shall deprive any person of the benefit of any civil customary law which may be applicable that is not repugnant to justice, equity or good conscience

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8 R. Kakungulu-Mayambala, 'Bruno Kiwuwa v. Ivan Serunkuma & Juliet Namazzi: An Appraisal of the right to marry and found a family in Uganda' (2013) 2 East African Journal of Peace and Human Rights 334-346

9 Article 37 of The Constitution of the Republic of Uganda 1995 as amended

10 The Judicature Act Cap 13

> or incompatible either in terms or by necessary implication with any written law for the time being in force."[11]

In relation to the general *corpus juris*, customary law is ranked third in hierarchy following the Constitution (which concerns itself with the establishment of government and power distribution) and the Acts of Parliament. This was made clear in the case of *The Kabaka's Government v Musa N.S.W Kitonto*[12] which, while upholding native customary law as a living law capable of adaptation and development, noted that it was only applicable in so far as the circumstances permitted and subject to such qualifications as local circumstances rendered necessary. In circumstances where the common law and customary law conflict, customary law prevails.[13]

2. ASCERTAINING CUSTOMARY LAW

2.1 AS A MATTER OF EVIDENCE

Generally speaking, customary law may be ascertained in one of three ways as will be explained below. Firstly, it may be proved as a matter of evidence. The party alleging that their particular case is supported by customary law has the burden of proving both the existence and validity of the custom.[14] The party must first call witnesses or refer to authoritative literature to show the court what the customary law is.

This was shown in the case of *Mawanda v The Kabaka's Government*[15] where the plaintiff filed an action in the High Court of Buganda against the Kabaka's Government, claiming that as the eldest son of the late Kabaka, he was entitled, under Buganda customary law, to the title of 'Kiwewa' which traditionally came with a financial allowance and that it was the defendant's

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11 The Magistrate's Courts Act Cap 16
12 *The Kabaka's Government v Musa NSW Kitonto* [1965] 1 EA 278
13 *The Kabaka's Government v Musa NSW Kitonto* [1965] 1 EA 278
14 The Evidence Act, Cap 6, s 101
15 *Mawanda v The Kabaka's Government* [1965] EA 455

duty to decide upon such allowance from time to time. The Katikiro of Buganda, as an expert in customary law of Buganda made a winning submission of evidence "the Kabaka has traditional power to do and undo a custom" which meant that the Kabaka had the authority to deprive Mawanda of the title of Kiwewa.

In the case of *Kimani v Gikanga* , the Court of Appeal stated in the majority judgment that because of the lack of the authoritative text books and case law, it was necessary that a party relying on African customary law called evidence to prove the African customary law as he would prove any other relevant fact in their case.[16] In *Njirwa v Kagangama,*[17] court relied on Roscoe's "The Banyankole"[18] in dealing with the customary law relating to death and inheritance among the Banyankole. In the recent case of *Mifumi (U) Ltd v AG,*[19] the constitutional court noted that a custom must be proved where it is not so widespread as to be subject to judicial notice in accordance with Section 55 of the Evidence Act.

2.2 JUDICIAL NOTICE

The second method is by the system of taking Judicial Notice. This is a rule of evidence that states that where a particular fact is so notorious and known to almost all people in that particular, then such a fact may need no proof.[20] A party can therefore invite court to take judicial notice of a given custom. The customary law is in the hearts of the judges and they are presumed to know it better than anyone else. If a particular custom has arisen several times before court, it will refer to a previous case(s) where it accepted observed and enforced that particular custom.

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16 [1965] EA 745

17 *Njirwa v Kagangama* 5 U.L.R. 146

18 John Roscoe, *The Banyankole*, (Cambridge University Press, 1923) 20

19 *Mifumi (U) Ltd & 12 Others v Attorney General, Kenneth Kakuru* [2010] Constitutional Petition No.12 Of 2007

20 The Evidence Act Cap 6, Section 55

In the West African case of *Kobina Angu v Cudjoe Attah*[21] the Privy Council sated, "As is the case with all customary law it has to be proved in the first instance by calling witnesses aquatinted with the native customs until the particular customs have by frequent prove in the courts become so notorious that the courts will take judicial notice of them."

This rule was applied in *Felista Nakawuka and Ors v Uganda*[22] where court refused to take judicial notice of an old *Kiganda* custom which permits a victim of theft to be compensated for the disturbance and trouble to which he or she is put by the theft because it had neither appeared before nor was there any evidence to its existence.

2.3 USE OF ASSESORS

The third method is by the use of assessors. [23] The English jury system was not adopted in East Africa and as a result trials in Uganda are heard before judges.[24] However, criminal trials in the High Court are heard before a judge sitting with two or more assessors.[25] Assessors are lay people without any legal background who give their opinions regarding facts before the court.[26]

They assist the judge in reaching a decision by giving their opinions pertaining the case. Although the system of relying on assessors is mainly used in criminal cases (to which customary law does not apply), It is still relevant where the judges need to ascertain the existence or nature of a custom. Section 46 of the Evidence Act states that;

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21 *Kobina Angu v Cudjoe Attah* [1916] UKPC 53

22 *Felista Nakawuka and Ors v Uganda* [1972] Unreported

23 The Trial on Indictments Act Cap 23, s 3

24 In colonial East Africa only Europeans were given an option of trial by jury under certain conditions: R. Knox-Mawer, 'The Jury System in British Colonial Africa' (1958) Journal of African Law 160-163.

25 The Trial on Indictments Act Cap 23, s 3

26 The Trial on Indictments Act Cap 23, Rule 2 of the Assessors Rules, Schedule 3

> "Where the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right of persons who would be likely to know of its existence if it existed, are relevant."

A custom is a practice that has been followed in a particular locality in such circumstances that it is to be accepted as part of the law of that locality. In order to be recognized as customary law, it must be reasonable in nature and it must have been followed continuously, and as if it was a right, since the beginning of legal memory.[27]

It is therefore the habitual practice of a community or a people established by usage. It is merely social usage but can't be enforceable in the courts unless it amounts to a law. In *Ojisna v Aiyebelehin*,[28] the court of Appeal held that "The word "custom" may only reflect the common usage and practice of the people in a particular matter without necessarily carrying with it the force of law. In other words a custom may exist without the element of coercion of sanction.

John Austin had this in mind when he defined "custom as positive morality, as long as it does not receive judicial pronouncement. The element of law is important because it is that which in reality carries sanction in the event of breach." In other words, it is those customs that the people consider compulsory that constitute customary law. This law, therefore, derives its strength and vitality from its acceptance by members of the community as obligatory on them. Hence, it would not be enough if a custom is merely shown to be in existence. It must be both a custom and law.[29]

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27 Dictionary of Law (4th Edition) p 122

28 *Ojisna v Aiyebelehin* 8 [1991] N.W.L.R [209], [280]

29 Martins Library, Customary law: The characteristics, admissibility, proof, validity or otherwise of customary law: https://martinslibrary.blogspot.com/2014/08/customary-law-characteristics.html [Accessed 21 December 2021]

It is therefore a requirement under the law that custom ought to be immemorial i.e. must have existed for a long time; it must not be absolute i.e. must have been continuously existing without unnecessary interruption; must not be challenged by members of society; must be obligatory, certain, reasonable and consistent for it to be acceptable in court.

3 EVOLUTION OF CUSTOMARY LAW FROM PRE-COLONIAL TIMES TO MODERN DAY UGANDA

3.1 Customary law in pre-colonial Uganda

Prior to the advent of the British, there were many tribes and peoples in the geographical area that is now called Uganda. Some lived a settled permanent existence in one particular area like the Baganda and Banyoro; while others lived a Nomadic life moving from one place to another. The people within each tribe had an affinity for each other, they lived and worked with each other and sometimes had sub divisions within the main tribe, like the Basoga were divided into sub tribes like the Bagwere, the Banyole and the Basiki.

Other tribes had no recognizable single ruler such as the Iteso, who were governed by clans; but whatever the internal organizations, the tribes had rules which each member within the tribe obeyed. For example, a tribe possessing cattle might have clearly defined rules reserving certain areas for grazing; some like the Karimojong did not for there were no specific rights of pasture attached to any individual or group; pasturage being common to all the members of the tribe. Despite the fact that some tribes had no ruler or ruling body, they all had some method of rallying forces in time of war; the common danger would generally unite the people within the tribe.

In times of peace, all tribes had a system of redressing personal wrongs. For example in Native Buganda, Justice was administered by the High office and chiefs who were themselves familiar with the customs of their people.[30]

[30] Henry Francis Morris & James S. Read, *Uganda: The Development of its laws and*

Sometimes, it was simply the effect of public opinion, if a man did something that the people considered unfair, he might be regarded as an outcast and be evicted from the tribe, thus exposing him to the dangers of having to live amongst another tribe or on his own. This was a strong compelling reason for a man to conform to the internal rules of the tribe, a form of moral suasion.

These tribes which had a ruler and a hierarchy of chiefs had a stronger system of law in that there was a man responsible for seeing that the law was obeyed. There were also occasions when it was considered proper for a man to take the law into his own hands like in attacking a thief while in defense of property. The reach of customary law was extensive even as regards land law, for example among the Bakiga in Kigezi, a man established his claim to a stretch of unused land by marking off its boundaries with a hoe and having acquired title he retained it indefinitely and eventually passed it to his heirs[31].

The influence of customary law stretches up to criminal law where customarily, the success of redressing wrongs was often largely dependent on the effort of the injured party and his kinsman. Decisions of any judicial process were seldom enforced unless the victim perused the matter vigorously. When the people were undecided as to what cause of action should be taken, they might look for a common source such as diviners or witchdoctors so as to discern how they should act.

By modern legal standards, justice was administered in a crude fashion but the nature of the justice administered was not questioned by the people nor thought to be unjust since it consisted of cultures and customs that though were unique to each individual group people, had been practiced for such a long time that the people of that tribe had adopted them as a way of life and respected them fully.

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constitution, (British Commonwealth Series, Vol. 13 London: Stevens 1966)

[31] Eedel M.M, *Property Amond the Ciga in Uganda* (Africa XI, 3, 1938), *The Chiga of Western Uganda* (London : International African Institute 1969)

3.2 Customary law in colonial Uganda

The Introduction of British rule was preceded by commercial activity of the Imperial British East Africa Company under the leadership of Captain Fredrick Lugard. This was between 1872 and 1875, but when the IBEAC ran bankrupt, it withdrew. However, the Majesty's government sent a consul to solve the company's administrative and financial status and also protect the missionaries who had arrived in 1877.

This occasioned the imposition of a foreign legal system; that of England. The British, coming off the experience of colonizing and administering India and other parts of Africa, had seen that this was the most convenient way for Africa to have justice. This legal system ran along with the customary law, side by side and operating in each other's own sphere of jurisdiction and hierarchy of courts.

Therefore, with the establishment of the protectorate on August 27 1894, a chancery court was set up, applying English law and ignoring customary law. The source of authority for this lay in the Foreign Jurisdiction Act and the African Order in Council which stated that "So far as circumstances permitted to be exercised upon the principles of and in conformity to, the substance of the law for the time being in force in England[32]"

In 1902, Her Majesty's Government proclaimed an Order in Council which formalized colonial rule in Uganda and was the fundamental law of the protectorate. The Order in Council had the effect of establishing a High Court with full jurisdiction over all persons and matters in Uganda and removed the consular court. It also brought in the legal practitioners' rules as stated by Judge Eivis.

[32] 1889 Order in Council

The Order in Council further stated that "Jurisdiction was to be exercised as far as circumstances permitted in conformity with the civil procedure, criminal procedure and penal codes of India[33]".

3.3 The Doctrine of Repugnancy

The Order in Council also provided that the governor was to respect existing Native law and custom in all cases, Civil and Criminal to which Natives are parties. Courts would be guided by Native law so far as it is applicable and not repugnant to justice and morality and inconsistent with any order in council ordinance or rules or regulations made there under.

This gave rise to what came to be known as the Repugnancy doctrine under Article 20 of the Order in Council. It was intended to remove those native laws and customs that were seen as backward in light of the foreign imposed rules of morality. However, due to the fact that it was a subjective test premised on the morals and standards of an ordinary English person, many Native customs were rendered void.

This doctrine was stressed in the case of *Rex V Amkeyo.*[34] The issue was whether the woman the accused was staying with could compelled to testify against him basing on the concept of spousal privilege. The court was forced to inquire as to whether the relationship between the accused and the woman was one of marriage.

The court examined the features of the relationship and concluded that; a) The woman was not a free contracting person b) The woman was treated as a chattel c) it was a polygamous marriage. The court held that the relationship did not fit the idea of marriage as understood in England. The alleged custom of traditional marriage through payment of bride price was found to be implicitly repugnant to conscience and morality.

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33 1902 Order in Council

34 *Rex. V. Amkeyo* [1917] 7 EACA PLR 14

However with regard to what would be considered repugnant, courts took an alternative view to what was in the case of *Marko Kajubi V Kulanima Kabali.*[35] The case concerned succession of illegitimate children of a father who died intestate, the appellant relied on the Buganda Custom which permits illegitimate children to receive a share of the inheritance of their deceased father. Sir Joseph Sheridan as he then was held that there can be nothing repugnant to morality or justice by allowing illegitimate children to share in their father's estate.

Both decisions highlight the subjective nature in which the test for repugnancy was applied resulting into two different outcomes; the former shunning customs considered paramount in our local traditions but foreign and repulsive to English traditions, and the latter upholding an ideal because of the result it invoked as opposed to whether or not the idea of illegitimate children was frowned upon in England. Despite the different outcomes, what is clear is that the test was applied with the judge having full discretion to decide what was and what was not repugnant to justice, good conscience and morality.

In 1911, the 1902 Order in Council was amended by another Order in Council. It provided for the basis of the jurisdiction exercised by the High Court throughout the period of the protectorate and was fore runner of the present day Judicature Act.[36] This was affirmed in *R. v Besweri Kiwanuka*[37] in which it was held that "by the Uganda order, Order in Council 1902. Her Majesty's government had made manifest the extent of his jurisdiction in Uganda; such manifestation may be regarded as an act of state, unchallengeable in any British court or may be attributed to states powers given under the Foreign Jurisdiction Act.

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35 *Marko Kajubi V Kulanima Kabali* [1944] Unreported
36 The Judicature Act No. 62 of 1962, Now Cap 13
37 *R v Besweri Kiwanuka* [1937] HCCA No. 38 of 1937

The 1962 Independence Constitution carried the Repugnancy Doctrine too. Article 24(8) stated that "No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore prescribed in a written law" and since customary law (criminal law) is not written, it is not provided for.

3.4 Customary law in Post Independent Uganda.

The 1962 and 1967 Independence Constitutions in Articles 24(8) and 15(8) respectively did not provide for the customary law unless prescribed by written law. In 1965, the Kalema Commission was set up to examine the functions of customary law. It proposed reforms in the areas of marriage, divorce, land and children. It recommended that customs that had outlived their usefulness be discarded.

Customs whose outstanding wisdom has been passed on from generation to generation and those consistent with natural justice, morality, good conscience and written law would then be upheld. In *Best Kemigisha V Mable Komuntale*, Katutsi, J opined that; "I protest against the claim that we should remain chained to medieval conceptions and cling to custom which would ignore reality.... a legal system ought to be able to match with the changing conditions, fitting itself into aspirations of the people it is supposed to safeguard and serve."

In line with these ever changing needs, The National Objective and Directive Principles of State Policy[38] states that "Everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs." Objective XXIV also states,

> "Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the

[38] The National Objective and Directive Principles of State Policy, Principle III (iii)

> Constitution may be developed and incorporated in aspects of Ugandan life.
>
> The State shall (a) promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans;" Laws, Culture, Customs or traditions which are against dignity, welfare, or interest of women or which undermine their status are prohibited by this Constitution[39].

In Post Independent Uganda, the repugnancy doctrine has been kept in the center stage as Customary law that has been repugnant to natural justice and morality has been seriously de-campaigned. In *Law and Advocacy for Women in Uganda V. AG*[40] the custom and practice of Female Genital Mutilation was held to be inconsistent with the Constitution, 1995 to the extent that it violated Articles 21(1), 22(1), 24, 32(2), 33(1) and 44(a) of the Constitution.

Justice Twinomujuni stated, "Any person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment."

Some of the law is being codified and made statutory, for example the offence of Adultery which was embodied in the Penal Code in 1964. It should therefore be noted that customary law in Post Independent Uganda is still existent and strong despite all efforts by English law to eradicate it.

3.5 Relevance of customary law in Contemporary Uganda

Customary Law has developed alongside other changes in other statutory laws while in other instances and indeed among certain tribes, it is evident that it has remained fairly constant. For example, the payment of bride price by the

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39 The Constitution of the Republic of Uganda 1995 as amended, Article 33

40 *LAWU v AG* [2008] Constitutional Petition No. 08 of 2007

family of the bridegroom to the family of the bride is universally practiced in Uganda as a social custom.[41] Some elements of customary law have therefore persisted among various tribes despite the remarkable economic and social changes which have occurred during the twentieth century.

Though customary law is still relevant in contemporary Uganda, it is limited by three factors, the first being statutory provisions. The Magistrate's court Act, The Judicature Act and the Constitution of Uganda 1995 all provide that customary law should be provided for by the law.[42] Since customary law is not codified, its effectiveness is limited.

Additionally, many customs are repugnant to contemporary concepts of justice and morality for example inheritance of widows or sharing of wives in some customs, thus limiting its application in our modern day judicial system. However, it should be noted that basic principles of morality and justice are based on English and not African standards, thus what has been acceptable and applied amongst Ugandans is criticized and set aside based on a foreign perception and opinion as to that practice. This has watered down the relevance of customary law in Uganda.

It is also been argued that the effectiveness of the customary law can not be well realized because of the existence and creation of uniform and overarching legislation. When the penal code was enacted in Uganda, all offences were codified therefore undermining the contribution of customary law to criminal law. Though a limited number of customary offences still existed, the London Conference on the "Future of Law is African", recommended in January 1960 that the general criminal law should be written and uniformly applicable thus outlawing customary criminal law.

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41 Douglas Brown and Peter A. P. J. Allen, *An introduction to the law of Uganda* (Law in Africa No.25) p 30

42 The Constitution of the Republic of Uganda 1995 as amended, Article 28 (12)

This is evident in section 10 of The Magistrate Courts Act which is specific to only applying civil customary law and states that nothing shall deprive a magistrate's court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any civil customary law which may be applicable that is not repugnant to justice, equity or good conscience or incompatible either in terms or by necessary implication with any written law for the time being in force.

Customary law has also been changing with the times as opposed to being static. As much as flexibility is a necessity for all laws, this aspect has slowly caused customary law to lose its relevance. This is because the evolving customary law tends to bend more towards modernity and loses the very practices and values for which it was formed. For example, in the past there were never any rules discouraging men from hunting wild animals. However, there are now very strict rules prohibiting hunting almost everywhere. The creation of the offence of poaching due to the need to preserve wild life suggests a clear step away from the customary notion of ownership by community to ownership by the state.

More so, in so far as traditional methods of land holding tend to restrict alienability and to lead to the land being fragmented into small portions, customary land laws are often looked on as obstacles to economic development.

In fields such as administrative law, immigration, taxation, company law, traffic and so on; customary law has contributed next to nothing. In these branches, most of the law is in form of local legislation, very largely modeled on English statutes or enactment of other countries that have been under British rule[43].

[43] E.S. Haydon ;J.P. Musoke, *Laws of Justice in Buganda* (London : Butterworths, 1960)

Another limitation to customary law is the general mentality that it is archaic and old fashioned thus lacking backing. It should be noted that this view is not held by everyone.

Despite the above limitations, customary law is not only relevant but existent and effective in various forms and ways. It is still applied and thrives in modern Uganda. The 1908 Buganda Native Laws section 2 provided that 'when a Muganda died intestate, a successor to his mailo land would be ascertained according to the rules of the law of succession of the Baganda. The Buganda Kingdom further passed the land succession law of 1912 which restricted anyone from dealing with the property of an intestate Muganda except after obtaining a certificate of succession issued by the Lukiiko.

In *Kajubi V Kabali*, Sir Joseph Sheridan held that there was nothing repugnant either to morality or justice in a custom which conferred upon a head of a clan a more or less unfettered discretion as to the mode of distribution of an intestate estate. This is the current position, which shows that this law is still relevant in Modern Uganda.

In Bunyoro, customary right to land by owners was established, and the owners would accept or refuse peasants from elsewhere who wished to cultivate or settle on their lands and would expel settlers from it[44]. In Busoga, control of the land remains in the hands of the traditional authorities and civil service chiefs have no say.[45]

In Bugisu, land is held individually subject to certain rights vested in the lineage which concern inheritance of the loan, lease, pledge or sale of land

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44 *Kibanja system of Land Tenure in Bunyoro*, (Uganda Journal of African Administration 6 1954) 16-24

45 J.T Fleny, *Recent development in Customary Kisoga Land Tenure*

outside the lineage[46]. This land law is based on and shows that customary law is still strong.

In the law of torts; the local courts apply the customary law relating to civil wrongs. This was seen in the case of *Muyaba V. Kalanzi,* which held that cases in Buganda must be determined by Buganda Customary law where all the parties are African.[47]

Customary law is further relevant and applicable in the area of marriage. There are three kinds of marriage recognized; Statutory, Religious and Native marriage. The vast majority of marriages contracted are under Native law and Custom and generally potentially polygamous. In 1902, A Marriage Act[48] was passed introducing certain provisions dealing with the specific circumstances prevailing in a country whose polygamous unions by customary law were the general rule among the African people.

The law is strong here because the vast majority of the Uganda population is engaged in agriculture and lives in rural areas. For such people, their family law is an integral part of their whole way of life and sweeping attempts to change it by legislation are not likely to meet much success. This is why the Customary Marriage Registration Act Cap 248 was enacted in 1973 to make provision for the registration of customary marriages and for other purposes connected therewith.

In the case of *Bruno Kiwuwa V Ivan Serunkuma and Juliet Namazzi,* a permanent injunction was issued against the two respondents, restraining them from contracting a marriage because they belonged to the same *Ndiga* clan and it was against the Kiganda custom that two members belonging to the same clan get married. This is a landmark case because for the first time in the

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46 J.S La Fontain, *The Gisu of Uganda* (Taylor and Francis 1959)

47 1960 EA 367

48 The Marriage Act Cap 211 of 1962

country, a permanent injunction was issued to restrain intending spouses from marrying on the ground that the proposed marriage was against an established custom in Buganda.[49]

Another important aspect of customary marriage is the practice of paying bride price. Bride wealth (Bride Price) is the payment of domestic animals, money or other commodities made by the bridegroom to the father or his heir of the bride whom he intends to marry[50]. Bride price was previously mandatory in order to ascertain a valid marriage and in some tribes, it had to be returned to the grooms' family, on dissolution of marriage.

This happened especially in the pre-colonial Uganda days and even extended into colonial era. This position has however changed thanks to the current case of *Mifumi (U) Ltd & Ors V. Attorney General,* in which the constitutionality of bride price was challenged on the grounds that it objectified women because of its being mandatory and its return on dissolution. All these practices alluded to the fact that women could be bought and thus were unequal to men. The court asserted that bride price should not be mandatory and the return of bride price on dissolution of marriage was unconstitutional and thus null and void.

Another strong base of customary law is the law of succession as assessed above. The succession ordinance 1906 gave the governor of the colony discretion to exempt any class or classes of people from the application of the whole or parts of the ordinance. According to the Succession (exemption) Order General Notice 22/1/1906, Africans continued with customary law of succession.

This was effective in governing the transfer of property vested in a person on their death to some other person or persons. The broad rules of inheritance were laid down in the customary law and a man couldn't by his will radically

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49 *Supra* 3

50 Op.cit at 4

alter their application to estate, the family would pay attention to his will but would not carry out any part of it which they considered to be unjust according to custom.

This was seen in *Yudesi Kasikulu V. Kyaka Lebule* where the plaintiff sued the defendant, her parental uncle for denying her possession and inheritance of 30 cows that belonged to her father. The principal court of Highness the Kabaka held that as a girl, she could not inherit her father's property since women could not inherit property. This position later changed. In *Best Kemigisha V. Mable Komuntale*, Katutsi J protested against clinging to such customs which refused people like the plaintiff from being granted letters of administration for their late husband's property.

Customary law is also effective in the development of local jurisprudence by its establishment of courts, legal authorities and patterns that help also in the achievement on the basis of law at large to keep order and protect humanity.

Customary law is also a feeder to statutory legislation and many laws in Uganda have been borne from it. Laws on adultery, witchcraft, trespass on burial grounds, neglect and desertion of children are seen in the written law of Uganda such as the Penal Code[51].

Customary law is also well suited to the local circumstances on which it is based and interpretation of it is eased by the fact that the majority of Ugandans are familiar with it. For example, the reinstallation of the Uganda Monarchies met with a lot of applause. This showed how credited and preferred customary law is.

From the above, contrary to the statement that "customary law has no place in Uganda," we see that it is very important because it continues to inform the development and codification of statutory provisions and furthermore has

[51] The Penal Code Act Cap 120

never been completely eradicated, affirming its relevance in contemporary Uganda. The Constitution of Uganda states in Article 37 effects that "every person has a right as applicable to belong to, enjoy, practice and maintain his culture.

The Judicature Act S.14 (2) b (ii) holds the application of customary law…subject to the written law and in so far as the written law does not extend or apply in conformity to…. an established or current custom or usage.

More so, 90% of the land belonging to Ugandans is in the village and more than 83% of the people of Uganda stay in these rural areas where customary land law applies.[52]We have seen in the last chapter that customary law is important but limited in an aspect or so. However, recommendations to secure the future of customary law as a source of law can be made.[53]

4.0 RECOMMENDATIONS

Codification of customary law can be effected to strengthen this law. This is because codification not only presents a unified conclusion as to what is acceptable and legal in terms of customs and practices, but also gives it the force of law.

In 1962, the Minister of Justice of Tanzania was empowered to declare by order that a written declaration of modification of customary law made by a District Council and submitted to him shall be binding upon the Africans to whom it relates within the area to which it relates. This codification can be done in local languages as well so as to enable people from all localities to access the law.

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52 Obol Ochola, 'Customary land law and the economic development of Uganda' (1971) available at https://www.researchgate.net/publication/34856772_Customary_land_law_and_the_economic_development_of_Uganda [accessed 15 March 2020]

53 Kenya Law resource Centre, 'Future of African Customary law'(2011) available at http://www.kenyalawresourcecenter.org/2011/07/future-of-african-customary-law.html [accessed 15 March 2020]

Teaching of customary law, that is its history, nature and application, will help members of society to realize its essence in contemporary Uganda. Courses can be laid on and carried out to ensure at least basic training for concerned parties especially the Judges, so that despite belonging to different customs, they can have better insight and discretion to changing circumstances. Legal education should also target a range of different actors, such as religious leaders, judges, traditional rulers and lawyers.

Customary law can also be made better by reformation or adjustment. In its present form, customary law is distorted and has been heavily influenced by its encounter with external and un-African forces such as colonial rule. In its application, customary law is often discriminatory especially in relation to capacity of women it tends to treat them as adjuncts to the group they belong to such as a clan, family or tribe rather than as equal with men. We therefore must adjust or void customs which promote discrimination and inequality of any kind. This will ensure a better way of life for all members of society.

5.0 CONCLUSION

As ably discussed in the past four chapters, customary law is very important in modern Uganda and despite its short comings it has been able to adapt itself to the changes in the evolving society of modern Uganda. A complete eradication of customary law would therefore make Uganda a state with no past and no foundation of growth or development. Customary law must not be looked at as a separate entity at odds with the other prevailing law. The two should instead be infused and applied where necessary, observing the rules of justice, equality and good conscience. Thus, the assertion that customary law has no place in Uganda" is a very negative and shortsighted view and should be completely ignored. Rather, the assertion that customary law and its relevance in modern Uganda cannot be overstated, would better suit this paper.

ASSESSING KENYA'S COMPLIANCE WITH THE INTERNATIONAL REGULATORY FRAMEWORK FOR THE PROTECTION OF REFUGEES: A RIGHT TO HEALTH PERSPECTIVE

Dr. Kenneth Wyne Mutuma[*] *& Saada Mohammed Kinago*

ABSTRACT

Hundreds of thousands of asylum-seekers fled into Kenya early 1991. While this year marks exactly 30 years since the genesis of Kenya's international law obligation toward the refugee communities it undertook to host, it also highlights three decades of its violation of the fundamental right to health. Kenya's refugee residents comprise of individuals from among the poorest nations of the world with their weak health conditions necessitating immediate health assistance. This article analyzes Kenya's practical conformity to its international law mandate vis-à-vis refugees' realization of their health care entitlements. Unresolved barriers exist, including the state's economic vulnerability, which attempt to justify its non-compliance. Respect for fundamental human rights along with practical strategies tailored by the relevant authorities, and an adequacy of the social determinants of health is central to securing progressive realization of the right to health and attainment of public health equity.

1.0 INTRODUCTION

The rationale for the adoption of the 1951 Refugee Convention was *to find durable solutions* to refugees' plight. Seven decades since its entry into force, the solutions sought are far from realisation. It defines who constitutes a refugee. Article 1 (A) of the 1951 Convention contends that,

> "*anyone who, owing to well-founded fear of being persecuted based on race, religion, nationality, religion, country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, member of a particular social group or political opinion, is*

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> *outside the country of his nationality, and is unable or owing to such fear, is unwilling to avail himself of the protection of that."*,

In effect, the instrument asserts that such persons falling within its definition are entitled to protection by its member states. However, the notion of "*protection*" is sometimes misconstrued to exclude the protection of their fundamental human rights. The inalienable nature of human rights contained in various international legal instruments means that those human rights apply to all, irrespective of nationality or legal status.

Kenya's position on the practical implementation of the right to health with respect to the refugee populations it hosts is disproportionate. With its first articulation contained in the 1946 Constitution of the World Health Organization (WHO)[1], the entitlement to health finds its basis as a crucial necessity of life. In fact, the preamble highlights that the right to the highest attainable standard of health is one of the fundamental entitlements of every human being without distinction based on race, religion, and political belief, economic or social condition.[2]

The World Health Organization advances the notion that "access to health" does not technically refer to the availability of medical services alone, but to the procurement of quality services in a timely, affordable and equitable manner.[3] Along this line, the Constitution of Kenya, 2010, acknowledges every individual's entitlement to access health care resources.

Notwithstanding the considerable number of initiatives attributed to the High Commissioner's office in Kenya, its efforts to secure quality and affordable health care services for refugees has been met with a lot of contention. Kenya's

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1 UN General Assembly, "Entry into force of the Constitution of the World Health Organization," 17 November 1947, A/RES/131 https://www.refworld.org/docid/3b00f09554.html [Accessed 16 December 2021]

2 *Ibid*

3 *See* supra note 1

objective of achieving universal and standardized access to health care assistance, steered by its commitment to attain global health coverage by 2022[4] is unrealistic – if at all its refugee population is included in this life-altering Agenda. Article 43 (1) (a) guarantees persons legally within the territory "the highest attainable standard of health, which includes the right to access health care resources, including reproductive health care."

Further, as a human right enshrined under the International Bill of Rights,[5] the right to health is absolute and indiscriminate as to nationality or legal status. Article 25 of the Universal Declaration of Human Rights denotes states' firm commitment to promote equitable health access within their jurisdictions. The provision is to the effect that every individual has the right to an adequate standard of living, including food, clothing, housing, and medical care.[6] The legal text as adopted by Kenya imposes a direct obligation upon it to ensure adequate provision of the social determinants to its entire population, including refugees and other persons of concern.

Referring to the 1969 OAU Convention's definition of a refugee, the "protection" of refugees by implication translates to respecting, safeguarding, and promoting their fundamental human rights. Thus, through Kenya's accession to the Convention, the 1951 Refugee Convention and adoption of health-related legislations, the state willingly imposes a limit to its sovereignty. It pledges to fulfill its obligations to the extent of its protection mandate – to ensure equitable access to healthcare services for the refugee communities it hosts.

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4 International Trade Administration, 'Kenya: Universal Health Coverage' (2 June 2018) <https://www.trade.gov/market-intelligence/kenya-universal-healthcare-coverage> [accessed 16 September 2021]

5 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the
International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

6 The United Nations Universal Declaration of Human Rights (UDHR) (1948), art. 25

Despite the significantly decreased trend of refugee migration into Kenya over the past decade, refugees are still part of the vulnerable persons' category desperately seeking the world's intervention of their healthcare needs. Kenya's refugee health system is however declining with thousands of refugees unable to secure quality and adequate medical care. The medical code of ethics *"do good, respect and equity"* are violated by the country's refugee health system.[7]

However, while the law remains clear, the protection scope with regards to facilitating access to health care services for refugees has since been ignored, particularly by low-middle income countries like Kenya. Despite being home to two of the world's largest refugee complexes, refugees in Kenya whether residing in camps or urban centers lack access to basic life requirements including quality healthcare with little to no accountability from the host government.

With the decades-long camps constructed to accommodate the growing refugee population, its initiative to promote self-reliance and foster service delivery is impeded by the unavailability of adequate medical resources despite the existence of various legal provisions safeguarding the right. Considering Kenya's financial vulnerability, it is fair to assume that inadequacy in healthcare aid is not unique to its refugee community; however, the refugee communities are more disadvantaged compared to the country's host population.

UNHCR-Kenya together with UN partnered agencies and local NGOs have undeniably made significant advancements in promoting and procuring the realization of refugees' healthcare entitlements despite practical execution by Kenya remaining unsatisfactory, prolonging the refugee health *crisis*.

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7 Bolliger, Larissa, and Arja R. Aro, "Europe's Refugee Crisis and the Human Right of Access to Health Care: A Public Health Challenge from an Ethical Perspective" (2018) Harvard Public Health Review 20 pp 1 <https://www.jstor.org/stable/48515220> [Accessed 7 September 2021]

2.0 AUTHENTICATING REFUGEES' ENTITLEMENT TO HEALTH TO THE EXISTING GUIDING FRAMEWORKS

2.1 Legally Binding International Instruments

With the growing influx of refugees being witnessed across the globe, the international community saw the need to adopt a regulatory framework that would manage and oversee the protection of refugees' rights in third states. While practical compliance remains debatable, through its ratification of the 1966 International Convention on Economic, Social and Cultural Rights (ECOSOC) including its adoption of the 1948 UN Universal Declaration of Human Rights (UDHR), Kenya undertakes to enforce and implement individuals' right to health.

The Refugee Convention,[8] on the other hand, acknowledges the entitlement to asylum by member states to any person, or group of persons with a well-founded fear of being persecuted on grounds of race, religion, nationality, membership to a particular social group or political opinion.[9] The Convention obliges member states, including Kenya to safeguard the enjoyment of rights for the refugees it voluntarily hosts.

In order to secure access to quality medical care for the entire refugee population, globally, Article 23 imposes an obligation on Kenya to ensure that the refugee communities legally residing within its territory enjoy equitable *access to public relief* and assistance. This provision, despite being general, can be construed to relate to the healthcare entitlements of refugees. To this end, Kenya undertakes to ensure refugees enjoy equitable access to healthcare services similar to those of its local population.

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8 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

9 *Ibid*. Article 1(A) (2)

Similarly, to modify and compliment the 1951 Refugee Convention, the 1967 Protocol was adopted through an Executive Committee's recommendation of the United Nations High Commissioner for Refugees. As another key legal instrument guaranteeing the protection of refugees' rights, the Protocol is binding to all member states of the 1951 Convention, with or without a separate ratification of the instrument. Like its preceding legislation, the framework encourages cooperation of states with UNHCR on matters central to safeguarding refugees, including providing any relevant assistance necessary for the Refugee Agency to efficiently report to the United Nations.[10]

It is worth noting that the Protocol does not provide for the specific rights Refugees' are entitled to protection – particularly their entitlement to health care access – nonetheless, with respect to the guaranteed access to public relief contained in Article 23 of the 1951 Convention, Article 1 (1) of the Protocol may be invoked.[11] However, being the only legally binding refugee instruments at the international level, an omission of exclusive provisions targeting the protection of refugees' health rights is detrimental to the enforceability and implementation of fundamental human rights, particularly by host states.

2.2 Non-Binding Instruments

Following the deteriorating nature of health, the international community's adoption of the Declaration of Alma-Ata[12] came as an advancement of its efforts to secure universal access to public health. The Declaration seeks to urge developing states' prioritization of health for its general population as an initiative that would foster their development. The non-binding agreement

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10 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol) Article II (2)

11 *See* supra note 9, Art 1 (1) provides that States parties to the Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

12 Declaration of Alma-Ata : International Conference on Primary Health Care, Alma Ata, USSR (adopted 6-12 September 1978) (Alma Ata Declaration)

reflects the commitments of the Ottawa Charter[13] by promoting health care access for all. It differs primarily in one aspect; while the latter's adoption sought to address the collapsing health systems in least developed states like Kenya, the former is focused on achieving global health equity without distinction on developed countries.

The unequitable distribution and utilization of quality and affordable health care resources compelled the international community's adoption of the declaration. However, even with its adoption coming prior to the massive inflow of asylum-seekers into Kenya, health equity has undeniably been the country's persistent concern – not only for its refugee population.

Further, to respond to the global urgency in the promotion of public health, the 1986 Ottawa Charter for Health Promotion[14] was initiated at the United Nation's first ever international conference on health promotion with the sole aim of securing healthcare for all. The legally non-binding instrument emphasizes the need for people to improve their well-being, which member states,' including Kenya can be achieved through fostering individuals' self-reliance and ability to cope with the environment they live in.

Emphasizing the need to secure inter-sectoral cooperation in an effort to equitably secure health care access, the agreement insists that health promotion cannot solely be achieved through efforts of the health sector alone, and that factors that go beyond a an individual's healthy lifestyle of is prerequisite to realizing the Charter's Agenda.[15] It further reiterates the need for UN member states, including refugee third states to first secure access to certain resources quite fundamental to promoting health.

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13 The Ottawa Charter for Health Promotion (adopted on 21 November 1986 1st WHO Conference on Health Promotion) (Ottawa Charter)

14 *Ibid*

15 Paul Hunt and Gunilla Backman (2008) 'Health Systems and the Right to the Highest Attainable Standard of Health' Health and Human Rights vol. 10(1) 81-92 <www.jstor.org/stable/20460089> [accessed 29 August 2021]

These conditions, according to the international community's commitment to promote health equity, include an adequacy in food, a stable income, suitable living conditions, a peaceful environment, to name but a few. This responsibility reflects Kenya's pledge to ensure its entire population, including refugees within its territory an adequacy of the social determinants of health essential to enhance appropriate conditions for their wellbeing – an assurance it has failed to fulfill.

The New York Declaration on Refugees and Migrants, 2016, unanimously adopted by United Nations' member states aims at addressing the unprecedented influx of refugees and migrants. Acknowledging the purpose and principles of the United Nations Charter, including international human rights agreements, the document[16] reaffirms refugees' entitlement to protection of their universal human rights.[17]

It seeks to encourage cooperation of the international community, especially countries of origin and nationality in securing global protection for refugees, contending that such responsibility is to be shared equitably among states without exclusively burdening a host state.[18] In essence, the negotiation agreement seals the international community's agenda to intervene and remedy the refugee dilemma through provision of funds and any assistance necessary for host states to secure protection for refugees' rights.

Reiterating the global community's strong political will, state parties adopting this non-binding agreement confirm that all persons including refugees, irrespective of nationality, race, or legal status, are born equal with equal entitlements to the respect of their fundamental human rights and freedoms. This means that, with respect to their right to health, as the 1951 Convention

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16 The New York Declaration on Refugees and Migrants (adopted 3 October 2006 UNGA Res A/RES/71/1)

17 Supra note 6, para 6

18 Ibid, para 7

obligates, refugees and migrants are entitled to equal standards as that afforded to host state's nationals.[19]

Advancing this legal commitment, the Declaration as embraced by UN member states including Kenya sought to advance its initiatives, through the simultaneous adoption of two global compacts – global compact on refugees and a global compact for safe, orderly and regular migration – as a means to further strengthen refugee protection and establish an all-inclusive response framework. Representative of the international community's ambition to promote solidarity between refugee host states, the Global Compact on Refugees seeks to foster responsibility sharing to realize its refugee protection mandate.

This negotiation agreement proposes a unique means for host states' governments and relevant stakeholders to acquire the necessary support system. This is the kind that enhances refugee self-reliance and promotes productivity[20] through fulfillment of their potential. The voluntary inter-governmental agreement enhances the commonly inferred refugee frameworks' protection capacity, emphasizing that to secure utmost protection of refugees' rights, member states should work towards burden-sharing and promoting conditions that would foster voluntary and safe repatriation – a strategy quite fitting for a financially deprived refugee host state like Kenya.

States' commitments as reiterated in these instruments highlight their appreciation of the need to take necessary measures leveled towards promoting respect for, and fulfillment of refugees' rights, including their access to quality and affordable health care.

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19 Supra note 4, art 23

20 Kate Mlauzi and Michelle Small, "Is the Global Compact on Refugees Fit for Africa's Purposes?" (2019) South African Institute of International Affairs <www.jstor.org/stable/resrep25889 > [accessed 29 August 2021]

Further, whereas both Compacts were drafted in fulfillment of the New York Declaration's commitment, the Global Compact for Safe, Orderly and Regular Migration pertains to migrants collectively, without direct emphasis on refugees. Noting that migration is inevitable to globalization,[21] the Compact on Migration represents the international community's shared commitment to establish a cooperative strategy through resource and skill contribution between the host states, UNHCR, local and foreign Civil Society Organizations along with UN Agencies and other partnered organizations.

Understanding the need to prioritize refugee matters within the global agenda, through the formulation and adoption of this inter-governmental agreement, Kenya recognizes the urgency to develop a comprehensive approach to manage migrant movement.

The instrument affirms that refugees and migrants are distinct groups, though equally deserving of respect and preservation of their fundamental rights and freedoms in line with the 2030 Sustainable Development Agenda.[22] Comprehensively addressing the concept of migration from different global dimensions, the Global Compact for Migration acknowledges state sovereignty but also encourages international cooperation on mobility, in a manner that fosters respect for, and protection of migrants' human rights.[23]

Essentially, while the non-binding instrument reiterates international cooperation through burden-sharing as a global commitment and effective strategy to safeguard the rights of society's most vulnerable populations, like

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21 Asmita Parshotam, "The UN Global Compacts on Migration and Refugees: A New Solution to Migration Management, or More of the Same?" (2017) South African Institute of International Affairs, <www.jstor.org/stable/resrep25910> [Accessed 23 August 2021]

22 Target 10.7 of the SDG: Facilitate orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies

23 IOM, Global Compact for Migration <https://www.iom.int/global-compact-migration> [Accessed 21 September 2021]

its refugee counterpart, this Compact is not specific to their health care entitlements.

Additionally, the United Nations General Assembly established the Executive Committee of the High Commissioner's Program to advise the Refugee Agency and stakeholders on matters pertaining to global protection. Like the 1951 Refugee Convention's mandate, the Executive Committee was recognized as a modality to secure global protection and promotion of refugee rights through making suitable recommendations upon UNHCR.[24]

The committee's decisions, though merely persuasive and not binding on states, set a ground for the international community's achievement of global health equity. For instance, the committee urges Kenya to ensure equitable access to health care resources, indiscriminately, to ensure protection of fundamental human rights.[25] Likewise, its decisions are inclined upon advising host states' prioritization of refugees' health while calling upon their adherence to international laws regarding the right to health, advising Kenya on the elimination of any existing legislative hindrances to the cause.[26]

2.3 Regional Instruments

As the only regional instrument governing the protection of Refugees' rights within the African region, the 1969 OAU Convention[27] acknowledges the need to alienate refugees' suffering through a humanitarian approach that is geared

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24 The Executive Committee of the Programme of the United Nations High Commissioner for Refugees as founded by the United Nations Economic and Social Council (ECOSOC) was established in 1958 [Resolution 672 (XXV)] and came into force on 1 January 1959.

25 Executive Committee Conclusion No.103 (LVI) of 2005

26 Executive Committee's Conclusion No. 57 (XL) of 1989

27 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 U.N.T.S. 45 (OAU Convention)

towards securing their enjoyment of fundamental human rights, including health.[28]

Being established more on humanitarian grounds, the African regional instrument adopts the 'refugee' term definition under the 1951 Refugee Convention with modifications to include a classification of persons not within the Convention. The Convention encourages Kenya's cooperation with UNHCR on matters pertaining to its refugee populations, which despite the absence of an explicit health protection mandate in its provisions, may be interpreted to include the promotion and protection of access to healthcare services for refugees hosted legally within their territories.

2.4 National Laws

Article 19 of the Constitution's Bill of Rights[29] recognizes the responsibility to uphold and protect human rights grounded on the need to preserve human dignity and realization of individuals' potential. Classifying health as an economic and social right under its Bill of Rights, Article 43 (1) (a) of the Constitution, 2010, entitles every individual to *the highest attainable standard of health*, including the right to access reproductive medical care and assistance. In fact, the article further makes provision for every individual's right to emergency medical aid.[30]

This stipulation satisfies the implication that Kenya as a state guarantees health care access to all individuals legally within their territory. Further, Article 2 (5) and (6), in demonstrating the applicability of Article 43 to refugees in Kenya, provides that the general rules of international law, including any treaty or Convention ratified by Kenya shall form part of the Kenyan law. This specific provision draws Kenya's legal obligation to secure access to medical

28 Ibid, preamble.
29 Constitution of Kenya (2010), Chapter 4
30 Ibid, Art 43 (2)

care and assistance to the refugees it hosts, with regard to the international refugee and human rights instruments it freely assents to.

Additionally, inspired by the adoption of the 1951 Refugee Convention and its subsequent Protocol, the 2006 Refugee Act is the solely enacted legal instrument regulating the protection of refugees at Kenya's domestic level.[31] The legislation adopts the 1969 OAU Convention's definition of a refugee and contains provisions governing the registration, cessation, and disqualification of refugee status.

Despite its focus on Kenya's refugee system, the statute does not make provision for the rights owed to refugees. However, with respect to the protection of refugees' rights subject to relevant Kenyan laws, Section 16 (1) (a) and (b) of the Act entitles refugees to all rights warranted in international treaties and conventions ratified by Kenya. This includes international human rights and humanitarian laws, including, inter alia the International Covenant on Social, Economic and Cultural Rights and the Universal Declaration of Human Rights – with particular emphasis on their provisions regarding health care access.

2.5 Institutional Framework

Through General Assembly Resolution 319 (IV) of December 3, 1949, the United Nations established the office of the High Commissioner for Refugees (UNHCR) as the primary institution tasked with the responsibility of ensuring the protection of refugees.[32] The international institution has since its establishment been instrumental in securing the realization of refugees' rights, including facilitating their access to healthcare services and assistance.

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31 Kenya: The Refugees Act No. 13 of 2006

32 Maynard P. D, "The Legal Competence of the United Nations High Commissioner for Refugees" The International and Comparative Law Quarterly, 31, no. 3 (1982): 415-25.. http://www.jstor.org/stable/758999 [Accessed 1 September 2021]

The UN Refugee Agency acknowledges health as a fundamental human right inalienable to refugees and strives to secure its access as a top agenda of its humanitarian mandate. Through the High Commissioner's office in Kenya, the institution continues to aid the implementation of its humanitarian directive as well as timely responding to refugee emergencies, constructing health centers, promoting individuals' access to the social determinants of health along with advancing the need for legal documentation.

The demand to prioritize and enhance equitable access to adequate, quality and affordable medical care for the world's most vulnerable communities is one that is well recognized by UNHCR, evident through its efforts to foster partnerships, collaborations and strategies that enhance refugees' access to public health services.[33]

In Kenya, UNHCR-Kenya works closely with the Kenyan Government, partnered agencies including Civil Society Organizations and foreign donors to procure medical resources for the hundreds of thousands of refugees hosted. The agency advocates for refugee inclusion into Kenya's national health systems as a means of ensuring that the 1951 Convention's mandate of securing public relief assistance of standards similar to that afforded to member state's local population,[34] is met. While through ratification, Kenya is obligated to undertake all necessary steps to secure a progressive realization of refugees' health rights, UNHCR has solely undertaken most of the country's responsibility.

Further, regulating humane, safe, and orderly migration since the adoption of the 1951 Refugee Convention, the International Organization for Migration (IOM) acknowledges migration as a social determinant of health necessitating

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33 UNHCR, (2015) 'Public Health 2014 Annual Global Overview' (Geneva) <https://www.refworld.org/docid/5534a8194.html> [accessed 31 August 2021]

34 See supra note 4

intervention,[35] and therefore works with UN member states' governments to actively respond to contemporary migration-related issues. Through its medical service provider and qualified medical team, IOM Migration Health Service (MHS) administers healthcare evaluation to various categories of migrants throughout their migration journeys to significantly improve migrants' health situations, assess and treat injuries requiring immediate attention and reduce the burden on third state's health system.

The inter-governmental organization has ensured medically safe migration to millions of disadvantage migrants, globally. For instance, in its health promotion mandate, IOM-Kenya conducts medical assessments for migrants wishing to travel to various countries such as Canada, USA and Australia.[36]

Likewise, being the sole UN Agency tasked with the mandate of securing international public health and leading states towards universal health equity, the World Health Organization **(**WHO) comprehends the fact that refugees are entitled to a healthy well-being in order to fully realize their potential. The Organization working closely with UNHCR, and the Kenyan government addresses refugees' healthcare demands through administering essential and preventive primary care early in time to reduce probable patients' financial inconveniences.[37]

Together with UNHCR, it also works to strengthen and further refugee integration into host countries' health systems and action plans to warrant their access to adequate and affordable medical resources. To second this notion and guarantee a sense of protection for refugees, its Constitution is guided upon the conviction that the enjoyment of the highest attainable

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35 IOM, "Making Migration Work for All" <https://www.iom.int/ourwork>

36 IOM, "IOM Migration Health Assessment Centre (MHAC) in Nairobi, Kenya" http://kenya.iom.int/migration-health [accessed 2 September 2021]

37 WHO, "Refugee and Migrant Health" <https://www.who.int/health-topics/refugee-and-migrant-health#tab=tab_1> [accessed 2 September 2021]

standard of health is a fundamental right of every human being without distinction of race, religion, political belief, economic or social condition.[38]

In fact, the Organization in collaboration with UNHCR has for decades steered efforts aimed at facilitating and promoting healthcare access through provision of services and health education, especially during the ongoing pandemic, to low and middle-income refugee host states. Moreover, the WHO is currently working with Kenya, including other refugee resettlement countries to secure continuance of service delivery for all, particularly the world's most vulnerable populations.

3.0 LIMITATIONS TO HEALTH CARE ACCESS

The fundamental human right to health stems from international human rights and humanitarian law principles that create a moral and legal duty upon the international community to promote respect for, and protection of individuals' inherent entitlements. This legal claim encompasses the need for states to facilitate access to medical resources and facilities including securing an adequate availability of its social determining factors.

Ensuring refugees' access to health care services is paramount to securing a healthy human population. While for Kenya's host population the *highest attainable standard of health* can be said to be progressively attained, the same cannot be said concerning its resident refugee communities. The concept of "progressive realization" acknowledges state's sovereignty as much as it does the need to fulfill its obligations under international law. A denial of refugees' access to specialized care, inadequacy in medical services, the low quality yet expensive medical care, deplorable living conditions irrespective of their legal

[38] UN General Assembly, "Entry into force of the constitution of the World Health Organization" (1947) A/RES/131, <https://www.refworld.org/docid/3b00f09554.html> [accessed 2 September 2021]

status within Kenyan law, is a violation of Article 12 of the Convention on Economic, Social and Cultural Rights (ICESCR).

A closer examination of the earlier discussed refugee regulatory structure, particularly the legal framework, reveals the inadequacy that exists which considerably substantiates Kenya' non-compliance – the fact that no refugee legal provision exists to invoke and facilitate obedience. Article 23 of the 1951 Refugee Convention entitling refugees to public relief cannot strictly, nor entirely be interpreted as construing access to health care. The Convention's obligation on states to afford refugees social welfare assistance does not *directly* enforce compliance. However, this does not dispense the fact that this obligation is clearly invoked by International Human Rights Laws.[39]

Further, the 2006 Refugee Act's failure to include a provision to the effect is yet another limitation to the fulfillment of Kenya's duty to its refugee population and Section 16 (1) does not conceal this insufficiency. Importantly, save for ICESCR and certain international human rights and humanitarian laws that provide generalized legal stipulations on individuals' right to obtain medical care, no exclusive *legally binding* provision exists linking this particular right to refugees, exclusively.

Another key factor impeding Kenya's inability to conform to its international law demand is the inadequacy of financial resources. In as much as states' practical implementation differs, the same can be inferred from their distinct financial capacities. A deficiency in finances is yet one of the main challenges

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[39] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, 3 September 1981) 1249 UNTS 13 (CEDAW), Art.10-14, Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515, 3 (CRPD) Art. 25, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) E/CN.4/RES/1990/74 (CRC) Art. 24

undermining the government's ability to fully cater for refugees' medical needs and UNHCR's efforts to provide humanitarian aid.[40]

Likewise, the enormous number of refugees hosted in Kenya's refugee resettlements can barely afford a day's meal let alone cover the expensive medical costs. Kenya's weak refugee health system is only part of the country's healthcare dilemma with hundreds of thousands being unable to access the bare minimum.

The overstretched health system leaves UNHCR and NGOs with the duty to ensure health care access for the vulnerable communities. However, UNHCR's budget is inadequate to foresee healthcare assistance to millions of refugees and other persons of concern globally, while at the same time assume the responsibility to specially cater for the healthcare needs without financial assistance from the host states. The poverty of the refugee population in Kenya, especially those residing in camps renders them unable to afford or continue the expensive medical treatments, particularly specialized care, which is only available in the country's capital– Nairobi.

Notably, Kenya is home to refugees with different ethnicities and religious beliefs from distinct parts of East and Central Africa. Even with the availability of substandard medical resources and assistance, refugee culture will often negatively affect their access. Cultural and religious ideologies of refugees ought to be compatible with that of caregivers in order to successfully administer the prerequisite medical care.[41] For instance, most refugee women

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40 Ahmed, Nizam U., Mohammed M. Alam, Fadia Sultana, Shahana N. Sayeed, Aliza M. Pressman, and Mary Beth Powers, "Reaching the Unreachable: Barriers of the Poorest to Accessing NGO Healthcare Services in Bangladesh" (2006) Journal of Health, Population and Nutrition vol. 24, no. 4, p. 461 <http://www.jstor.org/stable/23499856> [Accessed 5 September 2021]

41 Joseph R. Betancourt, Alexander R. Green, J. Emilio Carrillo, and Owusu Ananeh-Firempong II, "Defining Cultural Competence: A Practical Framework for Addressing

are uncomfortable being medically examined by a male practitioner. Cultural insensitivity in this case undermines refugees' access to the inadequate, though available healthcare services.[42]

Further, mental, and psychological health (MHPSS) has over the decades been misconceived by majority of the African communities. This is in fact a major limitation to refugees' access to MHPSS services in Kenya surrounded by the scantiness in mental healthcare resources, psychologists, and psychiatrists. Undoubtedly, refugees have a higher risk of suffering mental health issues based on their traumatic endurances.

Similarly, the language and communication differences delay health care provision and attainment of suitable medical examination outcomes.[43] A patient's inability to effectively communicate their medical history inevitably steers miscommunication and misinterpretation of their medical problem, leading to a subsequent misdiagnosis and unwarranted infringement of their right to health.

Discrimination further limits refugees' capacity to effectively utilize the available healthcare resources. The international community's efforts to emphasize equal treatment of persons of the LGBTQ community have proved futile with its members still being discriminated against. Health officers may discriminate against refugees, with particular emphasis on this group of individuals undermining their ability to seek appropriate diagnoses. Bias against minority groups has for decades crippled the health system impeding refugees' ability to utilize the available medical assistance.

Racial/Ethnic Disparities in Health and Health Care" (2003) Public Health Reports vol. 118, no. 4 pp. 293-302 <http://www.jstor.org/stable/4598855> [Accessed 5 September 2021]

42 Elliott, Jean Leonard, "Cultural Barriers to the Utilization of Health Services." (1972) Inquiry vol. 9, no. 4 pp. 28–35 JSTOR <www.jstor.org/stable/29770744> [Accessed 5 Sept. 2021]

43 *Ibid*

Another main barrier of Kenya's refugee community is the hostile living conditions. The unmet standards of social determinants (SDH) are indirect causes of diseases and other healthcare complications for refugees residing in Kenyan camps and the slums, to which most host states pay minimum attention. The substandard conditions of Kenya's refugee resettlement areas, coupled with unhygienic surroundings and underdeveloped housing contribute to residents' internal sufferings.[44]

Intolerable living conditions with poor levels of sanitation and hygiene is what characterizes the situation of Kenya's refugee camps. The Ottawa Charter for Health Promotion identifies access to the social healthcare determinants as a crucial step towards promoting health.[45] Essentially, a country that addresses the various social determinants of health and fosters to strengthen public health inclusion can be regarded as one that is mindful of its population's healthcare needs.[46]

However, the mental situation of refugees keeps deteriorating due to the risk factors caused by the appalling social conditions. The poor sanitation practices, congested and unhealthy living quarters, including overcrowded classrooms and unsafe work environments are just some of the numerous issues necessitating intervention to secure healthy living standards for the hundreds of thousands of refugees under Kenya's jurisdiction.

4.0 STRATEGIES TO ADRESS THE SHORTCOMINGS

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44 Link, Bruce G. and Jo Phelan, "Social Conditions As Fundamental Causes of Disease" (1995) Journal of Health and Social Behavior, pp. 80–94 JSTOR, <www.jstor.org/stable/2626958> [Accessed 5 September 2021]

45 *See* supra note 13

46 Canadian Public Health Association, Canada's Leadership in Addressing the Social Determinants of Health, <https://www.cpha.ca/canadas-leadership-addressing-social-determinants-health> [Accessed 6 September 2021]

One of the pertinent issues demanding intercession lies with the legal framework. The UNHCR suggests that to facilitate and improve access to healthcare, legal constraints must be removed.[47] Over the decades the world has concluded that migration is inevitable. Binding principles ought to exist to secure their protection in third states. An analysis of the preexisting legal frameworks reveals that while strict laws exist safeguarding their protection, the right to health is afforded the least importance particularly in the legally enforceable instruments. Quite disappointing is the fact that the 2006 Refugee Act omits to mention this crucial right within its provisions. However, the promotion and protection of health is emphasized in the non-binding instruments relating to refugees.

Whereas the Ottawa Charter, for instance promotes the protection of refugees' right to health in host states, an incorporation of the same into legally binding agreements is crucial to compel states' compliance. Access to healthcare services remains an entitlement with minimal efforts engineered towards its implementation.

As reflected in Human Rights instruments adopted by Kenya, health is an inalienable human right irrespective of legal status. This creates the implication that every single individual, including refugees are equally entitled to the respect, protection, and fulfillment of this right.

An express provision guaranteeing refugees' equitable access to quality and affordable health care with standards similar to those of its local population should therefore be adopted as a means to secure practical protection of refugee rights and achievement Kenya's sustainable development goal (SDG) three, target 3.8, towards universal health coverage (UHC).

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47 UNHCR, Ensuring access to health care: operational guidance on refugee protection and solutions in urban areas. 2011, United Nations High Commissioner for Refugees; Available from: http://www.unhcr.org/4e26c9c69.pdf [Accessed 6 September 2021]

The need to adopt a durable and cost-effective solution to the financial resources crisis remains essential. Financial constraints limit the utilization of the available medical services for refugee communities in Kenya. Monetary assistance and donations by UNHCR and stakeholders cannot entirely offset the refugee healthcare burden. An insurance plan that would indiscriminately cater for refugees' healthcare needs can prove effective in securing populations' health equity. Majority of refugees residing in poor and under-resourced countries like Kenya are unable to afford medical care while at the same time meet their families' personal needs.

In line with the tenets of UHC, for countrywide health coverage to be attained, the Government of Kenya must first address the underlying barriers to healthcare access, especially refugees' vulnerability in procuring medical fees. While the Government may work towards developing and expanding infrastructure including securing an adequate number of medical resources to assure quality health care, the desired outcome cannot be achieved if the targeted population is unable to practically acquire the services. In the context of the common incidences surrounding refugee unemployment, and precisely the geographical location of refugee residences, procurement of healthcare certainly necessitates financial support from the Government, UNHCR-Kenya, and potential donors.

A cash aid approach can also be a viable strategy in relieving refugees' financial burden. This involves providing monetary assistance to most vulnerable refugee households and individuals, especially those with serious medical conditions. The provision of assistance in form of cash has gained momentum since it was initially framed, in 2016. For instance, UNHCR has provided almost USD 3 billion in financial aid to more than twenty million people in over

ninety countries as a form of assistance to enhance their access to basic opportunities like healthcare[48].

Despite its mandate to primarily increase health status and promote access to quality healthcare like nationals,[49] UNHCR has inarguably taken up host states' role in not only supporting efforts, but also facilitating access through practically assisting them overcome financial constraints. Nevertheless, based on Kenya's financial situation and its underdeveloped health system, provision of cash may not be a viable modality to reach the entire refugee population and cure the financial impediment. However, through working together with UNHCR including local and foreign stakeholders the government can be able to assist refugees' equitable utilization of medical resources.

Further, developing and promoting a culturally sensitive refugee health system that is perceptive to the medical needs of refugees would bridge the long-standing gap between their access to medical services and health staffs' perceptions. Refugees include persons who have fled their countries due to fear of facing persecution.[50] A socially competent medical team is precisely what the currently collapsing refugee health system needs to achieve universal health equity – particularly for a county like Kenya, hosting refugees with diverse cultures and ethnicities.

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48 UNHCR (2020) "The Role of Cash Assistance in Financing Access to Health Care in Refugee Settings and for other People of Concern to UNHCR" <https://www.unhcr.org/5fc0b3fb4.pdf> [Accessed 6 September 2021]

49 UNHCR, "Mandate of the High Commissioner of Refugees and his office – Executive Summary" Available at: https://www.unhcr.org/5fc0b3fb4.pdf [Accessed 6 September 2021]

50 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, available at: <https://www.refworld.org/docid/3be01b964.html>. The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to resolution 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950, Art. 1 (A) (2)

This intervention embraces the need for the government to promote an approach that provides quality medical care to patients while maintaining special consideration of their socio-cultural values and beliefs, including their communication differences. This means that in an effort to secure refugees' equitable access to quality medical resources, Kenya should first consider educating the medical staff and personnel on administering services to patients from diverse communities. This implies gaining familiarity with the various languages of the refugee populations including increasing the number of competent translators.

Crucially, in as far as women form a large fraction of Kenya's refugee population, the substantial number should be able to access medical services in a culturally safe environment – preferably female medical practitioners. The number of refugees accessing mental and psychological health service is significantly low compared to physical health – despite the major instances of violence and traumatic experiences they continue enduring. In fact, Kenya places least priority on mental health for its local population and even worse for its refugee communities.

Currently, efforts to promote and facilitate access to MHPSS are limited, a matter that necessitates the government's immediate intervention. While educating refugees on the importance of seeking mental health assistance is vital in curing their misconceptions thus its securing access, the government through its independent efforts including that of UNHCR and private donors ought to increase supply mental health resources such as equipment and medication, while at the same time multiplying the number of MPHSS specialists.

Focusing on procuring refugees' adequate access to the social determinants of health is in fact one way of reducing health risks thereby decreasing chances of human morbidity. Kenya's obligation to secure enjoyment of "the highest

attainable standards of health" implies the right to identify and eradicate any disparities likely to affect individuals' wellbeing. According to the World Health Organization, social determinants of health comprise of the non-medical factors such as the living and working conditions that negatively influence health equity.[51]

In fact, an individual's social conditions are a more crucial factor in determining their health compared to availability or access thereof of medical care. The prevailing harsh conditions, both in camps and urban settlements are in no way suitable to foster the wellbeing of its resident population.[52] To achieve general health equity, Kenya must consider a multi-sectoral approach that addresses discrepancies beyond the health sector alone.

Addressing the social determinants of refugee health is an operational action plan to improve the refugee health care situation and eliminate the enduring health inequities, compelling inter-sectoral intervention. Additionally, the government should spearhead the establishment of conducive learning facilities including safe work environments in an effort to promote health.[53] Special efforts should be directed towards securing hygienic housing particularly for camp residents, to replace the current temporarily intended dwellings.

5.0 CONCLUSION

Hundreds of thousands of refugees remain vulnerable to health complications in one of the world's largest refugee host states, Kenya. Whereas the Country

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51 World Health Organization, "Social Determinants of Health" https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1> [accessed 9 September 2021]

52 Boru, Qaabata (2020) "Kakuma camp has become a permanent settlement" <https://www.dandc.eu/en/article/living-conditions-kenyas-kakuma-refugee-camp-are-harsh-and-dangerous> [accessed 9 September 2021]

53 Taylor, Lauren (2018) "Housing And Health: An Overview Of The Literature" <https://www.healthaffairs.org/do/10.1377/hpb20180313.396577/full/> [accessed 9 September 2021]

has proved welcoming to persecution survivors despite its financial constraints, the implementation of its international law obligations on respect, promotion, protection, and fulfillment of their inalienable human rights, particularly their entitlement *to the highest attainable standard of health* is crippling.

Kenya's prevailing refugee situation is detrimental to individuals' general wellbeing and a clear violation of fundamental human rights. As the state steers toward fulfilling its commitment to secure Universal Health Coverage, a closer look into the prevailing resettlement and healthcare conditions sufficiently prove that the pledge excludes refugee communities. Efforts to achieve health equity among refugee settings are being led by international stakeholders – actors who generously attempt to fulfill Kenya's legal responsibility on its behalf.

UGANDA'S MILITARY JUSTICE SYSTEM: PUBLIC INTEREST AT THE COST OF HUMAN RIGHTS

Kabazzi Maurice Lwanga & Mpindi Percy Christopher[*]

ABSTRACT

The concept of public interest in military justice has been and still is heralded at the expense of human rights, constitutionalism and justice. Military jurisdiction over civilians during times of peace leaves a lot to be desired. In reply to the view that court-martial jurisdiction over civilians is necessary for public interest; it is observed that in some jurisdictions, court-martial rule over civilians in times of peace has been abolished. The cost of violations with respect to civilian rights and service men weigh heavier in justice than the call of public interest in military discipline.

1.0 INTRODUCTION

The concept of military justice largely revolves around the justification for military justice as a separate system of administration of justice.[1] Uganda's military justice system has jurisdiction over both military personnel and civilians[2]. The major reason always advanced for the need to expand the jurisdiction of military courts over civilians and over matters that ordinarily fall within the jurisdiction of ordinary courts is that the civil courts take a long time to dispose of cases.

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[1] According to the UN Commission on Human Rights, military justice is not and should not be considered as a separate system of administration of justice but an integral part of the general justice system. See the UN Draft Principles Governing the Administration of Justice through Military Tribunals (hereinafter referred to as ―the UN Principles on Military Justice‖), U.N. Doc. E/CN.4/2006/58 (2006), paras.3, 10 and 11. See also UN Commission on Human Rights Resolutions 2004/32 and 2005/30

[2] Naluwairo, Ronald (2011) Military justice, human rights and the law: an appraisal of the right to a fair trial in Uganda's military justice system. Mphil Thesis. SOAS, University of London http://eprints.soas.ac.uk/18467 (accessed 12 August 2021)

Military justice has been called a rough justice[3]. This view, among other reasons, has been under scrutiny by constitutional lawyers and human rights scholars. Notwithstanding the critics, military justice is much-sought-after for the discipline of the military. Senator Nunn summarised the reasons why the military is considered as a unique specialised community which requires different rules and standards in the following words:

> Once an individual has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy and grooming standards are all governed by military necessity, not personal choice[4].

Perhaps the most compelling justification is that military justice as a separate system of administration of justice is necessary for the enforcement of military discipline, which is said to be paramount in ensuring military efficiency.[5] Discipline must be underpinned by a code which defines the rights and obligations of those who serve[6], providing sanctions for proven misconduct. Some forms of misconduct such as the most serious criminal offences, affect

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3 As recently as 2009, Chief Justice John Roberts cited with approval the 1957 case of Reid v. Covert for the proposition that "traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks See Military Justice Charles J. Dunlap Jr.

4 Nunn S (2003), —The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases

5 In the old case of Heddon v. Evans (1919) 35 TLR 642, McCardie J put it as follows: — I agree that discipline is the soul of the army. It is the basis of all military efficiency. National safety depends upon the armed forces of the people. The power of those forces rests on maintenance of discipline. The plainest instincts of patriotism call for its enforcement on one hand, and a ready submission to its requirements on the other. In military science, discipline means a state of mind in the individual serviceman, so that he will instantly obey orders no matter how unpleasant or dangerous the task may be. See Byrne EM (1981), Military Law, Naval Institute Press, Annapolis, p.1. See also Dambazau (1991), supra note 2, p.39. A subordinate officer must not judge of the dangers, propriety, expediency, or consequences of the order he receives; he must obey – nothing can excuse him but a physical impossibility. See Clode (1981), supra note 2, p.15. The development of this state of mind (i.e. to instantly obey orders without question regardless of the risk involved) among members of the armed forces is said to be a command, responsibility and a necessity.

6 See for instance, Rowe P (2006), The Impact of Human Rights Law on Armed Forces, Sherman EF (1973), —Military Justice Without Military Control, The Yale Law Journal, Vol.82, No.7, pp.1398-1425

civilians and service personnel alike; others such as conduct prejudicial to service discipline, have no civilian equivalent.[7]

The concern of this paper is court-martial jurisdiction over civilians and whether public interest is fundamental to the court-martial jurisdiction. It posits that discipline of the army has nothing to do with infractions of law by civilians. Indeed, as Rowe rightly notes, the Geneva Conventions of 1949 permit trial of civilians by military courts in certain circumstances.[8]

There is in fact dormancy of constitutionalism if public interest in court-martial justice for civilians is prioritized over constitutional rights. A conferment of a general criminal jurisdiction to court-martial courts is inconsistent with the state's human rights obligations.

In respect of criminal jurisdiction by court-martial, the paper adopts the argument that it is not enough for the national legislation to allocate certain categories of offences to military courts in abstract.[9]

2.0 MILITARY COURT JURISDICTION OVER CIVILIANS (MARTIAL RULE)

The subject jurisdiction of military tribunals[10] can be divided into three categories according to the source of law applied[11]- "military law," the "law of

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7 Foreword to Rant JW (1998), Courts-Martial Handbook, Practice and Procedure, Johnwiley and Sons Ltd, London. This Foreword is reproduced in the second edition of this book viz., Rant JW (2003), Courts_Martial, Discipline, and the Criminal Process in the Armed Services, Oxford University Press, New York, p.5.

8 Rowe P (2006), The Impact of Human Rights Law on Armed Forces, Cambridge University Press, Cambridge, p.101. See also Gibson MR (2008), —International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity, Journal of International Law and International Relations, Vol.4, No.1, p.35.

9 R Naluwairo 'The development of Uganda's military justice system and the right to a fair trial: Old wine in new bottles?' (2018) 2 Global Campus Human Rights Journal 59-76 https://doi.org/20.500.11825/687 (Accessed 12 August 2021)

10 Military law is a code which regulates the conduct of members of the armed forces, and which ordinarily is not supposed but in some jurisdictions like Uganda applies to civilians in certain circumstances. The major objective of military law is to ensure discipline and good order in the armed forces. See Dambazau AB (1991), Military Law Terminologies, Spectrum Books Limited, Ibadan, p.75. It is always important to

war, "and "martial rule" (court-martial). It is noteworthy that all these jurisdictions are limited to the military but could be applied to civilians in limited circumstances. This paper focuses on the last 'martial rule' over civilians on grounds of public interest.

The martial rule refers to situations where civilian institutions tasked with maintaining order and justice have more or less ceased functioning because of disruptive events, and the armed forces have been directed by appropriate civilian authority to exercise power in their stead. Lawfully, martial rule may vary in its nature and extent as strict necessity demands. It may range from mere apprehension or confinement of offenders for the purpose of trial by civil authorities to the creation and punishment of capital offenses by military authorities.

Under the UPDF Act 2005, Court-martial jurisdiction over civilians under the Act falls into four categories. These are jurisdiction over civilians accompanying the armed forces during peacetime or wartime[12], jurisdiction over civilians in possession of firearms[13], and jurisdiction over civilians by engagement (this

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distinguish military law from martial law. Martial law generally refers to the exceptional measures adopted whether by the military or the civil authorities in time of war or domestic disturbance for the purpose of preservation of order and maintenance of public authority. Unlike military law whose application is limited (i.e. to mainly members of the armed forces), martial law once established, applies to all persons i.e. soldiers and civilians alike. See O'Sullivan R (1921), Military Law and the Supremacy of the Civil Courts, Stevens and Sons Ltd, London, p.47. See also Clode CM (1981), The Administration of Justice under Military and Martial Law, University Microfilms International, London, p.157. Martial law normally involves the suspension of ordinary law and derogation from the guaranteed human rights and fundamental freedoms. According to Dicey, martial law —...is nothing more nor less than a name for the common law right of the Crown and its servants to repel force by force in case of invasion, insurrection, riot, or generally of any violent resistance to the law. See Dicey AV (1908), Introduction to the Study of the Law of the Constitution, 7th Edition, MacMillan, London, p.284 (with acknowledgement to Naluwairo Ronald in his PhD thesis).

11 Robert Girard, 'The Constitution and Court-Martial of Civilians Accompanying the Armed Forces. A Preliminary Analysis Stanford Law Review , May, 1961, Vol. 13, No. 3 (May, 1961), pp. 461-521 www.jstor.org (Accessed 12 August 2021)

12 Section 119 (e) of the UPDF Act 2005

13 Section 119 (h) ibid

may extend to civilian employees) of the army who are appointed by agreement[14] and jurisdiction over ex-service men[15].

Naluwairo Ronald observed that Uganda's military justice system now also embraces a number of crimes; many of which have no bearing on military discipline and, in ordinary cases, would fall under the jurisdiction of civilian courts. Examples of such crimes include assault, rape, defilement, larceny, burglary and traffic offences.

According to the Uganda Peoples' Defence Forces (UPDF) Act 2005 which is the major legal framework governing the administration of military justice in Uganda, a person subject to military law, who does or omits to do an act which constitutes an offence under the Penal Code Act or any other enactment, commits a service offence and is therefore liable to trial by a military court.[16]

In the United States, court-martial jurisdiction in time of peace can no longer be constitutionally applied over civilian dependents or civilians serving with, employed by, or accompanying the armed forces outside the United States. Article 2(10) of the Military Code on jurisdiction in *Time of War*; the court-martial jurisdiction of persons serving with or accompanying an armed force in the field pursuant to Article 2(10) has been restricted in regard to what constitutes a "time of war" by the Averette decision[17].

Concerning the question of jurisdiction over the subject matter, Principle 8 of the UN Principles on Military Justice states that —The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. In the Ugandan context, section 179 of the UPDF Act 2005 provides for court-martial jurisdiction over criminal offences unrelated to

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14 Section 119 (f) ibid
15 Section 210 of the UPDF Act 2005
16 See Section 179
17 United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363, 19 USCMA 363 (1970) https://cite.case.law/cma/19/363/ (Accessed 12 August 2021)

military services. It is also difficult to reconcile the fact that ex-soldiers (discharged and retired servicemen) could be tried for offences by court-martial.

Military courts may try persons treated as military personnel for infractions strictly related to their military status. In a series of its Concluding Observations on the periodic national reports under the International Covenant on Civil and Cultural Rights (ICCPR), the HRC has increasingly stressed the principle that the jurisdiction of military tribunals should be limited to offences of a strictly military nature. Regarding Cameroon, the HRC was concerned about the extension of the jurisdiction of military courts not only over civilians but also offences which were not of a military nature per se, for example all offences involving firearms.

An important question regarding the competence of military tribunals in as far as the issue of jurisdiction over the subject matter is concerned is whether military tribunals should have jurisdiction to try military personnel accused of committing gross human rights violations.

Trial by the civilian courts would avoid the unpopular exercise of military jurisdiction over civilians and would guarantee defendants certain constitutional and procedural rights hardly available in the military courts[18].

3.0 PUBLIC INTEREST IN MILITARY JUSTICE

It is the duty of the court to balance public interest in the efficient administration of criminal justice against the individual's constitutional

[18] THE EXERCISING OF MILITARY AND EXTRATERRITORIAL JURISDICTION OVER? CIVILIANS AND WAR CRIMES A Thesis Presented to The Judge Advocate General's School, United States Army The opinions and conclusions expressed herein are those of the individual author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency. Major Zugene A. Steffen United States Marine Corps 2 4 Judge ~Advocate Officer Advanced Course March 1976

rights.[19] Public interest is the efficient allocation of judicial resources, consistency of verdicts, convenience of witnesses and finality of litigation. Ironically, this duty to balance public interest and constitutional rights does not apply to military justice, but military discipline emerges as the superior public interest over constitutional rights.

I. Legal certainty as public interest (stare decisis)

In the decision of Kabaziguruka v. Attorney General[20], the minority judgment relied on the doctrine of stare decisis to justify public interest of legal certainty. The decision followed the Civil Appeal decision in *Namugerwa Hadijah v Attorney General*[21] where Supreme Court considered section 119(1) of the UPDF ACT which found a civilian in unlawful possession of a firearm to be subject to military law. But the minority decision overlooks the public policy in trying civilians under civilian courts given that these offences are adequately established under other enactments.

II. Military discipline as public interest (conduct)

The minority decision in the Kabaziguruka[22] case established that commission of a service offence violates the Public interest.

To maintain the armed forces in a state of readiness, the military must be in position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own code of service discipline to allow it to meet its particular disciplinary needs.[23] Wigmore argued that, ―Military justice knows

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19 Reportable Misc. Criminal Application No. 151 of 2020 In the matter between Kanyamunyu Mathew Muyogoma And Uganda. Delivered: 9 November, 2020

20 Constitutional petition no. 45 of 2016

21 Supreme Court Civil Appeal no. 04 of 2012

22 Supra at pg. 41

23 In the celebrated Canada Supreme Court case of R v. Genereux, 52 former Chief Justice of Canada, Justice Lamer, tersely put it as follows R v. Genereux [1992] 1 S.C.R 259.

what it wants…i.e… discipline…and it systematically goes in and gets it. He emphasised that —…military Justice wants discipline – that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of men[24]

In support of the view that the military discipline is for public interest, it is also frequently argued that military offences such as absence without leave, desertion, insubordination, cowardice, mutiny and the like have no civilian analogues: the adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors.[25]

However, the military court's jurisdiction over service offences has not been disputed at any one time, except the criminal jurisdiction which is broader and superior to civilian courts. In that sense, court martial jurisdiction weighs heavily against civilians. This will be tackled in the critique of public interest in section 4.0.

III. Time delays and public interest

Time delays in civilian courts are inconsistent with public interest necessitated for military discipline. To further the public interest ideology, it is often argued in this respect that the machinery by which ordinary courts of law ascertain the guilt or innocence of an accused citizen is too slow and too intricate to be applied to an accused soldier. Lord Macaulay thus argued that —…for, of all the maladies incident to the body politic, military insubordination is that which requires the most prompt and drastic measures…For the general safety, therefore, a summary jurisdiction of terrible extent must, in camps, be entrusted to rude tribunals composed of men of the sword.

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24 See Wigmore J (1921), —Lessons from Military Justice,‖ Journal of the American Judicature Society, Vol. 4, p.151

25 See Section 119(1)(g)

The Constitutional Court of South Africa has also stressed the need for a speedy disposal of cases as justification for the separation of the military justice system, emphasising that, —The conditions in which the South Africa National Defence Forces (SANDF) must operate in times of war- and in which therefore must be trained in peace time - are such that quick and efficient investigation of infractions must be possible, as well as prompt decisions on institutions of prosecutions…[26]

But military justice scholars like Rowe acknowledge that military courts may also succumb to delay. Rowe argues that there may be various reasons for such delay including the fact that the process for convening of courts-martial may not move quickly[27].

In a series of cases[28], as Rowe rightly observes, the ECrtHR has emphasized the principle that a soldier does not waive his rights given by a human rights instrument, merely by voluntarily joining the armed forces.[29]

4.0 COST OF HUMAN RIGHTS: A CRITIQUE OF THE PUBLIC INTEREST DOCTRINE

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26 Potsane v. Minister of Defence, Constitutional Court of South Africa 2002 (1) SAI CC (2001).

27 See Naluwairo (2011) thesis citing See Rowe (2006), p.86. 30 Macaulay TB (1856), History of England, Longman, London, p.35.

28 Naluwairo argues that the need to ensure speedy trials as justification for having military justice as a separate system of administration of justice remains questionable in Uganda‘s context.

29 See for instance Smith and Grady v. United Kingdom (2000) 29 EHRR 493 and Perkins v. United Kingdom (22 October 2002). These cases involved dismissals of the applicants from the army for violations of the United Kingdom Ministry of Defence absolute policy against presence of homosexuals in the armed forces. The ECrtHR did not however hold that since the respective members of the armed forces had willingly accepted a system of military discipline incompatible with their sexual orientation, Article 8 of the ECHR which guarantees the right to privacy was inapplicable to their cases. On the contrary, the Court found a violation of Article 8 of the ECHR, arguing that the direct interferences with the applicants‘ right to respect for their private lives could not be justified as being necessary in a democratic society as per Article 8 (2) of the ECHR. In Kalac v. Turkey (1999) 27 EHRR 552, para.28, the ECrtHR however stressed the point that in choosing to pursue a military career, a member of the armed forces accepts a system of military discipline which by nature implies the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians.

In this section, we shall appraise the public interest in administration of justice and the public interest in military discipline. It is also argued that the two public interest ideologies are reconcilable for court-martial jurisdiction. This section highlights some of the violations which are engendered by public interest to retain court-martial jurisdiction over civilians. These include: (1) constitutional rights (2) constitutionalism (separation of powers doctrine) (3) human rights (4) arbitrary power and abuse.

A. Threat to constitutional rights

This subject of constitutional rights such as the non-derogable right to a fair hearing has received much attention in military law literature and case law. Indeed, in the Supreme Court of the United States of America in *United States ex rel. Toth v. Quarles*, Mr. Justice Black agreed thus: ―It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offence charged against a soldier is purely military, such as disobedience of an order, leaving post, etc.[30]

Examination of the nature of military justice substantiates this basic approach. Historically, military law and procedures have been characterized by major deficiencies when compared with civilian criminal justice in light of traditional libertarian values. The qualifications of the personnel running these courts have constantly come into question. For example, in September 2010, 20-year-old Judith Koryang was sentenced to death for killing her husband, a member of the Ugandan military. She contended that she was abused by her husband

30 It is noteworthy that, at least going by media reports, Uganda‘s military tribunals are increasingly handling more civilian than military offences. See for instance Amoru P, Army Jails three over poaching in Murchison Falls, Sunday Monitor, 17 May 2009, Edyegu D, Court Martial Orders Omeda to Refund Sh2.3 Million, The New Vision, 17 November 2008 and Bagala A, Kampala‘s Top Criminals, The Daily Monitor, 23 May 2008. See also Jaramogi P, Two Held over Mityana Road Robbery, The New Vision, 9 March 200

and that he had threatened to force her from their home after she tested positive for HIV.

She pleaded guilty and was represented by a military defense lawyer, who did not raise a legal objection that the military courts were not competent to hear the case. The military court said the death penalty "should serve as an example to all women married to soldiers to desist from plotting to kill their husbands over petty issues."[31]

Such legally regrettable occurrences pose an irreconcilable threat to the constitutionally guarded non derogable right to a fair trial.

Applying the same principles and standards of administration of criminal justice, and with the help of experts where need be, it is submitted that in Uganda's context, civilian courts would be more competent and better placed to deal with infractions of military law than the military tribunals[32]. To depart slightly without prejudice to this finding, it is our considered view that civilian courts would be more competent to try civilians in times of peace other than military tribunals.

B. The demise of constitutionalism[33]

The structure of military tribunals is under the Executive arm of government. Thus, the Judiciary's place risks being usurped in the name of public interest.

Charles Fombad posits that constitutionalism encompasses the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that effectively compels it to operate within its

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31 Human Rights watch, Uganda: End Trials of Civilians in Military Courts. Find at https://www.hrw.org/news/2011/07/27/uganda-end-trials-civilians-military-courts (Accessed 12 August 2021)

32 Supra Naluwairo

33 Policy Brief April 26, 2016 The Challenge of Constitutionalism and Separation of Powers Doctrine in South Sudan Abraham A. Awolich

constitutional limitations. In this respect, constitutionalism has certain fundamental values that are well defined, lending mechanisms to hold the government accountable.

Constitutionalism is a "commitment to limitations on ordinary political power and revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates, and it resides in public consciousness"

The personnel that run military courts are only but an appendage of the coercive executive arm of government. With the absence of security of tenure for many of these hitherto serving military officers, the allegiance is, quite probably, with the appointing authority, the president, and not the Ugandans that deserve a fair hearing before the courts.

In *re Grimley,* the Court observed: ―An Army is not a deliberative body. It is the executive arm. Its law is that of obedience…‖ More recently, we noted that ―the military constitutes a specialized community governed by a separate discipline from that of civilians…

It is argued that if the General Court Martial has concurrent and unlimited criminal jurisdiction, it means that crimes by a military officer unrelated to the discipline of the military could also be determined without further appeal.

Suffice to say a case against an army officer is a case against one of their own (the Générale Court Martial) would be tainted with bias and may not be an impartial court for purposes of determining liability against the Executive for the mishaps of its own officers.

C. Abuse of power and human rights violations

A blanket and general jurisdiction of military tribunals is inconsistent with human rights obligations. This is because military courts are able to try human rights violations against civilians that amount to crimes, such as torture under the Prohibition of Torture Act, extrajudicial execution and enforced disappearance. John Gilissen observed that the Doctrine of National Security and the emergence of military dictatorships and authoritarian governments in many countries of Africa had set the stage for the expansion of 'military justice' in many countries.

He noted that the Doctrine of National Security, in particular, turned military courts into an instrument for combatting the so-called "enemy within". Thus, as pointed out by one of its critics, the late President of the Colombian Supreme Court of Justice, Dr. Alfonso Reyes Echandía, the practice of trying civilians in military courts was to become an extension of the Doctrine of National Security. It is questionable whether the retention of court-martial jurisdiction over civilians may be a conduit for the other public interest of national security.

The UPDF Act goes far beyond ensuring military discipline and allows jurisdiction over some civilians in certain circumstances, oftentimes for offences which are considered to be against national security. In the recent decision of *Madani v. Algeria*[34], the HRC emphasised that it is incumbent on a State party that does try civilians before military courts to justify the practice. On the facts of the case, the HRC therefore held that the trial of Madani (for jeopardizing State security and smooth operation of the national economy) by a military tribunal, was a violation of Article 14 of the ICCPR. Algeria did not show why recourse to a military court was required and did not indicate why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him.

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[34] Communication No. 1172/2003

It was emphasised that the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences does not constitute an argument under the ICCPR in support of recourse to such tribunals. From the above reasoning of the HRC, as Shah argues, it is plausible to conclude that it has established a principle that as a matter of presumption, the trial of civilians by military tribunals is per se a violation of the right to a competent tribunal guaranteed by Article 14 (1) of the ICCPR.71 It is therefore incumbent on the State whose military tribunals try civilians to rebut this presumption.[35]

Additionally, given that military courts are in practise an appendage of the executive arm of government, there is a high likelihood that they will turn into a mere tool of oppression to civilian dissidents.[36] In Uganda, the court martial has often been in the spotlight with many critics maintaining that it is a tool to imprison civilian opposition activists.[37]

D. Impunity and threat to the rule of law

Military courts often remove members of the armed forces and military institutions from the rule of law and the scrutiny of society.

The UN Special Rapporteur considered that: "Military tribunals, particularly when composed of military officers within the command structure of the security forces, very often lack the independence and impartiality required under international law. Military jurisdiction over human rights violations committed by members of the security forces very often results in impunity.

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35 See Shah S (2008), ―The Human Rights Committee and Military Trial of Civilians: Madani v. Algeria,‖ Human Rights Law Review, Vol. 8, No.1, p.143.

36 The Israeli Military Judicial System As A Tool Of Oppression And Control: A Review Of Military Order No. 1827 Find at https://www.addameer.org/publications/israeli-military-judicial-system-tool-oppression-and-control-review-military-order-no (Accessed 12 August 2021)

37 Daily Monitor Newspaper, Military court: Tool for punishing Opposition? Find at https://www.monitor.co.ug/uganda/news/national/military-court-tool-for-punishing-opposition--3298358 (Accessed 12 August 2021)

The Special Rapporteur expressed deep concern and need to enact legislative reforms allowing for such cases to be treated by civilian tribunals.

Naluwairo Ronald observed that:

> "In 2005 the Ugandan Parliament enacted a 'new' UPDF Act which repealed and replaced the 1992 UPDF Act. This law does not provide any positive reforms in as far as the protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts is concerned. The UPDF Act 2005 does not provide adequate guarantees to ensure the independence and impartiality of Uganda's military courts. Contrary to the right to an independent and impartial tribunal requirement that the tenure and financial security of people who serve as judicial officers should be secured by law, the UPDF Act 2005 is silent on the issue of security of tenure and financial security of the members of the UPDF who serve as judge advocates. The one-year tenure provided for the members of the military courts is also insufficient to guarantee their independence."

The absence of the Director of Public Prosecutions in participation in the military justice process may result in impunity before military tribunals. Impunity for the perpetrators of human rights violations in itself constitutes a breach of the duty of guarantee the State has where human rights are concerned.

There are several forms of de facto impunity. For example, they include complicit inertia on the part of the authorities, frequent passivity on the part of investigators, bias, intimidation and corruption within the judiciary.[38] As the Expert on impunity put it, "[i]impunity conflicts with the duty to prosecute and punish the perpetrators of gross violations of human rights which is inherent

[38] In general, de facto impunity exists when, in the words of the United Nations Expert on the right to restitution, compensation and rehabilitation, "the State authorities fail to investigate the facts and to establish criminal responsibility"

in the entitlement of victims to obtain from the State not only material reparation but also satisfaction of the 'right to know' or, more precisely, the 'right to the truth'."

5.1 RECOMMENDATIONS

A. Trial of civilians accompanying units and civilian employees

There have been critiques of court-martial jurisdiction over civilians by military tribunals. This is evident in the trial of civilian employees which section 119 (f) of the UPDF Act 2005 clearly enlists as subject to military jurisdiction. In the 1969 case of *O'Callaghan v. Parker*° Justice William O. Douglas remarked that while "the Court of Military Appeals takes cognizance of some constitutional rights," courts-martial "as an institution are singularly inept in dealing with the nice subtleties of constitutional law."

He added that "a civilian trial ... is held in an atmosphere conducive to the protection of individual rights, while a military trial, "is marked by the age-old manifest destiny of retributive justice."[39] Indeed, the Kenyan Defence forces law exempts certain offences of a sexual nature and domestic violence to allow an atmosphere conducive to the victims of these offences.

B. Trial of Ex-service men (civilians)

Should the court-martial extend jurisdiction over an ex-soldier under section 210 of the UPDF Act? On a similar question; Mr. Justice Black rightly argued that —It is impossible to think that discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-

[39] Major Susan Gibson(1995) Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem Vol 147-150 at pg. 178 Accessed at https://books.google.co.ug/books?id=djv7nSD6K9sC&pg=RA1PA178&dq=%22a+civilian+trial+...+is+held+in+an+atmosphere+conducive+to+the+protection+of+individual+rights,+while+a+military+trial,+ (accessed 15 January 2022)

servicemen the benefits of a civilian court when they are actually civilians. In this way, section 210 of the UPDF Act 2005 may be challenged for allowing prosecution of ex-service men who are no longer on active service.

In *United States ex rel. Toth v.* Quarles, an ex-serviceman in the United States Air Force was arrested and taken to Korea to stand trial before court martial on charges of murder and conspiracy to commit murder while he was still an airman. The Supreme Court of United States of America pointed out that it was impossible to think that discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefits of a civilian court when they are actually civilians.

It stressed that it was not impressed by the fact that some other countries indulged in the practice of subjecting civilians who were once soldiers to trials by courts-martial instead of trials by civilian courts[40]. It emphasised that free countries of the world restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

The court observed that it had never been intimated by Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationships with the military and its institutions. To allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on.

C. Trial of the unlawful possession of firearms by civilians

This offence under s.119 (h) of the Act is questionable if the civilian is in possession of a firearm in that court-martial may take over the case from the civil courts.

[40] https://supreme.justia.com/cases/federal/us/350/11/ [Accessed 15 January 2022]

General Sherman[41] once stated: The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation. These objects are as wide apart as the poles, and each requires its own separate system of laws-statute and common. Following General Sherman's reasoning, an offence by a civilian has nothing to do with governance of the army.

5.2 CONCLUSION

As noted earlier, the trial of civilians should at all times be within the jurisdiction of civilian's courts in times of peace. Trial of ex-servicemen should be abolished as they are civilians. The Uganda Law Reform Commission should revise the UPDF Act 2005 in respect of Sexual offences and domestic violence committed by servicemen to be tried in civilian courts. Therefore, a blanket criminal jurisdiction over service men may not be salutary.

The most plausible approach by the Judiciary is to outlaw military jurisdiction over civilians in times of peace and recommend to parliament for reform of the UPDF Act 2005 to remove offences of sexual nature and domestic violence to be excluded from military court's criminal jurisdiction.

41 https://www.caaflog.org/home/contingencies-of-proof-ernesto-and-alberto-return [Accessed 15 January 2022]

IGNORANCE OF THE LAW IS NO DEFENCE: AN ANALYSIS OF THE MAXIM IN UGANDA

Rita Owach[*]

ABSTRACT

The maxim, ''Ignorantia juris non excusat' means that ignorance about a legal requirement or prohibition is never an excuse to a criminal charge. Before application of this maxim, it is important that the law is available to a layperson in a simplified form for him/her to be aware of it. This article focuses not just on how strict application of the maxim without the aforesaid requirement occasions injustice, but also on the efforts Uganda has made to make the law available. Further discussed are the reasons for the continued inaccessibility to the law, and suggestions for solutions to address these causes.

1.0 INTRODUCTION.

The maxim, '*Ignorantia juris non excusat'* is one that is familiar to the layman (nonprofessional) as well as to the lawyer.[1] The maxim is to the effect that lack of knowledge about a legal requirement or prohibition is never an excuse to a criminal charge.[2]

Aristotle in Athens first described the maxim.[3] Roman law did not allow ignorance as a defence for *jus gentium,* which was law derived from the common customs of the Italian tribes that embodied the basic rules of conduct which any civilized person would deduce from proper reasoning.[4] However, ignorance of the more compendious and less common sense *jus civile* was a defense allowed to women, males under 25 years of age, peasants, persons of

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1 Keedy, '*Ignorance and Mistake in the Criminal Law,*' 22 Harvard Law Review 76

2 ibid

3 Hughes G, *''Routledge philosophy guidebook to Aristotle on Ethics'',* Routledge, London,2001, 126-127

4 Cass R, '*Ignorance of the law'* 685

small intelligence and soldiers who were away when a statute was passed.[5] It was believed that these individuals, because of their status, would not have knowledge of the law.[6] The maxim also did not apply where one had not had the opportunity to consult counsel familiar with the laws.[7]

The maxim was also applicable in English law and was considered in a plethora of cases, the first being *Hilary Term, 1241*.[8] In this case, Robert Waggehastr was summoned to answer for breach of a fine for entering upon the land in possession of the mother of Wakelinius. Robert pleaded that he entered upon the land under a belief that the estate belonged to him, which belief was founded upon the advice of counsel. The court held that this was no defense and ordered Robert to be imprisoned for breach of the fine.[9]

Similarly, in *Brett v Ridgen*,[10] Manwood J. asserted that, "It is to be presumed that no subject of this realm is miscognisant of the law whereby he is governed. Ignorance of the law is no excuse." The same position was adopted in *Mildmay*,[11] where court held that as the defendant had taken upon him a knowledge of the law, he must be bound by "ignorantia juris non-excusat."[12]

The idea behind the maxim is that all people are required to be knowledgeable of the law to safeguard themselves, to protect and enforce their rights[13].

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5 L. Hall & Seligman, '*Ignorance of the Law and Mens Rea,*' U. CHI. Law Review page 643-44

6 Supra note 1, 80

7 Supra note 2, 685

8 Reported in Bracton's Note Book, Maitland'd ed., pl. 496

9 Edwin Roulette Keedy 'Ignorance and Mistake in the Criminal Law' Havard Law Review, 78

10 (1568) I Plowd.342

11 (1584) I Co. Rep.175

12 Supra note 1, page 79

13 John Cantius Mubangizi '*The Protection of Human Rights in Uganda; Public Awareness and Perceptions,'* African Journal of Legal Studies, pg. 178

Another rationale for this law is the belief in legislative rationality i.e. the law written by a rational legislature should be knowable.[14]

The maxim *'Ignorantia juris non excusat'* is trite law in Uganda. It is enshrined in Section 6 of the Penal Code Act, which states;

> "Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence."[15]

The maxim is elucidated through Ugandan jurisprudence. In *Byansi & Anor v Kiryomujungu,*[16] the appellants sought to rely on the fact that as non-professionals, they were ignorant of the court procedures. As a result, it was one of the grounds advanced for failure to file their defence in time. The court however held that this was a flawed argument, and that to plead ignorance of the law was untenable because of the Latin maxim, 'ignoratia juris non excusat.'[17]

The case of *Uganda v Nakoupuet* is another example where the Latin maxim comes into play.[18] Here, the court convicted the accused of rape and noted that the form of cultural rape that was meted upon the victim could not be excused by the accused's ignorance of the law, given that the relevant law had been in place for a long time.

There have been, however, a number of arguments concerning this maxim. Some authors argue that the maxim, premised on the presumption that all

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14 Mark D. Yochum, *'The Death of a Maxim: Ignorance of Law is no Excuse (Killed by Money, Guns and a Little Sex) Journal of Civil Rights and Economic Development,'* Issue 3, Volume 13 Spring 1999

15 Penal Code Act (Chapter 120) Section 6.

16 HCT-05-CV-CA-2010/29 [2013] UGHCCD

17 ibid

18 Criminal Case-2016/109 [2019] UGHCCRD

people know the law, is illogical and absurd, even though most of the time it is irrefutable.[19] This is because no man in any community knows the law either intensively or extensively. To predicate that of the ignorant which cannot be predicated of the learned is absurd.[20]

There is also an argument that the maxim ought to be applied to heinous crimes (*mala in se*) crimes whose criminality seems self-evident[21] through the application of practical reasonableness,[22] instead of *mala prohibita* crimes that are prohibited but not morally wrong.[23] This however might pose a problem given the varying opinions on what constitutes morality.[24]

This paper asserts that for the maxim, '*ignorantia juris non excusat*' to be applied, the law must reach out to a layperson in a simplified and digestible form for him or her to be aware of it[25]. To strictly apply the maxim without meeting this requirement would greatly occasion an injustice and erode the entire purpose of criminal law which is to punish only blame worthy members of society.[26]Many times, people are blamed for ignorance while having reasonable grounds to be ignorant.[27]

2.0 KNOWLEDGE OF THE LAW IN UGANDA.

Prior to a state's application of the "*ignoratia juris non excusat*" maxim, it must do its part by ensuring that the law reaches out to a layperson in a simplified

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19 Cas R, *'Ignorance of the Law: A maxim re-examined*' William & Mary Law Review, 1976, 688

20 Wharton, Criminal Evidence, Section 723.

21 Cran F, *'Legal moralism considered'* 89(2) Ethics, 147

22 Legarre S, *'Derivation of Positive Law from Natural Law*' revisited.' 57 Notre Dome Law School, 2012, 109

23 Kahan D, '*Ignorance of the law is no excuse.*' 129

24 Posner R, '*The problematic of moral and legal theory.*' 111(7) Harvard Law Review, 1998 - 1641

25 Alter L. *''Morality Influences how people apply the Ignorance of the Law defense.'* 820

26 Grace R, *'Ignorance of the law as an Excuse.'* 86(7) Columbia Law Review, 1986, 14-16

27 ibid

and digestible form for him or her to be aware of it.[28] The law must therefore be known and the laws publicly promulgated. Legal awareness is key.[29]

According to the Uganda constitution, laws enacted by parliament must be published in the Gazette, an official government publication that contains notices, government declarations and supplements, bills, statutes, statutory instruments and Legal Notices.[30] Article 91 (8) of the Uganda constitution is to the effect that;

> "a bill passed by parliament and assented to by the president or which has otherwise become law under that article shall be an Act of Parliament ***and shall be published in the Gazette."***

These laws are also available on the parliamentary website.[31] For ordinances passed, (law made or passed by the district council)[32], it is mandatory that these too are published both in the Gazette and the local media.[33] Institutions like the Uganda Law Reform Commission have also published user-friendly versions of the law, for example it prepared a compendium containing labour related laws and all the laws relating to employment.[34] It has also prepared a compendium of the former constitutions of the Republic of Uganda translated into different local languages like Dhu-Alur, Lugbara-ti, Lusoga and Lumasaaba.[35]

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28 Ashworth A, *'Ignorance of the Criminal Law, and Duties to Avoid it'* 19 and 25.

29 Legal awareness can be defined as the empowerment of individuals regarding issues involving the law." What is legal literacy? Examining the concept and objectives of legal literacy. [Accessed 31 January 2022]

30 https://uppc.go.ug/gazette/ [Accessed 28 August 2021]

31 https://www.parliament.go.ug/documents/acts [accessed 3 September 2021]

32 Section 1(1)(m) of the Local Government Act, (Cap 243) defines Ordinance as the law made or passed by the district council under Section 38 of the aforementioned Act.

33 ibid Section 38 (4)

34 https://www.ulrc.go.ug/content/publications [Accessed 3 September 2021]

35 ibid

It is therefore evident that there exist legal provisions requiring the law is published in order to make it known and available to the public. The question then becomes how many people can actually access these laws.

2.1 ACCESSIBILITY OF THE LAW IN UGANDA

The need to access the law stems from the right to access of information, a right not only enshrined in the constitution,[36] but also in international and regional treaties ratified by Uganda. These include inter alia; the Universal Declaration of Human Rights (UDHR)[37], International Covenant on Civil and Political Rights (ICCPR)[38] and the African Charter on Human and People's Rights.[39]

While the law might be available[40], its accessibility is problematic for some. As such, some people may remain ignorant of the law which in some cases is no fault of their own. Thus to strictly apply the maxim, '*ignorantia juris non excusat*' while neglecting this fact would greatly occasion an injustice.

How accessible a law is greatly depends on the means through which it is disseminated. In Uganda, the law can be accessed through various platforms including but not limited to; the Gazette[41], printed statutes, and even internet websites.

I. DISSEMINATION OF THE LAW THROUGH THE GAZZETTE.

The law requires that new laws must be published in the Gazette.[42] However, given the cost implications of accessing the Gazette, a number of people are barred from accessing it and the information therein.

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36 Article 41 0f the 1995 Uganda Constitution.
37 Article 19
38 Article 19 (2)
39 Article 9
40 See supra note 18, 20 and 21.
41 Supra note 19
42 Supra note 18 and 22

The annual subscription fee for the Uganda Gazette is UGX 1,400,000 (Uganda Shillings One Million Four Hundred Thousand Shillings.) This fee enables one to receive a weekly copy of the Uganda Gazette and all supplements published therein[43]. However, given that nearly half of Uganda households experience multidimensional poverty, more than double the percentage living in monetary poverty;[44] not many are able to afford this fee.

Poverty and low levels of legal literacy are interlinked. [45] In a note to the UN General Assembly 67th session, the UN Secretary General states,

> "the deprivation that persons living in poverty encounter throughout their lives-lack of access to quality education, reduced access to information, limited political voice and social capital translate into lower levels of legal literacy and awareness of their rights, creating social obstacles to seeking redress."[46]

In light of this, the gazette then becomes accessible only to those who can afford it for example the middle class and law firms.

II. DISSEMINATION OF THE LAW THROUGH THE INTERNET.

The law is disseminated and made available in Uganda through the parliamentary website[47]. According to a Market Performance Report by Uganda Communications Commission (UCC), at the end of the first quarter of 2021, the total internet subscriptions stood at 31.2 million, which is more than 50%.[48]

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43 ibid

44 Going Beyond Monetary Poverty"; Uganda's Multidimensional Poverty Profile-UNICEF

45 Report of the Special Rapporteur on extreme poverty and human rights" page 6 from note by the Secretary General on Extreme Poverty and human rights for UN GA 67th Session A67/278 Distri: General 9 Aug 2012<www.ohchr.org> [accessed 24 August 2021]

46 ibid

47 Supra note 20

48 Market Performance Report 1Q21-Uganda Communication Commission-page 14

However, with the recent introduction of the 12% tax on internet[49], it is likely that internet access is stifled because additional costs including taxes deepen the affordability challenge.[50]

Strict application of the adage 'ignorance of the law permits no excuse' would thus contradict the aim of criminal law, which is to punish the blameworthy.[51] This is because the people cannot be sanctioned for breaking a law they were unable to know of. Perhaps, the more feasible solution would be to consider a lighter sentence for those who plead ignorance of the law. Fortunately, this has been considered in Uganda.

The emeritus Chief Justice of Uganda, Benjamin Odoki, in his book, *''Guide to Criminal Procedure in Uganda''* mentioned that while ignorance of the law does not afford a defense, it may however afford a ground for the court to be lenient while issuing a sentence. This is due to the reduced moral blame worthiness given that not everyone knows all the laws of the country that govern him.[52]

III. DISSEMINATION OF THE LAW THROUGH LOCAL MEDIA.

The law can also be disseminated through local media.[53] This includes newspapers, radio and television. A recent example of this is the use of local newspapers such as the *Daily Monitor* to publicize the recently introduced 12% tax on internet[54] as well as the *New Vision* to inform citizens on the new tax amendments for the financial year, 2021/2022.[55]

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49 <https://www.monitor.co.ug/uganda/news/national/govt-substitutes-ott-with-12-tax-on-data-airtime--3432728> [accessed 24 August 2021]

50 <https://cipesa.org/2021/07/digital-taxation-doing-more-harm-than-good-for-access-and-rights-in-africa/ > [accessed 25 August 2021]

51 Supra note 15

52 B.J. Odoki Rtd. C.J *''Guide to Criminal Procedure in Uganda in Uganda''* 2nd Edition page 51

53 Supra note 22

54 https://www.monitor.co.ug/uganda/news/national/govt-substitutes-ott-with-12-tax-on-data-airtime--3432728 [accessed 28 August 2021]

55 https://www.newvision.co.ug/articledetails/111857 [accessed 28 August 2021]

The issue though is; how many people are able to access these papers let alone read them? One might argue that this conundrum is solved through dissemination by alternative forms of mass media for example radios but again, how many people are able to access these given that nearly half of Uganda households experience multidimensional poverty more than double the percentage living in monetary poverty?[56]

On a more positive note however, some judicial institutions are working on spreading the knowledge of the Law throughout the country and have, to an extent, been successful. A case in point is the Uganda Law Reform Commission.[57]

3.0 'IGNORANTIA JURIS NON EXCUSAT' AND THE RULE OF LAW.

The maxim, 'ignorantia juris non excusat' and the Rule of Law are interlinked. The Rule of Law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[58]

Rule of Law is therefore existent in a country when the various institutions operate in accordance with the law. Adherence to it implies that governments are accountable by law and that citizens are equal under the law.[59]

For the Rule of Law to flourish in a country, the laws, which the government and other institutions are expected to adhere to, must be both publicly promulgated and accessible. Reliance on the maxim without giving the

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56 Supra note 46

57 Supra note 37

58 Guidance Note to the Secretary General; UN Approach to Rule of Law Assistance- April 2008.

59 Rule of Law and Constitution Building; The Role of Regional Organizations- IDEA (International Institute for Democracy and Electoral Assistance 2014) Page 1

layperson access to law in a simplified and digestible form erodes the Rule of law[60] and stifles its application.

4.1 RECOMMENDATIONS

The maxim, '*ignoratia juris non excusat'* was meant for the greater good. This is because "excusable ignorance might encourage ignorance".[61] In fact, to allow ignorance as an excuse would be to offer a reward to the ignorant.[62] If ignorance of the law were a defense to prosecution for breaking such a law, there is no law of which a villain would not be scrupulously ignorant.[63]

This paper recommends that for the maxim to be strictly applied in Uganda, the law must reach out to a layperson in a simplified and digestible form for him or her to be aware of it[64]. To strictly apply the maxim without meeting the aforesaid requirement would greatly occasion an injustice and erode the entire purpose of criminal law which is to punish only blame worthy members of society.[65]

It also posits that while the law has to an extent been made available and accessible[66], there is need to continue pursuing efforts in this regard. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans.[67]

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60 Nciko Arnold, '*Ignorance of the Law is no Defence: Street Law as a Means to Reconcile this Maxim with the Rule of Law'* 2018 page 12

61 Kahan D '*Ignorance of the Law is an Excuse*.' But only for the virtuous.' 96(127) Michigan Law Review, 1997,127

62 *State v Boyett*, 32 N.C. 336 (1849)

63 Wharton, Criminal Law, Section 102

64 Supra note 16

65 Supra note 14

66 Supra note 31,35,36 and 37

67 Ashton A, *'Ignorance of the Criminal Law, and duties to avoid it*,' 4-5

This paper advises that more steps be taken to ensure that the law is accessible to the public especially through the gazette and through the internet for example by waiving the cost of accessing the gazette.

Legal awareness, for example through methods like a street law programme, is also a step in the right direction. In such a programme, law students engage with the person involved in the various fields of law such as criminal, juvenile, consumer protection, housing, welfare and human rights in order to make them aware of their rights and obligations before the law.[68]

4.2 CONCLUSION

The rule of law requires that all persons are accountable to laws, but this is subject to the requirement that they are publicly promulgated. In particular, the principle of legality requires sufficient accessibility and clarity of law. This paper asserts therefore that it is only when these laws have been sufficiently publicised that the maxim *Ignorantia juris non excusat* may come into play. Otherwise, strict application of law despite proven ignorance of the same may run contrary to the rule of law.

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68 Maisel P, *'Expanding and Sustaining Clinical Legal Education in Developing countries. What we can learn from South Africa'* 30(2) Fordham International Law Journal, 2007, 384

HOW LAWS PROMOTING GENDER AND DISABILITY RIGHTS SUPPORT ECONOMIC DEVELOPMENT

Onen Cylus[*]

ABSTRACT

At first glance, the concepts of gender, disability rights and economic development do not reveal any links. However, the Sustainable Development Goals expose an inextricable link, proving that gender and disability rights invariably impact economic development. As such, the relevance of inclusive laws cannot be overstated, in order to propel the economic development of any state forward.

1.0 INTRODUCTION

Economic development is one of the aims of the Strategic Development Goals (SDGs). The SDGs are goals agreed to by over 193 countries to ensure that countries around the world attain economic development by 2030. These also demarcate the different means in which economic development and growth can be achieved, and these are expressed as targets.[1]

This article examines the relationship between the observance of human rights and economic development, and defines the specific relationship between gender and disability rights laws and economic development, with particular focus on the existent legal regime internationally and in Africa, the impacts that the available laws have had on the subject. The paper suggests a way forward regarding how these laws can impact economic development.

2.0 DEFINITIONS: GENDER RIGHTS, DISABILITY RIGHTS AND ECONOMIC DEVELOPMENT

Gender rights have been largely defined in the context of gender equality, which refers to all genders being free to pursue whatever career, lifestyle

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[*] The author is a former student of law at Makerere University. Special gratitude to Chelsea Tumwebaze, for relentlessly encouraging me to write this paper until its end.

[1] SDGF, *Goal 8: Decent Work and economic growth.* Available at: https://www.sdgfund.org/goal-8-decent-work-and-economic-growth [accessed 21 January 2022]

choice, and abilities they want without discrimination.[2] The importance of gender rights is not to have everyone treated exactly the same, but rather that everyone has a leveled playing ground, and because of this, gender equality cannot be discussed without including gender equity, which recognizes that one gender (men) has in history received an advantage over their counterparts the women. Therefore, gender equity looks at putting in place incentives to ensure that women can "catch up" with men.

Disability rights refer to the capability of persons with disability[3] to fully enjoy all human rights and freedoms. They must be equally treated and with dignity.[4] Disability rights laws aim at protecting persons with disabilities and ensuring they are treated fairly, and not denied access to different opportunities just based on their disability.

Economic development on the other hand refers to the process through which low income economies are transformed into modern industrial economies. This transformation is shown by qualitative and quantitative improvement.[5] Economic development is measured through metrics like the Gross Domestic Product (GDP), Gross National Product (GNP) and GNP per capita among others.[6]

For a State to achieve economic development with the above metrices, there must be a high level economic activity going on in the country, and this

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2 Human Rights Careers, *What Does Gender Equality Mean?* Accessed at: https://www.humanrightscareers.com/issues/what-does-gender-equality-mean/ [accessed 21 January 2022]

3 Article 1 of the Convention on the Rights of People with Disabilities

4 Stanley Mutuma. (2012) "*The Legal Definition of Disability"* The East African Review. Access at: https://journals.openedition.org/eastafrica/434 [accessed 21 January 2022]

5 Britannica, *Economic Development.* Accessed at: https://www.britannica.com/topic/economic-development [accessed 21 January 2022]

6 Bitesize, *Contrasts in development: Economic development indicators.* Accessed at: https://www.bbc.co.uk/bitesize/guides/zs7wrdm/revision/3 [accessed 21 January 2022]

requires that many people get involved in the process. This essay will illustrate how gender and disability rights laws can be used to improve the involvement and inclusion of all persons in the process of economic development.

2.1 The general link between human rights and economic development.

It is important to have this discussion because for a case to be developed around gender and disability rights, there must be an understanding of the role that rights generally play in bringing about economic development. Even if this discussion can be had in two ways, that is to say the impact human rights have on economic development, and secondly, how economic development is a good platform for the observance of human rights, the focus of this essay will be on the former.

As noted above, the measure for economic development is based on the GDP, GNP and GNP per income. All these metrices require that there is production and or trade going on. The recognition of human rights opens up not only opportunities for people to have access to various opportunities, but also improves production in the country because the recognition can directly be related to the development of human resource which is very vital in the production process.

An example of right whose recognition and respect would increase the human resource and open up opportunities for citizens is the right to education. An example being the impact the Universal Primary Education (UPE) policy which was introduced in Uganda in 1997 has had on the nature of human capital.[7]

Therefore, it is important to recognize that for a country to achieve economic development, it is important that the people in that country are educated and

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7 Andy McKay and Polly Vizard. (2005), *"Rights and economic growth: Inevitable conflict or 'common ground'?"* Rights in Action. Accessed at: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4353.pdf [accessed 21 January 2022]

healthy for them to be able to provide Labour for production, come up with innovative ideas, become entrepreneurs and be employable. All these cannot be achieved if there isn't a recognition of human rights generally.[8]

2.2 Gender rights and economic development.

As noted above, SDG 8 that provides for economic growth recognizes that one of the ways of achieving this is by having inclusion of both men and women in the process[9]. The International Labour Organization has stated that the involvement of women in the labor force stood at 47% in 2019, which was 27% lesser than the male participation.[10] Therefore discussions about gender rights laws and their impact on economic development ought to focus on gender equality and specifically the inclusion of women.

The world bank in its 2012[11] report indicated that there are 4 thematic areas that require attention if gender equality is to be achieve. They included: (i) human capital, (ii) economic productivity, (iii) access to finance and (iv) empowerment.

i) Human capital.

Human capital is generally important because it is the only way an individual can make a meaningful contribution to the economic development process.

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8 Utpal Kumar De, "*Human Resource and Economic Development: Where Does North-East India Stand?" Ideas. Accessed at: https://ideas.repec.org/a/asi/ijoass/2011p108-116.html* [accessed 21 January 2022]

9 UNDP, *Goal 8 Targets. Accessed at*: https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-8-decent-work-and-economic-growth/targets.html [accessed 21 January 2022]

10 ILO, *World Employment and Social Outlook Trends 2020.*

11 World Bank. (2012) *Gender Equality and Development.*

This is illustrated by an individual's education, skill, creativity, health and experience which enable them to add value to their work.[12]

As noted by the world bank,[13] the gender gaps in human capital are created by the fact that women in most developing countries are not able to access health and education services, and on top of this, there are cultural shocks that do not enable them develop the required skills and experiences. For example, in Nigeria, as much as women engage in employment, most of the employment is not gainful because they were not able to access education, and it is projected that their salaries wages would be up by about 11% if they had attained full education.[14]

Still in Nigeria, women are not able to access skilled pregnancy care because they do not have the financial capacity.[15] This has increased the number of women who die in the process of giving birth, another impediment to the development of human capital among the women.

ii) Economic productivity.

Economic productivity can only be achieved by women if there are economic opportunities. This is undermined because women have a lower access to production inputs. Most female farmers in the global south have less access to information about agricultural extension networks, which are dominated by

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12 The World Bank, *The Human Capital Project: Frequently Asked Question.* Accessed at: https://www.worldbank.org/en/publication/human-capital/brief/the-human-capital-project-frequently-asked-questions [accessed 21 January 2022]

13 Supra, note 11

14 Borgen Magazine. (2020), *"AGILE fights for Girls' access to education in Northern Nigeria.* Accessed at: https://www.borgenmagazine.com/agile-fights-for-girls-access-to-education-in-northern-nigeria/ [accessed 21 January 2022]

15 Sanni Yaya. (2019), "*Gender inequity as a barrier to women's access to skilled pregnancy care in rural Nigeria: a qualitative study.*" Accessed at: https://academic.oup.com/inthealth/article/11/6/551/5480910 [accessed 21 January 2022]

men in countries like Malawi, and most developing states in Africa.[16] This greatly limits the participation of women in activities that are meant to create economic development.

iii) Access to finance.

The lack of access to finance by women is attributed to economic, regulatory and cultural factors.[17] In Ethiopia for example, culturally, women are discouraged from engaging in economic activities or even owning land which could be a means to access credit services.[18] Because of this, women find themselves not being able to access financial services and resultantly establish economic activities that would help generate income and in turn bring about financial development.

iv) Empowerment.

The empowerment of women should focus on giving women the opportunity to access resources and a platform for them to take on leadership positions. There is approximately 22 women in ministerial and parliamentary roles for every 100 men,[19] and yet the significance of women in power in relation to economic development cannot be denied. In India, women leadership at the local level revealed that there was a great reduction in corruption, and more money was allocated to the education sector.[20] Therefore women's priorities have always been seen to be more about the development of the community than it is for the men.

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16 Supra note 11

17 UNCTAD (2014) "*Impact of access to financial services, including by highlighting remittances on development: Economic empowerment of women and youth."*

18 Tekeste Berhanu. (2020), "*Financial Inclusion in Ethiopia: Is it on the Right Track?"* International Journal of Financial Studies.

19 Lynn Taliento. (2016), "*Power with Purpose: How women's leadership boosts the economy and society"* McKinsey Global Institute. Accessed at: https://www.mckinsey.com/mgi/overview/in-the-news/power-with-purpose# [accessed 21 January 2022]

20 Ibid.

2.3 Disability rights and economic development.

Persons with disabilities have a lot of professional potential that has not been tapped into as a result of the misconceptions around their ability to work. These misconceptions limit the impact that persons with disabilities may have. As earlier on discussed, SDG 8 has made it clear that for the attainment of economic growth and development, there must be an inclusive approach to the provision of decent work to all.

The UN Department of Economic and Social Affairs has stated that persons with disabilities are less likely to be employed than their counterparts without disabilities, and according to the figures of employment to population ratios, in sub Saharan Africa it stands at 34% for persons with disabilities and compared to 53% for persons without disabilities.[21]

This is largely as result of the low levels of education attained by people with disabilities, since most countries do not put in place sufficient resources or infrastructure that is friendly and that would encourage education among persons with disabilities. Persons with disabilities are also denied employment opportunities because of discrimination, stigma and negative attitudes.

These limit their involvement in money generating activities, even when they have the capacity to. Therefore, to achieve the SDG 8, there must be more inclusivity in the employment sector and other sectors for persons with disabilities.

3.0 WAY FORWARD: HOW BEST GENDER AND DISABILITY RIGHTS LAWS CAN LEAD TO ECONOMIC DEVELOPMENT

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21 UN Department of Economic and Social Affairs, *Disability and Employment.* Accessed at: https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities/disability-and-employment.html [accessed 21 January 2022]

Based on the above discussion, for there to be economic development, it is important that all persons that can engage in economic activities are given the opportunities to do so. States must put in place various policies to increase participation in these activities to lessen poverty and in turn improve the country's economy. Laws focusing on disability and gender rights should pay much attention to the following aspects in a bid to promote economic development.

i) Human Capital.

As stated earlier, human capital is important because it ensures that employees give valuable employment. Therefore, the gender and disability rights' laws should focus on improving access to meaningful education. Access to education for girls can be achieved by ensuring that girls don't just go to school, but they feel safe while in school.[22]

This is important because most girls fail to attain higher education because they do not feel safe in the schools where they are subject to negative cultural sentiments.

In addition, the laws should focus on ensuring that girls attain training in different professions, outside those that have culturally been tied to them like cooking. For persons with disabilities, disability rights laws should put emphasis on ensuring that educational institutions are accessible. They should also put an obligation on states to provide for free special requirements needed by persons with disabilities in schools, such as interpreters and aides. These laws can also push for specialized schools for persons with disabilities.

In addition to the above, the two groups ought to have access to health services, which are vital to ensuring that they keep alive and are able to make a contribution to the economy. Therefore, for strong human capital to be built,

22 The World Bank, "*Girl's Education"* Accessed at: https://www.worldbank.org/en/topic/girlseducation [accessed 21 January 2022]

the laws must ensure that the above rights are accessible to both women and persons with disabilities.

ii) Economic productivity.

Just like women, persons with disabilities also have a challenge of being economically productive because they cannot access production inputs like capital and other resources. This essay recommends that gender rights laws abolish cultural practices that do not allow women to own resources like land that they can use for production, and they should also encourage women to take up leadership in the various economic programs so that they can directly benefit from the same.

These laws should also make it incumbent on the states to provide capital to women that are ready to start up money making ventures but lack the capital. Such arrangements should be able to be utilized by women at the grass roots. The same should be done in disability rights laws.

iii) Access to finance.

Gender and disability rights laws should be formulated in a way that allows for financial institutions to lower rates on loans for women and persons with disabilities, and considering the historical and cultural injustices that they have suffered in relation to owning property, these laws should lower the bar of securities required by financial institutions when giving out loans.

iv) Empowerment.

This essay recommends that gender and disability rights law should put in place mechanisms that encourage this group of people to take up elective offices. They should also focus on disbanding cultural norms and practices that do not agree that women can be leaders.

4.0 CONCLUSION

This article has shown the link between disability and gender rights laws and economic development. It has made the point that for there to be economic development, there must be inclusion of all persons, and that this inclusion must be done in a non-discriminatory manner. It makes suggestions as to how disability and gender rights laws can be modified to ensure that women and persons with disabilities are fully incorporated into the process of economic development, as required by SDG 8. Finally, it must be categorically stated that the laws must not only be in the law books, but must also be actualized.

UNRAVELLING THE SOCIAL MEDIA INFLUENCER JIGSAW IN UGANDA: THE LEGAL QUESTIONS

Rogers Turyasingura Terry[*]

ABSTRACT

In the wake of technological advancement and social media application in Uganda, comes the question on social media influencers and how they place in, and contribute to the Ugandan economy. In a bid to solve this, it begs the legal questions of how should the advertising practices of influencers be regulated? Should these individuals be treated as professionals or as consumers? How should their speech be regulated? Is influencer marketing a new type of work? What is the role of online platforms? What are the consumer protection issues around this phenomenon? Are there any child labour issues where the influencer is under 18? Should Uganda Revenue Authority move in on this income stream?

1.0 INTRODUCTION

The emergence of social media influencers fits within the broader framework of peer- to-peer services, the sharing economy, the 'gig-economy' and the 'do-it-yourself trend' that has grown dramatically in the past decade[1] reaching its height in these times of the COVID-19 Pandemic where everything is being done online.

In Uganda, the emergence of what has been coined to be a "scientific campaign and election" has brought to the fore the emerging importance of influencers. Recently, socialite Shanita Namuyimba aka Bad black was engaged in a campaign by Ministry of Health to appeal to a certain cluster of society which she did excellently. Her work was initially not rewarded as the technocrats did not understand what exactly she had done to earn the money she was demanding. This matter was settled outside court but is a small sign of the

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[1] Vanessa Katz, 'Regulating the Sharing Economy' (2015) 30 Berkeley Tech. L.J. 1067.

questions that lie ahead for influencers, consumers, legal practitioners and the adjudicating courts.

This phenomenon is generating a wealth of new legal and ethical issues which deserve to be addressed. For example, how should the advertising practices of influencers be regulated? Should these individuals be treated as professionals or as consumers?[2] How should their speech be regulated? Is influencer marketing a new type of work? What is the role of online platforms? What are the consumer protection issues around this phenomenon? Are there any child labor issues where the influencer is under 18? Should Uganda Revenue Authority move in on this income stream?

Thus far, these issues have been paid 'lip service' in the media and have attracted the attention of Uganda Communications Commission (UCC) to the extent of licensing social media influencers[3] under its mandate in Section 6(A) of the Uganda Communications Act, 2013. UCC has approached this issue rather narrow-mindedly.

1.1 WHO IS A SOCIAL MEDIA INFLUENCER?

One of the challenges of influencer marketing in the digital age is precisely its definition. Influencer marketing is characterized diversely at several levels: social media influencers share common features such as their reliance on social media networks, production of regular media content, and a peer-to-peer engagement with the public on apparently non- commercial grounds (*e.g.*, sharing workouts on YouTube to inspire users rather than to offer services).

Nevertheless, since social media influencers engage with different audiences and focus on different types of content, these general features are insufficient

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2 Catalina Goanta and Sofia Rachordas', "The Regulation of social media influencers, University of Groningen Faculty of law Research Paper series 41/2019.

3 Public Notice of Registration by UCC dated 5th March, 2018.

to truly understand their nature. In other words, social media influencers should be primarily characterized by reference to a number of specific elements. These features may be crucial to assess whether an individual can be considered as an influencer or not.[4]

The ***first element*** is *the industry* where an influencer operates. In 2017, Forbes tracked top influencers from 12 categories: pets, parenting, fashion, entertainment, travel, gaming, fitness, beauty, home, food, tech & business, and kids.[5] On the basis of this analysis, the top ten influencer pets (*e.g.* Grumpy Cat, Nala) had at that moment a total reach of 68 million users. In comparison, the gaming sector does much better at amassing followers (*e.g.* the highest outreach in this sector was 228 million users).

The same applies to the beauty industry which at the time of the Forbes analysis had about 135 million followers. The total dimension of the industry is relevant as the qualification of an individual's influence will be evaluated according to the average number of followers in the industry in which he or she operates. In the gaming sector, influencers will thus need to have several hundreds of thousands of followers to become relevant, while in more niche markets some thousands will be sufficient to have an impact on the market. However, there are some influencers who do not fit into predefined market definitions.

The ***second element*** of an influencer brand is the *source* of their popularity. Here we can distinguish between celebrities who became famous outside of social media, but use social media for their personal and professional promotion, and influencers who are exclusively known for their activity on social media.

The first category under element 2 includes well-known singers, football players, actors, TV stars and some cultural leaders. The second category

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4 Catalina Goanta and Sofia Rachordas', "The Regulation of social media influencers, University of Groningen Faculty of law Research Paper series 41/2019.

5 Forbes, 'Top Influencers' (*Forbes*, 2017)

refers to individuals who were fully anonymous before they started attracting attention on social media and owe their popularity to YouTube, Instagram, Facebook, twitter, snapchat or tiktok etc.

This second element is important as the first group (show- business professionals in general) ought to be well-informed as to their role as public figures and the compulsory disclosure of sponsorship. The second group (originally 'peers'), on the contrary, may start being treated in the same way as the first one (the 'professionals') only from the moment they start amassing a significant amount of market power and influence, typically translated into the number of followers and the ability to shape for example their commercial or political decisions.

The ***third element*** that can help us characterize an influencer is their influence analytics, that is, any data-driven measurement of how far their influence spreads (e.g. the number of followers, subscribers, views, likes and dislikes, retweets, impressions). These metrics point to which influencers are well-known - and have managed to amass the highest number of followers in a specific industry - and those influencers with a more limited impact on the market.

The ***fourth element*** of an influencer is their legal status, closely linked to the pursued business models. Here we can distinguish between influencers who have companies, influencers who have the legal status of a freelancer, and influencers who are still consumers themselves. This is a very important legal aspect, which is very rarely obvious to users. Some high-earning influencers launch their own brand of products and create companies to this end. Other influencers – also depending on the industry – will rely on freelance legal forms to gather financial resources through platforms.

Lastly, influencers who are still consumers may be involved in influencer marketing, but with more limited ways of earning financial benefits.

2.0 LEGAL QUALIFICATION OF CONTENT MONETIZATION.

Monetization entails creating revenue out of content posted on social media by creators who are social media influencers.

The first business model used by influencers is *affiliate marketing*, 'an endorsement marketing strategy that pays affiliates (the content publishers) money when users click on their customized URLs'.

The main feature of affiliate marketing is that influencers are paid for sales/clicks. An example of this business model is any Instagram post which includes a discount code. When such a code is included, the influencer will typically receive a commission for every item purchased with it.

Although the practices of affiliate marketing are not fully transparent, these can either be (i) a service contract between either a producing/selling company and the influencer, or as the case may be, between an advertiser and the influencer; or (ii) an innominate contract which can bear any name and which will establish advertising obligations on the influencer, as well as payment obligations on the advertiser/seller/service provider.

The second business model is the *exchange of goods and/or services*. In this case, the advertising brand offers its goods or services for a post, a review, a mention and/or a story made by the influencer on their social media, depending on the nature of the industry e.g., Uganda Tourism Board reaching out to influencers and taking them to a different national parks to get free access and stays. This agreement can be explicit, if the offer and acceptance model is fulfilled in a more formal way (e.g., by signing a contract), or it can be implicit, if the influencer accepts, through their conduct, to promote the goods/services in a way that the other party can benefit from, based on negotiations undertaken in the private messaging of social media platforms.

The third business model is that of endorsement deals. These are framework contracts by which influencers receive a compensation for advertising as indicated by the brand. A good example in this respect is Luka Sabbat's contract with Snap Inc.[6] In 2018, Sabbat, a fashion/lifestyle influencer who was supposed to advertise eyewear made by social media company Snapchat, was sued by the company's PR agency for non-performance. So far, the litigation further revealed the conditions of the contract, which Sabbat had broken: a lump sum paid in exchange for a number of posts and stories on Instagram.

In such a transaction, the influencer acts as more or less like a brand ambassador, and often is limited by exclusivity clauses, meaning that they will have to specifically not endorse any competing brands.

The fourth business model reflects more complex business operations which include the influencer becoming a *producer/provider of goods or services* themselves, or – depending on how the agreement is built – collaborating with other companies for guest products. This business model raises a number of legal questions as once again the legal obligations of the influencers are determined by their agreement with the parties whose products they promote. In the case of an influencer owning a brand and promoting it among other brands, it is unclear what capacity the influencer acts in – as the CEO of the company, as an advertiser of the company, or as an actor completely independent from the company.

3.0 LEGAL QUESTIONS BEYOND ADVERTISING.

The earlier stated legal questions include:

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6 Alexandra Ma, '20-year-old 'influencer' sued for allegedly refusing to wear Snap Spectacles in public despite being paid $45,000' (Business Insider, 1 November 2018) https://www.businessinsider.com/influencer-luka- sabbat-sued-for-alleged-refusal-to-wear-snap-glasses-2018-11 [Accessed 18 January 2022]

i) What is the liability of influencers?

No Ugandan Court has been faced with this question and therefore the decisions on this subject are largely in foreign jurisdictions that we can persuasively rely on.

Swedish Patent- and Market Court[7] published judgment in a case concerning a Swedish influencer and an Influencer Marketing Agency. The main legal issues concerned:how marketing should be indicated on social media (wording, placement etc.) to be clearly distinguishable, and; who is liable for the (misleading) marketing for the purposes of the Swedish Market Act (transposing Directive 2005/29/EC on unfair business-to-consumer commercial practices).

In this specific case, an Influencer Marketing Agency gave an influencer the task to promote a certain service on her blog and Instagram account. She made three postings, two blog postings and one posting on her Instagram account. The first blog post had the text "in collaboration with" (in Swedish: i samarbete med) written in small font at the end of the post. The second post had "sponsored post" written in English and highlighted in pink directly under the title of the post. The Instagram post had the #collaboration (in Swedish: #samarbete) at the end of six lines of text under a photo.

The Swedish Consumer Ombudsman deemed the choice of wording and placement of the words in all three of the cases to be insufficient as a clearly distinguishable indication of marketed content. (See for instance Article 9 of the ICC Code which has been confirmed in Swedish case-law by the case MD 2009:15).

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7 https://www.konsumentverket.se/globalassets/artikel/pagaende-mal-domar-och-forelagganden/domar/dom-kissie-konsumentverket.pdf [Accessed 24 January 2022]

The Court started by defining the concept of the "average consumer" for the purposes of the marketing in question. The target group for the influencer was said to be women between 18 - 34 years old. The Court held that the average consumer in this group was probably more skilled and used to distinguish marketed content on social media than the average consumer in general. Taking this into account, the Court looked at the wording used by the influencer. It found all the expressions, which the influencer had used, to be enough to indicate marketed content for the average consumer of the target group.

The Swedish expressions for "in collaboration with" as well as the English expression "sponsored post" were all accepted by the Court. It should be noted in this regard that Sweden, unlike several other European countries, has no legal protection in place for the use of Swedish as a language to communicate with consumers in Sweden. The Court noted that the word "sponsored" was differently used compared to what had been established by ICC Code and reflected in national legislation on broadcasting, but that change of meaning of the word "sponsored" had been established as market practice in social media by several of the main actors, such as Facebook and Instagram.

Turning to the layout of the three different posts, the Court found the second blog post with "sponsored post" highlighted in pink directly under the title was sufficient to make it clearly distinguishable as marketing. However, it amounted to misleading marketing when the text "in collaboration with" or the #collaboration were placed at the end of the posts.

It should be noted that the Swedish Consumer Ombudsman had not included the trader when the case was filed to the Court. It could be that the Consumer Ombudsman found the legal liability of the trader to be

clear and the, in general fairly low, conditional administrative fine only to be of symbolic value anyway.

The Swedish Consumer Ombudsman argued that the influencer was either mainly (in Swedish: huvudsakligen) or jointly liable for the misleading marketing and the Influencer Marketing Agency was jointly liable for the marketing in question.

The Court stated that as such, both influencers and Influencer Marketing Agencies could potentially be held as "acting on behalf of a trader" and be jointly held liable for misleading marketing. It also clearly pointed out that it is the trader who is always mainly liable for any misleading marketing. Turning to the facts of the case, it noted that the influencer had finalised the design and the content of the posts in her social media channels and published the posts.

In other words, she was acting on behalf of the trader by substantially contributing to the marketing. As a consquence, the influencer got a conditional administrative fine of 100 000 SEK (approx. 10 000 EUR).

The Court stated it was established that the Influencer Marketing Agency had provided an online platform for the influencer's blog, communicated the task to the influencer, provided the influencer with a draft of the post(s), and commented on the influencer's first reworked version of the draft (which the Agency had provided).

Even so, it was not enough to establish that the Influencer Marketing Agency had acted on behalf of the trader, because the Swedish Consumer Ombudsman had not shown that the Agency had given the influencer any instructions regarding how the marketing should be indicated as such, and the Agency had no final decision right regarding

the posts. The influencer could (and did) publish the final versions of the posts without needing a signing off or approval from the Agency.

The Swedish Consumer Ombudsman was to therefore reimburse the legal expenses of the Influencer Media Agency, amounting to 963 650 SEK (approx. 96 365 EUR).

ii) How should the advertising practices of influencers be regulated?

We must acknowledge that in most cases, technology moves much faster than the legal framework and Uganda is no exception. Uganda needs a comprehensive legal framework to deal with influencer marketing as has been done in some advanced jurisdictions like the United States like the laws pertaining to the influencer brand relationship in the United States codified in 15 U.S.C. §§ 41–58 (and mirrored in the Electronic Code of Federal Regulations, §§ 255–255.5).

In the United States, the laws surrounding how social media influencers should interact publicly with consumers with respect to brands and companies can be found in the Federal Trade Commission Act (FTC Act)[8]. Section 5(a) of the FTC Act prohibits 'unfair or deceptive acts or practices in or affecting commerce.'[9]

The time is now for UCC to come up with proper and well thought out guidelines keeping in mind the ever changing nature of this phenomenon.

iii) Should these individuals be treated as professionals or as consumers?

This is a question that can be answered based on the category of influencer and the business model as earlier discussed.

iv) How should their speech be regulated?

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8 15 U.S. Code, § 45

9 (15 U.S. Code, s 45(a)(1)).

Under national, regional and international laws, Uganda is obligated to respect the right to freedom of speech and expression of all persons. Article 29 of the

Constitution of the Republic of Uganda 1995, guarantees protection of these individual rights—which include freedom of the press, media practitioners, civil society organizations (CSOs) and all political groupings.

The overriding importance of the freedom of expression—including the right to seek, receive and impart information, as a human right has been widely recognized, both on its own and as an essential underpinning of democracy and means of safeguarding other human rights. Therefore, Social media influencers should be allowed to express themselves for as long as the information is not misleading or discriminatory.

v) Is influencer marketing a new type of work?

In some ways yes, it is a new way of doing things largely because it is mostly run by anyone and not qualified marketing executives

vi) What is the role of online platforms?

Online platforms owe consumers, and influencers alike, a duty of care to flag any content that is deemed misleading or offensive and to protect the data of consumers in accordance with the GDPR and the Data Protection and Privacy Act, 2019.

Uganda unfortunately has not yet passed a comprehensive consumer protection law and therefore consumer protection legislation is largely scattered in different legislation, chief among them being the Uganda National Bureau of Standards Act. In the absence of a proper consumer protection law, consumers are exposed to a business environment that is uncertain.

vii) Are there any child labor issues where the influencer is under 18?

Yes, the demographics show that children in Uganda access internet as early as 8 years. Of those, 7 out 10 face the risk of unregulated internet exposure[10]. Many companies have taken to using children influencers such as fresh kid to send a message to that market segment. The law[11] prohibits exploitation of children below 18 for labor and financial gain. Therefore, children influencers must be protected in terms of content and what contracts their guardians enter into on their behalf.

4.0 CONCLUSION

The relevance of social media influencing cannot be overstated in the wake of technological advancement and its resultant impact in society. However, as is the case with all unregulated services, this could lay breeding ground for legal violations. As such, the law must step up to deal with the rapidly growing media influencer roles to protect the broader framework of issues arising.

10 UNESCO Institute for Statistics, 2018. Source for all other data: Understanding Children's Work Project's analysis of statistics from Labour Force Survey, 2011–12. (9).

11 ILO C.138, Minimum age, Section 7 of the Children (Amendment) Act 40.

THE MILES ARE OURS: THE LEGAL IMPLICATIONS OF THE ABOLITION OF THE MAILO LAND TENURE SYSTEM

Nasser Konde[*]

ABSTRACT

The mailo land tenure system has been subject to numerous criticism and calls for its abolition. The Commission of Inquiry into Land Matters recommended the abolition of mailo land tenure system among its reforms to land tenure in Uganda. The call for the abolition of mailo land tenure system is however premised on the nature and intricacies of the mailo land tenure system and is not alive to the implications of the same on the property and cultural rights of the individuals that own land under this tenure. This paper suggests that abolition is not the way to go.

1.0 INTRODUCTION

The land and the interests of those who live on the land, must always be the first consideration in the government of African countries. ~Lord Hailey[1]

The mailo land tenure is a unique system that is only home to Buganda Kingdom. As such, the same is intertwined with Buganda culture and custom. This makes many critics believe that ownership and possession of land under this tenure system is exclusive to only Baganda which is not the case. Buganda is one of the regions in Uganda where a foreigner can acquire land.

In his Heroes Day speech on 9th June 2021, the President of the Republic of Uganda expressed his disapproval of the mailo land tenure system referring to the same as "very bad".[2] This was no surprise given the fact that the President had earlier stated that the recommendations of the Commission of Inquiry Into

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[1] Meek, C. K. (1946), Land Law and Custom in the Colonies, London, page xxvi.

[2] https://www.monitor.co.ug/uganda/news/national/museveni-slams-very-bad-mailo-land-policy-3431222 [Accessed 22 June 2021]

Land Matters which included overhauling the tenure system and only remaining with two tenure systems were going to be implemented by the new cabinet.[3]

Buganda Kingdom has rejected the government's plans to abolish the mailo land tenure system and maintained that the current land conflicts are not triggered by the mailo land tenure system as claimed. The Kingdom indicated that the abolition of the mailo land tenure system and its fusion into other tenures contrary to Article 26 and Article 237 of the Constitution disenfranchises land owners in Buganda, which constitutes the most sought after land for commercial and public interests because it lies at the heart of the country's transport system, public administration, business and commerce.[4]

Most of the critics of the mailo land tenure system assert that it does not grant security of tenure to tenants in addition to making tenants vulnerable to exploitation by landlords through subjecting them to exorbitant rent. This makes it the prime cause of land conflicts and evictions in Uganda.

However, the framers of the Land Act 1998 were alive to all the above owing to their occurrence during the initial and formative period of the mailo land tenure system, the colonial period. They provided sufficient safeguards for the same as will discussed in later sections of this paper.

This paper interrogates the nature of the mailo land tenure system, the legality and implications of its abolition on property and cultural rights of the individuals that own land under the tenure system.

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3 National Leadership Institute, New Cabinet to study white paper on Land Inquiry-President , Uganda Media Centre , Thursday 22 April 2021. Available at https://www.mediacentre.go.ug/media/new-cabinet-study-white-paper-land-inquiry-president
[Accessed 22 June 2021]

4 James Kabengwa, Mengo speaks out on Mailo Land Tenure, Daily Monitor, and Friday 23 April 2021. Available at https://www.monitor.co.ug/uganda/news/national/mengo-speaks-out-on-mailo-land-tenure-3374430?view=htmlamp [Accessed 24 June 2021]

Section one discusses the historical context of the mailo land tenure system , section two discusses the nature of the mailo land tenure system , section three discusses the legality of its abolition, section four discusses the effects of its abolition and section five concludes the paper.

2.0 HISTORICAL CONTEXT OF THE MAILO LAND TENURE SYSTEM

2.1. THE CONCEPTION

During the early years of the Uganda Protectorate, several attempts at land settlement had been made. When Sir Harry Johnston was appointed Special Commissioner with effect from 1st July 1989, he demanded that there should be a land settlement as early as possible in the history of British rule in Uganda.[5]

This land settlement was finally achieved through the 1900 Buganda Agreement that was negotiated between Sir Harry Johnston and the Regents on behalf of the Kabaka. Article 15 of the 1900 Buganda Agreement provided for a general land settlement, the kind which had never been seen in East Africa.[6]

The total area of land in Buganda was assumed to be 19,600 square miles. This was to be divided between the Kabaka and other notables on the one hand and the Protectorate Government on the other. Thus the Kabaka, members of the royal family, the Regents, County Chiefs and certain other leaders were to receive either private or official estates totaling 958 square miles and 1,000 chiefs and private landowners were to receive the estates of which they were already in possession.[7]

These were computed at an average of eight square miles for each individual, making a total of 8000 square miles. A total of 92 square miles was to be

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5 West H. W. (1964), The Mailo System in Buganda, Uganda Government Press, 8.

6 Ibid 8 & 9.

7 Ibid page 10.

granted to the three missionary societies, 50 square miles set aside for existing Government stations and 1,500 square miles for forest reserves. The remaining area amounting to an estimated 9,000 square miles of waste and uncultivated land was to be vested in Her Majesty's Government.[8]

Part of Article 15 read**;**

> "... as regards the allotment of 8,000 square miles among the 1,000 private landowners, this will be a matter left to the decision of the Lukiiko with an appeal to the Kabaka. The Lukiiko will be empowered to decide as to the validity of claims, number of claimants and the extent of the land granted....."[9]

The responsibility for the initial allocation of the mailo estates therefore fell upon the Lukiiko. Necessarily, the procedure was by paper allocation of areas and an allotment was made to each of the twenty counties of Buganda. Each Chief was then required to produce detailed allotment lists for allocation within his Ssaza (Administrative County).[10]

Most of the new allottees of land were not slow in making their claims and implementing the new mailo land tenure system. However, little notice was taken of old rights of occupancy. No one considered the position of the Bakopi (commoners) and their customary and hereditary rights of occupation were degraded to tenancies at will upon privately owned land. In some instances the former occupants were ordered to leave their land for the followers of the incoming Chiefs.[11]

2.2 THE INITIAL PERIOD

8 Ibid.
9 Ibid.
10 Ibid.
11 Supra n5, 11.

Article 15 did not indicate the manner in which these private or official estates were to be held but the Certificates of Claim, issued to the first allottees in Buganda, certified that the claimants had obtained an estate in Fee Simple. This is a term in English Real Property Law specifying a definite form of tenure.[12]

In 1902, Judge Ennis advised the withdrawal of this form of certificate so far as African claims in Buganda were concerned. He substituted a form of Provisional Certificate for mailo land which avoided all terms of English law and confined the recognition of ownership to such tenure, whatever it might be, under which the land was to be held. Evidently, at this time, official opinion was not in favour of introducing a new European concept of land ownership and the intention was to preserve Ganda customary tenure as far as possible.[13]

By 1904, the allotment lists were being prepared and finalized and the claimants were marking out their claims and submitting written memoranda to the Lukiiko for confirmation. Once confirmed, each claim was then further evidenced by the issue of a Provisional Certificate pending formal demarcation and survey.[14]

In 1906, Judge Carter carried out an investigation into the facts of land tenure in Buganda. His report furnished the background for the deliberations of a Committee upon the Protectorate's outstanding land problems. The Committee's report dated 13th March 1907 contained a number of important recommendations which laid a foundation for the future of land administration in Uganda.

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12 Supra, West, 13.

13 Ibid.

14 Ibid.

As regards Buganda, the Committee was satisfied that the natives regarded the 1900 Agreement as having introduced a new order of things in which were merged any differences between butaka and butongole holdings.[15]

It saw no good purpose in attempting to check this new conception of a single allodial ownership and it suggested that the conditions of this new form of ownership, for which the name mailo tenure was proposed, should be defined in a Buganda native law, thus showing an appreciation of the fact that mailo land had never been vested in the Crown. The Committee's recommendation was informed by the fact that a butaka tenure suggested the creation and confirmation of a class of hereditable but inalienable property, whereas the whole course of legislation in England had been to free the land from restrictions on alienation. [16]

2.3 THE FORMATIVE PERIOD

From the recommendations of the Committee stemmed the basic law governing the tenure of mailo land. This was the Buganda Land Law 1908. The same appeared in Buganda legislation virtually unchanged under the title Possession of Land Law 1908. This law defined and set down the incidents of mailo tenure. The law provided that mailo land should be freely transferable and disposable by will or customary succession to Africans of Uganda but except with official consent , should not be transferable either in perpetuity or by lease (other than certain annual tenancies) to non-Africans.[17]

This is demonstrated in the case of *Singh v Kulubya*[18] where the Respondent owned mailo land and purported to lease it out to the Appellant an Indian without the consent of the Lukiiko and Governor. The Privy Council observed that the purported lease by the Respondent was void ab initio for being

15 Supra, West 14.
16 Ibid.
17 Ibid.
18 [1964] AC 142.

contrary to Section 2 of the Possession of Land Law that required the consent of the Lukiiko and Governor for the lease of land to non-Africans.

The total area which might be held by any one individual was limited in general to thirty square miles. The Protectorate or English law of easements was made applicable to mailo land and provision was made for the resumption of land for public purposes. Any mailo land which was the subject of lapsing of property upon the death of owner intestate without heirs, was to be dealt with by the Governor and the Lukiiko as trustees for the people of Buganda.

Among other provisions it was enacted that an owner of mailo land would not be compelled to give a chief any portion of the produce of his land, either in kind or in cash; and all transactions concerning mailo land were to be recorded in duplicate, one copy being stored by the Government and the other held by the owner of the land.[19]

The Committee also recommended that the current system of registration of documents should be replaced by a system of registration of title with a guarantee of indefeasibility in line with the Torrens system. Accordingly, the Registration of Titles Ordinance 1908 was enacted to embrace the registration of the first mailo final certificates issued in 1909. [20]

Land in Buganda gained commercial value due to the introduction of cash crops and cash crop growing. As such, a commercial trend developed in the relationship between landlord and tenant on mailo land.

The imposition of a rent on cultivators was a simple evolution arising from the commutation into money of the services traditionally due by a peasant to his overlord. By 1918, this rent had been generally fixed at ten shillings a year for each peasant's garden. A few thousand fortunate landowners were entitled to

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19 Supra, West, 133 to 134.

20 Supra, West, 14.

the rent of several hundred thousand tenants, but there was no security of tenure or formal recognition of tenant rights.[21]

Since earliest times tenants paid tribute to their landlords from produce on the land. By tradition, such tribute was usually in the form of bananas, beer or goats and was intended for the sustenance only of the landlord and not for profit in any commercial sense. But a radical change in the concept of this tribute (envujjo) occurred when with the spread of cotton cultivation, the landlords extended it to include a proportion of the tenants' cotton crop. [22]

It is said that in some localities, landlords demanded as much as one bag out of every three from the produce of the tenants' cotton plots. That such an imposition should bear heavily upon the peasantry is not surprising. The discontent of the tenants caused them to join forces with the Bataka and seek for a return to the old customary forms of tenure. This discontent found expression in the establishment in 1921 of the Bataka Movement. [23]

The movement addressed itself to the British Government. The British Government was therefore faced with a choice between two possible courses of action. It had to either order a reversion to the traditional system, still understood in Buganda, but ill-adapted to the requirements of a rapidly developing economy. Alternatively, it could accept the new order, for good or evil, by refusing to interfere with the spreading individualisation of rights in land.[24]

Inevitably the latter course was chosen and this decision was publicly announced on 7th October and published in the Uganda Herald on 5th October 1926. At the same time, the British Government, mindful of the powerful

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21 Thomas, H.B., and Spencer, A. E (1938), A History of Uganda Land and Surveys and of the Uganda Land and Survey Department, Entebbe, 69.

22 Supra, West, 20.

23 Ibid.

24 Supra West 21.

support rendered to the few bataka by the many tenants,[25] declared its intention of insisting upon the passage of legislation to ensure security of tenure to tenants and for the limitation and regulation of rent and tribute in kind.[26]

So, the Busuulu and Envujjo Law 1927 was enacted which came into effect on 1st January 1928. This law has profoundly influenced the utilization of mailo land. Statutory limitations were set upon the dues payable to the mailo owners by the tenants. Thus busuulu, the former semi feudal labour obligation which had already been commuted into a cash payment variable at will by the landlord was fixed by law at Shs.10 per annum and has since come to be regarded as an annual rent. Envujjo, formerly the feudal obligation for the rendering of tribute in kind, became for the most part a cash levy upon the growing of commercial crops.[27]

In return, the tenant receives for himself and his successors, statutory protection of his right of occupancy in his holding. This right being revocable only for good and sufficient reasons (which are duly prescribed in the law) and then, only upon an eviction order being granted by the Court. There were furthermore, other provisions designed to safeguard the tenant.[28] Particularly, a tenant's ownership of his or her own improvements was recognised except when he or she abandons his or her holding.[29]

It may be said that with the enactment of the Busuulu and Envujjo Law, the initial and formative period in mailo tenure came to an end. Article 15 of the Buganda Agreement had introduced to Buganda an entirely new concept of the relationship between man and the land.

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25 Ibid.
26 Supra West, 72.
27 Supra, West. 22.
28 Ibid.
29 Section 12.

The conditions of a quasi-freehold system of individual title to land had been defined for Buganda by the Buganda Land Law 1908. Later with the reaction which found expression in the Bataka Movement, onto this modernised system permitting the free negotiability of land, there was superimposed a pattern of hereditable tenancies. These were protected by a statute, which perpetuated and extended certain aspects of the former customary systems of land occupancy. [30]

3.0 NATURE OF MAILO LAND TENURE SYSTEM

The name mailo is derived from the mile which was the unit measurement of the land that was allotted under Article 15 of the Buganda Agreement 1900. The mailo land tenure system found in Buganda Kingdom is unique to East and Central Africa. It is not a complex of communal rights commonly found in other tribal areas. It is not based on clan rights, also fairly common elsewhere nor despite the recognition and full acceptance of individual title to land. It has a truly commercial tenure in which custom yielded to contract as the basis for economic relations.[31]

Instead, it is somewhere in between. It is characterised mainly by the quasi freehold titles introduced after 1900, but it has also been deeply affected by a later partial reversion to tradition, a compromise with custom. It is the product of a well-meaning, but hasty, attempt to introduce modern European concepts of land holding to a people amongst whom such ideas had not at that time developed spontaneously.[32]

3.1 CONTEMPORARY MAILO TENURE SYSTEM

30 Supra, West, 22.
31 Supra, West, VI.
32 Ibid.

The contemporary mailo land tenure system is no different from the one that existed during the colonial period. The 1995 Constitution [33] and the Land Act 1998 [34] establish the contemporary mailo land tenure system.

The Land Act 1998[35] further describes the mailo land tenure system as a form of tenure involving the holding of registered land in perpetuity; permitting the separation of ownership of land from the ownership of developments on the land made by a tenant; enables the owner, subject to the customary and statutory rights of those persons lawful or bonafide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the land.

The mailo land tenure system provided for in the Land Act 1998 is simply a reincarnation of the mailo land tenure system that existed during the colonial period under the Buganda Land Law 1908, Possession of Land Law and the Busuulu and Envujjo Law 1927 with a number of modifications to guarantee protection to both the landlord and tenant.

One of the modifications in the contemporary mailo land tenure system is the nature and definition of a tenant. The Land Act 1998[36] provides for two types of tenants to wit;

3.1.1. LAWFUL OCCUPANT

A lawful occupant is a person who entered the land with the consent of the registered owner.[37]

3.1.2.BONAFIDE OCCUPANT

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33 Article 237(3) (c).
34 Section 2(c).
35 Section 3(4) (a)-(c).
36 Section 29.
37 Section 29(1) (b) Land Act 1998.

A bonafide occupant is a person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner twelve years or more;[38] or had been settled on land by Government or an agent of the Government.[39]

In *Kampala District Land Board and Chemical Distributors v National Housing and Construction Corporation***,**[40] the Court observed that the Respondent Company was a bonafide occupant because it utilised and developed the suit land unchallenged for more than twelve years before the coming into force of the 1995 Constitution.

Another modification of the contemporary mailo land tenure system is the additional rights that are accorded to landlords and tenants in addition to those previously provided for in the Busuulu and Envujjo Law 1927 and custom. Landlords and tenants under the mailo land tenure system have a number of attendant rights.

3.2. RIGHTS OF LANDLORDS

A landlord has considerable proprietary rights in the land which are limited only by the provisions of the Land Act 1998.[41] (Mukwaya,1953,at pg42)These include the following;

3.2.1.THE RIGHT TO ALLOT LAND

A landlord has a right to allot or refuse to allot any portion of his land and reserve it for his own present or future use. He or she may allot it to

38 Section 29(2) (a) Land Act 1998.

39 Section 29(2) (b) Land Act 1998.

40 [2005] UGSC 20.

41 Mukwaya, A. B., (1953), Land Tenure in Buganda: Present-day Tendencies. East African Studies, Kampala, No.1 at page 42.

whomsoever he wishes and can make whatever boundaries he or she wishes on allotting the land.[42]

In *Ndazizale v Womeraka*[43] , the tenant Ndazizale, cultivated an area bigger than that allotted to him and claimed that he had a right to three acres for the growing of economic crops. The landlord successfully prevented him from doing so. The Judicial Adviser, in his judgement stated as follows;

> "The only ground of appeal which requires consideration is the reference to the second schedule of the Busuulu and Envujjo Law. Obviously the appellant interprets this as meaning that because three acres of economic crops may be grown without the landlord's consent, the landlord is compelled to provide three acres in addition to the area under food crops. This is not so. Section 6 of the Busuulu and Envujjo Law gives the landlord authority to collect additional Envujjo but does not impose on him any duty to provide land."

3.2.2.THE RIGHT TO RENT

A landlord is entitled to an annual ground rent. The Land Act 1998[44] provides that a tenant shall pay to the landlord an annual nominal ground rent. Failure to pay rent is a ground for termination of the tenancy.[45]

3.2.3.RIGHT TO BE GRANTED OPTION TO PURCHASE

A landlord has the right to be given the first option of taking the assignment of the tenancy by a tenant who wishes to assign the tenancy.[46] Any transaction done by the tenant without giving the landlord first option to purchase is null

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42 Ibid, 42 & 43.
43 Principal Court Civil Appeal Number 46 of 1947.
44 Section 31(3).
45 Section 31(6) Land Act 1998.
46 Section 35(1) Land Act 1998.

and void, constitutes a criminal offence and the tenancy reverts to the landlord.[47]

3.2.4.RIGHT TO OCCUPY ANY PART OF THE LAND

A landlord has the right to occupy some part of his land subject to the interests of the tenant of the tenant. If the part the landlord desires is held by a tenant, he or she must apply to a Court of law for an order of eviction against the particular tenant. But the Court will not make an order of eviction unless it is satisfied that there is not sufficient land and suitable area on the land for occupation by the landlord. Compensation is granted in such cases to the tenant and the tenant is allowed to first harvest their crops and remove their property.[48]

3.2.5. RIGHT TO CONSENT TO TRANSACTIONS

A landlord has a right to consent to any transaction done with regards to the holding and any transaction done without the consent of the landlord is null void.[49]

3.3. RIGHTS OF TENANTS

A tenant has certain recognised rights which are protected by law and custom. These rights are inalienable and un-transferrable and they are permanent and

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47 Section 35(1a) ; this provision has been challenged in the Constitutional Court by a petition lodged by Dr Zahara Nampewo vide Dr Zahara Nampewo and Brian Kibirango v Attorney General Constitutional Petition Number 10 of 2020, with the petitioners contending that the criminal sanction imposed on the tenant and reversion of the land to landlord for failure to give the landlord first option to purchase without imposing the same to the landlord for failure to give the tenant first option to purchase was discriminatory against the tenant contrary to Article 21 and a violation of their right to property contrary to Article 26 since the tenants are deprived of their land without prior compensation.

48 Supra West, 44.

49 Sections 34(1) and 34(9) Land Act 1998.

heritable.[50] These rights are normally acquired through the consent of the landlord.[51] The rights of the tenant include the following;

3.3.1. RIGHT TO UNDISTURBED OCCUPATION

A tenant on registered land enjoys security of occupancy on the land. [52]A tenant enjoys permanent occupation which occupation can only be interrupted by a Court eviction order for failure to pay rent. [53] In *Kampala District Land Board and Chemical Distributors v National Housing and Construction Corporation,*[54] the Court observed that;

> "…the Respondent had been in possession of the suit land for more than 12 years at the time of coming into force of the 1995 Constitution as thus was tenant in accordance with Section 29 of the Land Act 1998 and thus was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and Section 31(1) of the Land Act 1998…."

In *Mukasa v Mpigwa*,[55] the landlord applied for an order of eviction against a tenant who had not paid Busuulu amounting to Shs. 25/50 for three years. The lower Court granted the application but the Principal Court at Mengo held that there was no reason why the tenant should be evicted if he could then produce Shs. 25/50 which was cause of the original case.

The tenant was allowed to remain in his holding and the landlord ordered to accept the Busuulu due. [56] In *Kasuwa v Mawanda***,**[57] the Saza Court of

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50 Supra, West 48.
51 Supra, West 49.
52 Section 31(1) Land Act 1998.
53 Section 32A (1) Land Act 1998.
54 [2005] UGSC 20.
55 Principal Court Civil Appeal Number 24 of 1951.
56 Supra at page 55.
57 The Saza Court Kyadondo Criminal Case Number 69 of 1951.

Kyadondo granted an order of eviction against the tenant who hae deliberately refused to pay busuulu.[58]

Although a landowner can make whatever boundaries he wishes when giving out the tenancy and can make any increases he or she desires to it, he cannot reduce it once it is occupied. However a different interpretation of the law and custom was made in the case of *Dungu v Katawoya,*[59] where the tenant Dungu, was unsuccessful in restraining the landowner from reducing his holding, part of which was left to be overgrown for a period of 18 years. It was pointed out by the Judicial Adviser in his judgment that "such neglect may be source of menace to the whole countryside". [60]

The fact that the Land Act 1998 unlike the Busuulu and Envujjo Law 1927 expressly provides that a tenant shall only be evicted for failure to pay rent guarantees undisturbed occupation to the tenant.

Courts rarely grant orders of eviction against tenants who fail to pay the annual ground rent. Any dues in arrears are legally considered civil debts, which are recoverable in the usual manner. The main reason why there is little or no conflict about the annual ground rent is that the present rates are within the means of every tenant. They bear no relation to the present value of the land or the prices of the crops on the land. [61]

3.3.2. RIGHT OF REVERSION

Tenants enjoy reversionary rights where a part of a holding has been occupied by a relative with the tenant and landlord's consent. Where, for example, a peasant holder had allowed his son to build and live on part of his holding and where the son had formally and in writing surrendered that part to the

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58 Ibid.

59 Principal Court Civil Appeal Number 38 of 1950.

60 Supra at page 54.

61 Supra at page 63.

landowner, the landowner has no power to allot that part of the holding to another tenant as the holding did not revert to him or her but the tenant. [62]

3.3.3. THE RIGHT TO REMAIN IN POSSESSION ON SUCCESSION

A tenancy by occupancy may be inherited.[63] As such relatives of a tenant have right to remain in possession of a tenant's holding in succession upon his or her death.

3.3.4. THE RIGHT TO POSSESSION OF THE DEPENDANTS OF THE TENANT

A spouse, children and close relatives of a tenant have a right to live and remain on the holding. A spouse has the right to live on a holding on the same terms as their spouse so long as their spouse is alive and has not surrendered their interest in the holding. Where for example, a landowner had exempted a tenant from the payment of Busuulu and other dues and later demanded them from the wife when the husband became insane, it was held by the Saza Court of Kyadondo that the wife had a right to exemption exercised for her husband.

The rights of a spouse however lapse on the death of their spouse in which case the rights pass to the legal customary heir. In the case of surrender by a spouse, it is considered that the spouse has no separate rights from those of their spouse. [64]

In *Kasirye v Nabwami* [65], a wife had claimed continued possession of coffee plots cultivated by herself when the husband surrendered the holding. The Court held that;[66]

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62 Supra at pages 56 to 57.
63 Section 34(2) Land Act 1998.
64 Ibid.
65 Principal Court Civil Appeal Number 101 of 1951.
66 Supra.

“the custom is that the husband is the proprietor of all crops cultivated by his wife and if the husband leaves, all the crops revert to the landowner. And the plots in question should similarly revert to the landowner".

This custom however can't be reconciled with the 1995 Constitution[67] and the Judicial Act 1996 [68] that prohibit discrimination on the basis of gender and render customs that prejudice women and are repugnant to nature justice and good conscious void. [69]

Similarly residential or other rights of other dependants lapse on the death or surrender of the holder. In *Nalumu v Malakai*[70], the Plaintiff Nalumu sued for possession of coffee trees and cultivated land, while the Defendant claimed that she planted these coffee trees and cultivated them during her father's lifetime and with his consent. The land had now passed by inheritance to the Plaintiff. In giving judgment and reversing the judgments of the lower Courts, the Judicial Adviser said;

"It seems to me that the defendant's position is rather similar to that of a temporary resident except that her right is that of cultivation and not of residence. Being only temporary rights and not the more permanent rights enjoyed by a peasant holder, her right ended with that of her father and she has never had the consent of the present owner."

3.3.5. RIGHT TO CERTIFICATE OF OCCUPANCY

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67 Articles 21 , 33 , 34

68 Section 14.

69 In Mifumi v Attorney General and Another[2015]UGSC13 , the Supreme Court held that the custom of refunding bride price as a condition for divorce on the breakdown of a customary marriage was unconstitutional for violating Article 32(2) of the Constitution that prohibits cultures , customs and traditions which are against the dignity , welfare and interests of women.

70 Principal Court Civil Appeal Number 41 of 1947.

Tenants have a right to apply to a landlord for and beissued with a certificate of occupancy in respect of the land which they occupy.[71] In *Kampala District Land Board and Chemical Distributors v National Housing and Construction Corporation,*[72] the Court observed that a bonafide occupant (tenant) has a right to apply for a certificate of occupancy under Section 33(1) of the Land Act 1998. The certificate of occupancy is very pertinent because it provides prima facie proof of the existence of the tenancy and buttresses the tenants' security of tenure. Lack of a certificate of occupancy however, does not prejudice the security of tenure of a tenant. [73]

3.3.6. RIGHT TO BE GRANTED FIRST OPTION TO PURCHASE

A tenant has the right to be granted the first option to purchase their interest in a holding in case of sale by the landlord. **[74]** *In Kampala District Land Board and Chemical Distributors v National Housing Construction Corporation*, **[75]** the Court observed that the Respondent as a tenant on the first Appellant's land had a right to be given the first option to acquire their interest in the land before the first Appellant could go ahead to lease off the land to the second Appellant.

3.3.7. RIGHT TO RECOGNITION OF INTEREST

Any transaction on land having tenants is subject to the interests of the tenants. As such a new proprietor is supposed to recognize the interests of the existing tenants on the land.[76]

In *Baleke Kayira Peter and Others v Attorney General and Others*,**[77]**the Court observed that;

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71 Section 33(1) Land Act 1998.
72 [2005] UGSC 20.
73 Section 31(9) Land Act 1998.
74 Section 35(2) Land Act 1998.
75 [2005] UGSC 20.
76 Section 35(8) Land Act 1998.

> "…. Since the freehold title is encumbered with the statutory rights of the tenants in occupation who were unlawfully evicted, any leasehold title to German investors would be subject to those encumbrances and rights."

3.3.8.CESSATION OF RIGHTS

The rights in a holding lapse by abandonment[78]or neglect for more than reasonable time.[79]The Land Act [80] provides for a period of three or more years. In several instances, the Courts decided that the rights of the holders had lapsed through non occupation. In *Kirabira v Musisi***,**[81] Kirabira after living on a holding for 24 years had left it vacant for 2 years and it was held that he had forfeited his rights by neglect. [82]

The rights of a tenant in a holding can also cease on surrender of the holding to the landlord. Where a tenant expressly surrenders a holding to the landlord it is rare that any conflict arises except where the peasant changes his mind or his successor re-claims the holding.

Landowners can demand written evidence of the surrender from tenants to mitigate against this. In *Lubega v Kayongo* [83], Kayongo succeeded his father who died in 1945 after the father had surrendered the holding in writing to the landowner a year before he died. When Kayongo claimed it, it was held that he could not inherit it as it had reverted to the landowner.

The rights of a tenant in a holding can equally cease on transfer of the holding. In *Lumonde v Kagwa*[84] , there was evidence that Kagwa had transferred his rights to Lumonde for a payment of 150s and later resold the same holding to

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77 Civil Suit Number 179 of 2002.
78 Section 37(1) Land Act 1998.
79 Section 37(2) (b) Land Act 1998.
80 Ibid.
81 The Saza Court Kyadondo Civil Case Number 1 of 1950.
82 Supra at page 61.
83 The Saza Court Kyadondo Civil Case Number 1 of 1950.
84 Katikiro we byalo bya Kabaka Number 14/43/47 of 1950.

another party. It was held that Lumonde could not sue Kagwa for the holding but only for the sum of 150s, as the holder had no right to transfer his rights to another. [85]

In *Bukenya v Lutalo*[86] , Lutalo had written a letter transferring his rights to Makumbi. Bukenya the landlord refused to recognize Makumbi as his tenant hence the suit. It was held that the rights of the tenant who had sold the holding had ceased though the rights of the transferee could not thereby be established without the landlord's consent.

In *Mutaganya v Waswa,*[87] the Saza Court recognised the purchaser of the holding as the rightful owner. Waswa had transferred the holding to Muteguya for a sum of 1,300s but he refused to vacate it in the time agreed upon. Muteguya sued for breach of contract and he was granted possession of the holding. The Deputy Saza Chief observed that;

> "It is known that a Court of Law has no right to grant a holding to an individual, but in this case the landowner was asked by the Court whether he accepted the tenant and he accepted him. There the Court derived the right to give judgment conferring rights in a holding to a tenant."

3.4. CONFLICTS ON MAILO LAND

The interests of the landlord and tenant are in many respects complementary. Very few landlords have the desire or capacity to develop their entire estates due to the vast nature of the same. A part of the landlord's revenue must therefore come from the tenants who on the other hand, find their tenure reasonably secure enough for them to live fairly content lives. As any other relationship there is bound to occur conflict between the land lord and the tenant to wit;

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85 Supra at pages 61 to 62.

86 Katikiro we byalo bya Kabaka Number 5/26 of 1946.

87 The Saza Court Kyadondo Civil Case Number 29 of 1951.

3.4.1. CONFLICT OVER BOUNDARIES

Most of the conflicts and litigation between landlord and tenant revolves around the question of boundaries. This must be the case in view of the fact that boundaries are normally not marked by any form of boundary marks or signs. In *Musoke v Kalinabiri*, [88] a tenant was granted an unspecified area in a large tract of bush land and the litigation arose when on transfer the landlord desired to confine the holding within proper limits. The Judicial Adviser's comment was that the legal position was “nebulous in the extreme."[89]

The rules of evidence regarding boundaries are, however, fairly simple. If a tenant is required to prove his boundaries, the best evidence is that of the landlord his steward, who showed him the holding on allotment. His evidence is usually taken as conclusive proof. In *Lwanga v Lwanga,*[90] the lower Courts were reprimanded in the following words;[91]

> "If the two lower Courts had called in the evidence of Petero Kakuba who allotted the holding to both the litigants they would have come to different conclusions."

If the landlord is not available, or if he or she is involved in the case, then recourse may be sought to other forms of evidence. The evidence of previous holders of the particular holding is very good because they are assumed to have known the boundaries. Also the evidence of old residents in the village especially if they are neighbours. [92]

If any of these people were present when the holding was originally allotted, the value of their evidence is thereby enhanced. In *Kizito v Kironde*,[93] the evidence

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88 Principal Court Civil Appeal Number 6 of 1947.
89 Supra, West, 66.
90 Katikiro we byalo bya Kabaka Number 15/43/40 of 1950.
91 Supra.
92 Supra.
93 Katikiro we byalo bya Kabaka Number 15/16 of 1947.

of the oldest resident in the village was considered so valuable that judgment was given in favour of a tenant it supported against the tenant whose claim was supported by the landlord's evidence.[94]

To establish boundaries in dispute with the landowner, previous holders may be called in as witness. But this is valuable only where the landlord does not show evidence that he purposely reduced the holding on re-allotment.[95]

Sometimes the boundaries of the adjacent holding may be used as evidence of the holding under dispute, because it is assumed that all the holdings in the neighbourhood must have been originally similar.[96]

3.4.2.CONFLICT OVER ALLOTMENT

Nothing in law or in custom prohibits a landlord from preserving land for his or her purposes or to allot it to any one he or she wishes. [97] Conflicts over allotment may arise over boundary delimitation on allotment and failure of a landlord to allot a holding in breach of contract. A landlord enjoys absolute discretion in boundary delimitation and as such will have an upper hand over a tenant in case of conflict. Where a landlord fails to allot a holding in breach of contract, a tenant can be entitled to specific performance or damages as the case may be.

3.4.3.CONFLICT OVER REVERSION

This may arise in situations where a tenant has made considerable improvements on the land and has planted permanent crops and attempts to get some return for these improvements on attempt to leave the holding.

The tenant may try to transfer the holding to another tenant for a consideration or alternatively may try to preserve his or her rights in the holding so as to

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94 Supra, West, 67.
95 Supra, West, 67.
96 Ibid.
97 Ibid.

prevent it from reverting to the landowner. To preserve his or her rights he or she may leave a relative or some other dependents on the holding after he or she has moved to another holding. [98]

In *Semakula v Musoke*[99] , Musoke had lived on a holding for thirty eight years. In 1947, he bought his own land and moved to it leaving a relative on the previous holding. On being sued by Semakula for leaving an unapproved tenant on the holding, it was held that Semakula could not evict the holder's relative and dependant.

Commenting on this case, the Court clerk at Kyadondo Saza Court said that the main point of the case was that the woman had lived on the holding with the tenant sometime before the tenant had moved. If she was a new person brought in on the point of departure it would have been necessary for the landlord's consent to be sought and obtained.[100]

3.5. LAND GRABBING AND EVICTIONS

Mailo land over the years has been a subject of land grabbing and evictions. This is due to the commercialisation of land that has made some landlords opt to sale of land of land instead of depend on the annual rent provided by tenants. In as much as the Land Act 1998 [101] , provides that a new proprietor's interests in the land shall be subject to the interests of the tenant , the new proprietors resort to evicting the tenants sometimes using excessive force.

In *Baleke Kayira Peter and Others v Attorney General and Others*,[102] the Plaintiffs who brought the action in representative capacity were tenants on land of four villages of Mubende district which is a registered free hold land. All the tenants were forcibly evicted from their homes without any compensation

98 Ibid.
99 The Saza Court Kyadondo Civil Case Number 24 of 1951.
100 Ibid, 69.
101 Section 35(8).
102 Civil Suit Number 179 of 2002.

by the Defendants to whom the land was sold and or leased. The Court observed that;

> "… There is overwhelming evidence that the tenants were violently evicted without any relocation or compensation. The tenants were evicted by agents of the Defendants. The Defendants had direct and constructive knowledge that the tenants were to be evicted and were indeed evicted forcefully when they knew that they had not been relocated at Kambuye. They well knew that compensation was not paid by the landlord because they he did not have the capacity to compensate the tenants. There was no evidence of payment of compensation by the landlord in accordance with the sale agreement or the provisions of the Land Act."

In *Kiconco Medard v Hon. Persis Namuganza and Others*,[103] the Plaintiff who had purchased land from a landlord sought to evict tenants on the land contending that they were not tenants on the land but squatters and thus trespassers. The Court observed that the Defendants had failed to adduce proof to show that they were tenants on the land and thus were trespassers. The Defendants contented that they were allocated land as tenants by the deceased owner of the land. The Plaintiff had purchased the same from the son of the former owner who was the administrator of his late father's estate. This case demonstrates that mailo land tenure system is not the problem but the failure of individuals to adhere to the legal rules and customs governing the mailo land tenure system.

One of the causes of evictions on mailo land as the case above has shown, is the failure of descendants of mailo land owners to recognise the tenants that had been on the land before them. Thus, when the descendants become landlords, they in most cases challenge the presence of the tenants on the land

103 [2019] UGHCLD 56.

and in absence of a certificate of occupancy or a written agreement between the tenant and previous landlord, the tenants in most cases are deemed squatters and thus trespassers.

However land grabbing and evictions are not peculiar to the mailo land tenure system. These equally occur on other land tenure systems especially customary land tenure. This is because it is very easy to exploit the nature of these tenure systems to one's advantage and be in position to fraudulently acquire and evict individuals from land.

In *Hon Ocula Michael and Others v Amuru District Land Board and Others***,** [104] the Applicants challenged the allocation of land by the first Respondent to third parties contending that they owned the land under customary tenure. The first Respondent contended that the land in question was public land. The first Respondent adduced evidence to show that the land in question was initially gazetted by the colonial government as Aswa Lolim Game Reserve in 1959 according to Legal Notice No. 217 of 1959 and that made it a habitation free area until it was degazetted in 1972 according to section 1 No.55 of the Game (Kilak) hunting area of 1972 (Revocation) Order 1972. [105](Nakayi,pg7-8,2013)

The Applicants did not adduce evidence to show that they owned the land under the Acholi custom or that they were in possession of the same. In absence of evidence from the Applicants, the Court held that the land in question was public land and the first Respondent had lawfully allocated it to third parties.[106]

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104 HCT-02-CV-MA-NO. 126 of 2008.

105 Rose Nakayi, (2013), The Challenge of Proving Customary Tenure in Courts of Law in Uganda: Review of the Case of Hon. Ocula Michael and Others v Amuru District Land `Board, Major General Oketa Julius, Christine Atimago and Amuru Sugar Works Ltd p 7, 8

106 Ibid p.15 to 20.

It's pertinent to note that most of the land in question was allocated to Amuru Sugar Works Ltd for the establishment of Atiak Sugar Factory which is a joint venture between Government of Uganda under the auspices of Uganda Development Corporation and a foreign investor by the names of Amina Hersi.[107] Today the sugar factory is up and running despite numerous attempts by the locals to resist the project.[108]

4.0. LEGALITY OF ABOLITION OF THE MAILO LAND TENURE SYSTEM

4.1. PROCEDURE OF ABOLITION

The abolition of the mailo land tenure system requires the amendment of the Constitution[109] to remove the mailo land tenure system as a tenure of land holding and the repeal of the Land Act 1998. [110]

4.2. LEGALITY OF THE ABOLITION

4.2.1. VIOLATION OF THE RIGHT TO PROPERTY

The abolition of the mailo land tenure system is a violation of the right to property guaranteed by the 1995 Constitution. Article 26(1) of the 1995 Constitution provides that every person has a right to own property either individually or in association with others. Article 26(2) provides for the conditions to be met before one can be deprived of property. These include;

i) The deprivation is necessary for inter alia public use and public order.

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107 President Commissions Multibillion Sugar Factory in Amuru, Uganda Media Centre, Friday 23 October 2020. Available at https://www.mediacentre.go.ug/media/president-commissions-multibillion-sugar-factory-amuru [Accessed 20 July 2021]

108 Fire destroys 600 acres of Atiak sugar cane plantation, Daily Monitor, Wednesday 20 February 2019. Available at https://www.monitor.co.ug/uganda/news/national/fire-destroys-600-acres-of-atiak-sugarcane-plantation-1808482 [accessed 20 July 2021]

109 Article 237.

110 Section 2(c).

> ii) The deprivation is subject to prompt payment of fair and adequate compensation, prior to the deprivation of property.

In *Uganda National Roads Authority v Irumba* and Another,[111] the Supreme Court retaliated that

> "From the above, it is debatable whether the abolition the mailo land tenure system is necessary for public use, public order or is in the public interest. The government claims that the mailo land tenure system hinders establishment and development of government projects due to the need to compensate tenants and landlords, hence the need to abolish it. However this cannot be a legitimate or justifiable reason for the abolition of the mailo land tenure system."

It is equally debatable whether the Government is willing and able to compensate either the tenants or landlords before the abolition of the mailo land tenure system. Mr. Sam Mayanja, the Minister of State for Lands has categorically stated that landlords will not be compensated for their land. If the Government intends to grant the tenants titles on the land they are occupying before the abolition of the mailo land tenure system is highly unlikely. There are no guarantees that the Government will grant the tenants titles after abolishing the mailo land tenure system, which will be detrimental to the tenants.

Even if the government requires the tenants or landlords to apply for titles under the remaining tenures, there are no guarantees that the Government will offer facilitation for this or that tenants will be in position to acquire titles under the remaining tenures.

In *Lawrence Kitts v Bugisu Cooperative Union***,** [112]Katureebe JSC as he was then observed in his obita dicta that tenants under customary tenure were declared

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111 [2005] UGSC 20.

tenants at sufferance under the Land Reform Decree 1975. They could be evicted by a more powerful person who could easily process a land title.

4.2.2. VIOLATION OF THE RIGHT TO CULTURE

The abolition of the mailo land tenure system amounts to a violation of the right to culture guaranteed by the 1995 Constitution[113], given that the tenure system is intertwined with Buganda culture and custom.

In Mifumi v Attorney General and Another,[114] the Supreme Court observed that individuals have a right to practice their cultures, customs and traditions in so far as the same are not repugnant and inconsistent with written law, natural justice and good conscience.

Given that the mailo land tenure system is not repugnant and inconsistent with written law, natural justice and good conscience, it is safe to say that the same should not be abolished.

4.2.3 CONTRAVENTION OF THE MULENGA DOCTRINE

Given that the abolition of the mailo land tenure system is a violation of the right to property and culture, it amounts to a limitation of the above rights. A limitation of rights is valid if it is demonstrably justifiable in a free and democratic society in accordance with the 1995 Constitution.[115] In essence, the 1995 Constitution imposes a limitation upon a limitation on human rights.

This is what is known as the Mulenga Doctrine propounded by the late Mulenga JSC as he was then in the case of Charles Onyango Obbo and Another v Attorney General.[116]A limitation is demonstrably justifiable in a free

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112 [2010] UGSC 9.
113 Article 37.
114 [2015] UGSC 13.
115 Article 43(2)(c).
116 [2004] UGSC 81.

and democratic society if it satisfies the tripartite test of being legal, necessary and proportional.

A limitation is necessary if aims at achieving a legitimate aim and is evidence based. The abolition of the mailo land tenure system is not necessary because it is not intended to achieve a legitimate aim. There is no evidence to show that the mailo land tenure system does not accord security of tenure to tenants, is the root cause of land conflicts, grabbing and evictions or hinders government projects.

A limitation is proportional if it is the least intrusive measure on the enjoyment of human rights in accordance with the Oakes test established by the Canadian Supreme Court in the case of *R v Oakes***.**[117] The abolition of the mailo land tenure system is not the least intrusive measure on the enjoyment of human rights because it is irrational and excessive. In the words of the late Mulenga JSC as he was then in *Charles Onyango Obbo and Another v Attorney General***,** [118]it is akin to the proverbial killing a mosquito with a sledge hammer.

4.2.3. CONTRAVENTION OF THE BASIC STRUCTURE DOCTRINE

The amendment of the Constitution to abolish the mailo land tenure system is in contravention of the basic structure doctrine. This doctrine enunciated by the Supreme Court of India in the case of *Kesavanada Bharati Spripadagalvaru and Others v State of Kerala and Another* [119] is to the effect that parliament cannot amend the Constitution if doing so distorts or destroys its basic structure.

Article 237 of the Constitution forms part of the basic structure of the 1995 Constitution as observed by the Supreme Court in Male Mabirizi and Others v

117 [1986] 1 SCR 103.

118 Supra.

119 (1973) 4 SCC 225; AIR 1973 SC 1461.

Attorney General.[120] Parliament's amendment of this Article to abolish the mailo land tenure system would amount to distorting the basic structure of the 1995 Constitution which in light of Articles 1 and 237 vested ownership of land in Uganda to the people of Uganda.

4.0. IMPACT OF THE ABOLITION OF THE MAILO LAND TENURE SYSTEM

The abolition of the mailo land tenure system would have far reaching implications on a number of attendant rights that are guaranteed by the rights of the Constitutio.[121] This is due to the fact that human rights are interdependent and a deprivation of one right can have a ripple effect on a number of other rights.

4.1. RIGHT TO PROPERTY

The abolition of the mailo land tenure system will lead to a deprivation of land for especially tenants that own land under this tenure system which amounts to a violation of their right to property guaranteed by the Constitution.[122] Article 26 of the Constitution guarantees individuals the right to own property either as single individuals or jointly with others.[123] The same article also prohibits the deprivation of property without prior adequate compensation.[124]

In *Uganda National Roads Authority v Irumba and Another* ,[125] the Supreme Court observed that the Constitution prohibited deprivation of property without prior adequate compensation and that the Appellant's compulsory acquisition of the Respondent's land for public use to wit construction of a public road

120 [2019] UGSC 6.
121 Chapter Four of the 1995 Constitution.
122 Article 26.
123 Rwabinumi v Bahimbisobwe [2013] UGSC 5.
124 Pyerali Abdul Rasul Esmail v Adrian Sibo [1998] UGCC 7; Uganda National Roads Authority v Irumba and Another [2015] UGSC 22.
125 [2015] UGSC 22.

without prior adequate compensation was a violation of the Respondent's right to property.

The abolition of the mailo land tenure system without the prior adequate compensation or provision of alternative land to tenants will amount to a violation of their right to property. Given the vast number of tenants on mailo land, it is impossible for government to offer them compensation or alternative land before the abolition of the mailo land tenure system.

Even if the government opted to sever the interests of the tenants from that of the landlord and create titles for the tenants as proposed by Mr. Sam Mayanja the Minister of State for Lands [126]that would amount to violation of the landlord's right to property especially if there is no prior compensation to the landlord. By the look of things at the moment, the government has no intention of compensating the landlords given the statement of the Minister of State for Lands Mr. Sam Mayanja in the press to effect that tenants will not compensate landlords for their land.[127]

4.2. RIGHT TO LIFE AND LIVELIHOOD

The abolition of the mailo land tenure system will have an adverse effect on the rights to life and livelihood for especially tenants that own land under this tenure system. This is because many tenants derive their sustenance from tilling the land that they possess and occupy.

In *Salvatori Abuki v Attorney General*,[128] the Constitutional Court relying on the Indian Supreme Court decision of *Tellis and Others v Bombay Municipal*

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126 John Odyek, Uganda's land squatters must get land titles for their land- Minister Mayanja, New Vision. Available at https://www.newvision.co.ug/articledetails/106750 [Accessed 15 July 2021]

127 Derrick Kiyonga, Kibanja holders won't compensate mailo land owners-Minister, Daily Monitor Sunday 4 July 2021. Available at https://www.monitor.co.ug/uganda/magazines/people-power/kibanja-holders-won-t-compensate-mailo-land-owners-minister-3460780 [Accessed 15 July 2021]

128 [1997] UGCC 10.

Corporation and Others[129] held that an exclusion order preventing the Petitioner from accessing his land was unconstitutional because it threatened the Petitioner's life by depriving him of the means of subsistence and livelihood. This decision was affirmed by the Supreme Court.[130]

Be that as it may, except the resettlement of tenants on alternative land, no amount of compensation will be enough. This is captured by Katureebe JSC as he was then, in his lead judgement in the case of *Lawrence Kitts v Bugisu Cooperative Union*[131] , where the learned Justice observed that;

> "This appeal highlights the plight of millions of citizens who held land by way customary tenure and were then declared tenants at sufferance under the Land Reform Decree 1975. They could be evicted by a more powerful person who could easily process a land title and only pay compensation for developments of the customary tenant. Yet to the customary tenant, the right to live on his land was more important than any money he may be paid as compensation for developments, with nowhere to go. There is no doubt in my mind that this is why the 1995 Constitution fully institutionalized customary tenure as one of the systems by which citizens may own land."

4.3. RIGHT TO CULTURE

The abolition of the mailo land tenure system amounts to a violation of the right to culture guaranteed by the 1995 Constitution[132] , given that the same is embedded with Kiganda culture and custom. This is buttressed by the fact that the mailo land tenure system only applies to land in Buganda.

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129 1985 SCC (3) 545.
130 Attorney General v Salvatori Abuki [1999] UGSC 7.
131 [2010] UGSC 9.
132 Article 37.

In *Mifumi v Attorney General and Another*,[133]the Supreme Court observed that individuals have a right to culture and are entitled to practice their culture in as far as the same are not repugnant to written law , natural justice and good conscience.

Since the mailo land tenure system and its attendant cultural and traditional rules are not repugnant to written law, natural justice and good conscience, individuals are entitled to hold land under this tenure system.

5.0 CONCLUSION

From the above, it is evident that tenants on mailo land are accorded sufficient safe guards by both the legal regime and custom, which safe guards, guarantee security of tenure for the tenants. As such the assertions of the critics of mailo land tenure system to the contrary are unfounded.

The injustices occasioned to tenants on mailo land to wit; land grabbing and evictions are a result of external factors for example commercialisation of land and land becoming a factor of production especially for foreign direct investment and not weaknesses of the mailo land tenure system. As such, the abolition of the mailo land tenure system will not solve the land question as its critics assert but will only deprive individuals of their land and cultural rights. It is equally noteworthy that the majority of criticism of the mailo land tenure system emanates from individuals that do not own land under this tenure system. One can only wonder whether their concerns are valid.

133 [2015] UGSC 13.

MENTAL HEALTH AND ILLNESS IN UGANDA: THE GAPS AND SHORTFALLS OF THE STATE, LAW AND ITS PRACTICE

Awano Collette Melvina & Victor Andrew Taremwa[*]

ABSTRACT

With mental health trending on social media and a growing cause for concern in the modern age, there is all the more need for the state and its laws to be able to reflect these changes and suitably protect the people's mental health. This article explores Uganda's mental health history as a backdrop to a discussion of various legal facets, particularly criminal law and torts, all in an effort to show the gaps and shortcomings affecting mental health and mental illness. It also presents an elaborate discussion on a spectrum of factors that affect mental health; and puts forward suggestions for reform in the mental health legislation and legal practice in Uganda for a better understanding and approach to mental health issues.

1.1 INTRODUCTION

If Hamlet from himself be ta'en away, And when he's not himself does wrong Laertes, Then Hamlet does it not, Hamlet denies it. Who does it, then? His madness. If't be so, Hamlet is of the faction that is wronged: His madness is poor Hamlet's enemy~ William Shakespeare, *The Tragedy of Hamlet*, Act V Scene 2

The history of psychiatry haunts our present. Our people remain chained and shackled in institutions and by ideas which colonisers brought to our continent and many other parts of the world. Indeed, we do remain 'objects of treatment and charity' and some of the worst human rights violations do occur in the very institutions that claim to provide mental health care services.[1]

In the seventeenth century, words like "madness"[2] used by William Shakespeare in his famous play, *Hamlet*, could pass as a reference to persons

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[*] Second year students of law at Makerere University. Gratitude to the Editorial Board for the guidance offered.

1 R. Alambuya, 'Human Rights Violations Experienced by People with Psychosocial Disabilities', Keynote address delivered at the Launch of the WHO Quality Rights Project and Tool Kit, New York, 28 June 2012

2 William Shakespeare, *The Tragedy of Hamlet*, Act V Scene 2

with mental health conditions. By the eighteenth century, these persons had almost no protection in law.[3] However, in the twenty-first century, significant strides in domestic and international law have been taken, such that terms like "mad", "imbecile", "idiot" and "lunatic" would be considered derogatory[4] and an affront to the dignity of persons with mental illnesses and conditions.[5]

In *Purohit and Moore v The Gambia*[6], the African Commission on Human and People's Rights stated;

> *"Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right."*[7]

This growing recognition of mental illnesses and disorders has led them to now be legally characterized as disabilities. The regional and international systems have addressed this right through treaties, declarations and thematic resolutions.[8]

To this end, the 1995 Constitution of the Republic of Uganda, which has been praised for its bill of rights[9], recognizes people with disabilities and their

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3 Kathleen Jones, Lunacy, Law and Conscience: The Social History of the Care of the Insane, 1744-1845 (2nd Edn Routledge 1998) 2.

4 Centre for Health, Human Rights and Development and Another v Attorney General, Constitutional Petition Number 64 of 2011.

5 Purohit and Moore v The Gambia, Communication Number 241/01.

6 Ibid.

7 Ibid, 57

8 Lance Gable and Lawrence O. Gostin, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (Vol. 63 Maryland Law Review, 2004) 23

9 Chapter Four of the 1995 Constitution of the Republic of Uganda. Professor Joe Oloka Onyango has stated that, "...the 1995 Constitution has been described as a human rights document in that it is suffused with human rights principles at every turn," 'Reviewing Chapter Four of the 1995 Constitution: Towards the Progressive Reform of

human rights.[10] As such, mental health issues should be accorded the status granted to human rights as being 'universal, indivisible, interdependent, and interrelated'.[11] People suffering from mental illness and those with mental health conditions should not face discrimination[12] and should have a right to, *inter alia*, liberty[13], privacy[14], fair hearing[15], freedom of expression[16] and education[17].

Despite the progress reported in as far as mental health issues are concerned, the law and the state have not done enough to protect people experiencing mental illness, and a number of gaps remain.[18]

The aim of this paper is not to solely discuss mental health vis-à-vis the law, but to show how the law, the state and its agencies have failed in their duty to protect and promote mental health, or how they have, in various ways, contributed to the problems facing the mental health sector. In order to do this, we point out a few loopholes in the law (particularly criminal law and the law of torts) that pertain to mental health. Another area of focus is the discussion on a few general aggravating factors contributing to the above stated issues.

1.2 WHAT IS MENTAL HEALTH?

Human Rights and Democratic Freedoms in Uganda' [2013] Study presented to the Human Rights Network—Uganda, 3.

10 Article 35 of the Constitution. This Article is also particular in extending the definition to include persons with mental health conditions by emphasizing that the State and society shall take appropriate measures to ensure that persons with disabilities realize their full *mental* and physical potential.

11 Vienna Declaration and Programme of Action of 1993.

12 Article 21.

13 Article 23.

14 Article 27.

15 Article 28.

16 Article 29.

17 Article 30.

18 Steven Davey and Sarah Gordon, 'Definitions of social inclusion and social exclusion: the invisibility of mental illness and the social conditions of participation.' (2017) International Journal of Culture and Mental Health< http://dx.doi.org/10.1080/17542863.2017.1295091 > [accessed 27 June 2021]

Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[19] The breadth of this definition recognizes persons that are born with and have to live with mental illnesses and disorders.

Mental health is the foundation for the well-being and effective functioning of individuals.[20] It is more than the absence of a mental disorder; it is the ability to think, learn, and understand one's emotions and the reactions of others. Mental health is a state of balance, both with and within the environment. The World Health Organization also defines it as a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community.[21]

1.2.1 Distinguishing mental health from mental illness

The focus on mental health in recent years has made reference to mental illness rarer.[22] However, there is a difference between the two. Mental health is the successful performance of mental function resulting in productive activities, fulfilling relationships, being able to adapt to change and cope with adversities.

The term 'mental illness' collectively refers to all diagnosable mental disorders — characterized by alterations in thinking, mood, or behaviours associated with distress or impaired functioning.[23] There are many different

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19 Preamble to the Constitution of the World Health Organization.

20 <https://www.who.int/westernpacific/health-topics/mental-health> [accessed 10 June 2021]

21 World Health Organization, Mental health: strengthening our response (2014) https://www.who.int/en/news-room/fact-sheets/detail/mental-health-strengthening-our-response [Accessed 12 June 2021]

22 Rebecca Lawrence, 'Mental illness is a reality—so why does 'mental health' get all the attention?' [2021] The Guardian, https://www.theguardian.com/commentisfree/2021/jul/14/mental-illness-sidelined-mental-health-treatment [accessed 10 June 2021]

23 'Mental health' (*Wikipedia*)

mental disorders, with different presentations, but they are generally characterized by a combination of abnormal thoughts, perceptions, emotions, behaviour and relationships with others.[24] Mental disorders include: depression, bipolar disorder, schizophrenia and other psychoses, dementia, and developmental disorders including autism.

The Mental Health Act[25] is silent on the definition of mental health. However, it defines mental illness as a diagnosis of a mental health condition in terms of accepted diagnostic criteria made by a mental health practitioner or medical practitioner authorized to make such diagnosis and includes depression, bi-polar, anxiety disorders, schizophrenia and addictive behaviour due to alcohol/substance abuse as some of the examples of mental illness.[26] The Act also defines a person with a mental illness as 'a person who is proven, at a particular time, by a mental health practitioner to have mental illness, at that particular time, and includes a patient'.[27]

Similarly, in a country that has been marred by military conflict throughout much of its post-independence history, many refugees and survivors from war-torn areas suffer from post-traumatic stress disorder (PTSD) and depression, among other mental illnesses and conditions.[28] In Uganda, depression, anxiety disorders, and elevated stress levels are the most common mental disorders,

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<https://en.wikipedia.org/wiki/Mental_health#Distinguishing_mental_health_from_mental_illness> accessed 10 June 2021

24 WHO report (2019). Mental disorders. World Health Organization (WHO), Geneva, Switzerland <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> [accessed 11 June 2021]

25 Mental Health Act, Cap 249 of the Laws of Uganda.

26 Ibid Section 2.

27 Ibid.

28 Liz Ford, 'Civil War Pushes Stress Levels To Record High In Uganda' (2008) <https://www.google.com/amp/s/amp.theguardian.com/katine/2008/jun/05/development.uganda> [accessed 27 June 2021]

sometimes leading to suicide attempts.[29] Uganda is ranked among the top six countries in Africa with high rates of depressive disorders.[30]

Mental health as an important public health and development issue in Uganda has been recognised to be not only a clinical problem but also a serious public health problem in the country, resulting in the inclusion of mental health as one of the components of the National Minimum Health Care Package.[31]

1.3 HISTORY OF MENTAL HEALTH LAW IN UGANDA

Mental health care became nationally recognized in 1916, on the basis of the mental health laws that existed in England.[32] The first unit to offer mental health services was established in the infamous Hoima Prison.[33] The sole purpose of the facility was to house those condemned by society as mentally unfit.[34]

With the success that had been achieved at this Unit, another was built at Mulago Hill in 1934.[35] In 1940, all the patients who were at Hoima prison were transferred to Mulago.[36] The continued success of these centres contributed greatly to the first piece of legislation in Uganda that regulated mental

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29 Farzaei, M. H., Bahramsoltani, *et al*, A Systematic Review of Plant-Derived Natural Compounds for Anxiety Disorders (2016) Current Topics in Medicinal Chemistry, 16(999)

30 Miller, A. P., Kintu. M., and Kiene, S. M, Challenges in measuring depression among Ugandan fisherfolk: a psychometric assessment of the Luganda version of the Centre for Epidemiologic Studies Depression Scale (CES-D) (2020) BMC Psychiatry, 20(45) <https://doi.org/10.1186/s12888-020-2463-2> [accessed 12 June 2021]

31 Cluster 4 of the Ministry of Health National Health Policy.

32 Frances Renee Gellert, 'Medical Illness, Socially Acceptable Treatment and Barriers to Health' (Independent Study Project (ISP) Collection, 2017) 9.

33 Ibid.

34 Chrispus Nyombi and Moses Wasswa Mulimira, Mental Health Laws in Uganda: A Critical Review (Part I) (2011) <https://ssrn.com/abstract=1967749> [accessed 27 June 2021]

35 Ibid.

36 Norman D. Nsereko, The Evolution of Mental Health Understanding and Practice in Uganda (Vol. 19 International Journal of Emergency Mental Health and Human Resilience, 2017) 1.

illnesses, the Mental Treatment Ordinance, in 1935.[37] It is noteworthy that the popular missionary hospitals that were established did not have mental health units, a trend which has persisted until today.[38]

In 1955, a mental health unit at Butabika with bed capacity of nineteen thousand seventy was opened. This was viewed as a fundamental achievement in mental health as it was the biggest centre for the persons with mental disability in Uganda at the time.[39] Currently, Butabika National Referral Mental Hospital is Uganda's second largest hospital and can house 700 to 800 people at a time, although its bed capacity is 550.[40]

After 1936, there were a number of other developments. Between 1954 and 1958, training and recruitment of mental health staff increased, and small mental health units in 8 districts with 3 bed capacity between 1962 and 1973 were opened to decentralize mental health services.[41] Additionally, people with mental health problems would be locked up in hospitals such as Soroti Hospital, which doubled as prisons.[42] The people often blamed (and many still do) mental illness on witchcraft or some other supernatural causes.[43]

In 1999, Mental Health Uganda was founded. Mainly donor-funded, it came to operate across 18 districts, setting up drug banks to ensure the consistency of medication supply and organising group saving schemes. It also had provision for start-up loans so members might have an opportunity to generate income and contribute to their families' well-being. Other organisations included the

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37 Ibid.

38 The Uganda National Health Research Symposium Report, Achieving Universal Coverage for Quality Mental Health Care in Uganda (2019) 6.

39 Ibid.

40 Daily Monitor, 'Inside Butabika: The Fear of Mental Treatment' (2015) <https://www.monitor.co.ug/uganda/magazines/healthy-living/inside-butabika-the-fear-of-mental-treatment-1619294?view=htmlamp> [accessed 19 June 2021]

41 Supra Note 37.

42 Richard M. Kavuma, 'Changing Perceptions of Mental Health In Uganda' (2010) <https://www.google.com/amp/s/amp.theguardian.com/katine/2010/may/19/mental-health-uganda [accessed 15 June 2021]

43 Ibid.

Uganda Schizophrenia Fellowship, with active user bases in Masaka and Jinja, and Basic Needs Uganda.[44]

The organisation which pioneered service user involvement, however, was *Heartsounds*. Founded in 2008 in collaboration with mental health service users and psychiatrists in the Butabika-East London Link, *Heartsounds* defined itself as being the first to truly tap what it referred to as the under-utilised resource of people with lived experience of mental illness.

In as far as legislation went, The Mental Treatment Act came into force in 1964 as a revised version of the colonial Mental Treatment Ordinance.[45] However, this Act was heavily criticized and before being repealed, was described as outdated and offensive.[46] Thus, in 2018, the Mental Health Act was passed and effectively became the national legislation on Mental Health in Uganda.

2.0 MENTAL HEALTH AND CRIMINAL LAW IN UGANDA

Mens rea[47] is an essential element in establishing criminal liability in Uganda. Discussed below are a few aspects which we believe the law needs to take into account or revise, because they actively affect the state of mental health and subsequent formation of necessary *mens rea* by defendants accused of particular crimes. We seek to show that some of the tests applied are rather rigid and application of the law may not always be as clear-cut as is implied by these tests.

2.1 Insanity as a defence

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44 The organization remains a leader in advocacy training and income generation projects across the country.

45 Joshua Ssebunnya, Sheila Ndyanabangi and Fred Kigozi, 'Mental health law reforms in Uganda: lessons learnt' (Vol. 11 International Psychiatry, 2014) 39.

46 Fred Kigozi *et al*, 'An Overview of Uganda's Mental Health Care System: Results from an Assessment Using the World Health Organization's Assessment Instrument for Mental Health Systems' (WHO-AIMS) (International Journal of Mental Health Systems, 2010) 2.

47 *Mens Rea* has been defined as *"The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime, criminal intent or recklessness."* Black's Law Dictionary (8th edn, 2004) 3124.

The defence of insanity is provided for under section 11 of the Penal Code Act.[48] The provision states;

> *"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above-mentioned in reference to that act or omission."*

2.1.1 M'Naghten rules

These were established in the case of *R v M'Naghten.*[49] The facts are that in January 1843, at the parish of Saint Martin, Middlesex, Daniel M'Naghten took a pistol and shot Edward Drummond, who he believed to be the British Prime Minister Robert Pell, wounding him fatally. Drummond died five days later and M'Naghten was charged with his murder. He pleaded not guilty by reason of insanity and was so found.

The rules from this case form the definition of legal insanity. They provide that a defendant wishing to rely on the defence of insanity must show that:

- They laboured under a defect of reason
- Caused by a disease of the mind; so that either
- He did not know the nature and quality of his acts, or that he did not know what he was doing was wrong.

However, this set of rules ignores the complications with mental health/disorders. As already elaborated above, there is a wide variety of disorders in existence, each affecting different individuals differently causing different behavioural patterns. The same is true even where two individuals are suffering the same condition.

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48 Cap 120 of the Laws of Uganda

49 (1843) 8 E.R. 718; (1843) 10 Cl. & F. 200

Stephen J Morse highlights one of the cautions that the Diagnostic and Statistical Manual of Mental Disorders (DSM) raises; "There is enormous heterogeneity within each disorder category. That is, people who technically meet the criteria for the diagnosis may have quite different presentations."[50]

The general defence is thus too narrow in its test for insanity and too broad in terms of its concept of disease. The result of this is that many defendants whom most people would regard as insane cannot use the defence, while some whom most would regard as sane are forced to use it if they wanted to avoid liability for an offence.[51]

In the same vein, lack of control is not well understood conceptually or scientifically in any of the relevant disciplines such as philosophy, psychology, and psychiatry, and we lack operationalized tests to accurately identify this type of lack of capacity.[52] The American Bar Association and the American Psychiatric Association also urged the rejection of control tests for legal insanity on these grounds.[53]

Further, the test is narrow as it ignores the existence of mental disorders or conditions suffered by individuals where they are aware that the law forbids those actions but they do them anyway, owing to some delusions or other compulsions. A good example is schizophrenia, a mental disorder characterized by continuous or relapsing episodes of psychosis. Here, clear consciousness

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50 Stephen J. Morse, Mental Disorder and Criminal Law, (2013) 101 J. Crim. L. & Criminology 885, 889 < https://scholarlycommons.law.northwestern.edu/jclc/vol101/iss3/6 > [accessed 14 June 2021]

51 Norrie A, *Insanity and Diminished Responsibility, Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn Cambridge University Press 2014) 237-273 <https://doi.org/10.1017/CBO9781139031851.017 > [accessed 30 June 2021]

52 Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025,1060–62 (2002)

53 American Bar Association, Criminal Justice Standards Committee, ABA Criminal Justice Mental Health Standards § 7-6.1 cmt. (1984); Am. Psychiatric Ass'n, American Psychiatric Association Statement on the Insanity Defense, reprinted in 140 American Journal of Psychiatry 681 (1983).

and intellectual capacity are usually maintained, although certain cognitive deficits may evolve in the course of time.[54]

2.2 A defendant's background and social factors as a contributor to mental capacity to commit a crime or mens rea

Criminal law addresses problems genuinely related to competence and responsibility, including consciousness, the formation of mental states such as intention, knowledge and comprehension, the capacity for rationality, and compulsion, but it never addresses the presence or absence of free will, the alleged ability to act uncaused by anything other than one's own self.[55] Defendant X would only be excused from liability if he is suffering a mental disorder affecting his rational capacity. Morse states that there is confusion that behaviour is excused if it is caused.[56] However, causation *per se* is not a legal or moral mitigating or excusing condition.[57] Shouldn't it be?

There is relatively strong evidence that physical and emotional child abuse is associated with later forms of antisocial behaviours in children, adolescents, and young adults.[58] A life history, childhood or background marred with physical abuse, absence of parental figures or sexual trauma can play a causal role in a defendant's behaviour.

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54 World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders Clinical Descriptions and Diagnostic Guidelines,* <https://www.who.int/classifications/icd/en/bluebook.pdf > [accessed 30 June, 2021]

55 Stephen J. Morse, 'Mental Disorder and Criminal Law', (2013) 101 J. Crim. L. & Criminology 885, 897 < https://scholarlycommons.law.northwestern.edu/jclc/vol101/iss3/6 > [accessed 14 June 2021]

56 Ibid, 898

57 Ibid.

58 Herrenkohl, RC.; Herrenkohl, EC.; Egolf, BP.; Wu, P. The developmental consequences of child abuse: The Lehigh Longitudinal Study. In: Starr, RHJ.; Wolfe, DA., editors. The effects of child abuse and neglect: Issues and research, (Guilford Press, 1991) 57-81

Take for instance the case of *Liundi v R.*[59] The appellant had an insecure, unhappy childhood and as such had an almost pathological dependence on her husband, whom she saw as her parents and siblings. After two years of a happy marriage, her husband chased her from their marital home, the result of which she made a poisonous concoction which she gave to her 4 children and herself.

She wrote two letters admitting guilt, and requesting that the husband be left out of prosecution. At the trial, a well experienced and qualified psychiatrist testified at trial that while she knew what she was doing in writing the letters, she did not know it was wrong because she believed that in chasing her away, her husband had ordered her to kill herself and their children. The court held that in asking the husband not to be involved in prosecution for the murders, the appellant fully appreciated that what she was doing was wrong and invited punishment, so therefore, she was guilty.

This case shows that social factors and background do indeed, in some cases (not all), substantially play a causal role in criminal behaviour and ultimately formation of necessary *mens rea*, and the control test under the McNaughten's Rules ignores this. It also neglects the reality that there are mental disorders/disabilities that affect individuals in more complex ways than the clear-cut 'knowledge that what one is doing is wrong'.

In addition, several studies[60] have shown that physical abuse at an early age influences subsequent adolescent and adult behaviour negatively. One study found adolescents who had been physically abused in the first 5 years of life were more likely to have been arrested as a juvenile for violent and nonviolent

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59 [1976–1985] EA 251

60 Smith C, Thornberry TP. 'The relationship between child maltreatment and adolescent involvement in delinquency Criminology' (1995);33: 451–481. *See also* Stouthamer-Loeber M, Loeber R, Homish DL, Wei E Dev Psychopathol. Maltreatment of boys and the development of disruptive and delinquent behavior (2001) Fall; 13(4):941-55

offenses.[61] These findings extend the literature on delinquency and aggression by showing that physical abuse predicts subsequent violent delinquency, at least according to arrest data. These effects persisted during a 17-year period and extended through late adolescence.

The above discussed factors show that these external factors that are often ignored during deliberations in court play a big role in influencing mental health of defendants, and ultimately their *mens rea*. While these factors do not mean that the defendants are not blameworthy or should not be held responsible for their criminal actions, a broader discussion or examination of causative factors would give a better understanding of the defendant's case, as well as guide courts and the state on long term solutions to curb crime at its root.

2.3 Provocation as a defence and the 'suddenness' requirement

Provocation will apply only to a charge of murder, and if successfully pleaded the conviction will be for manslaughter. The classic definition of provocation was given by Devlin J in Duffy (1949)[62]:

> *"Provocation is some act, or series of acts, done (or words spoken) which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind."*

However, section 192 of the Penal Code Act[63] requires that the unlawful act be done in the heat of passion due to *sudden* provocation.[64] It is also generally

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61 Lansford, J. E., Miller-Johnson, S., Berlin, L. J., Dodge, K. A., Bates, J. E., & Pettit, G. S, Early physical abuse and later violent delinquency: a prospective longitudinal study, Child maltreatment, (2007) 12(3), 233–245. <https://doi.org/10.1177/1077559507301841> [accessed 1 July, 2021]

62 R v Duffy [1949] 1 ALL ER 932

63 Cap 120 of the Laws of Uganda

64 The same was maintained in the case of Nyaga vs Republic [1965] EA 496. It was held

agreed upon that previous knowledge of facts doesn't amount to provocation, that is, one who assaults another based on knowledge of facts that he found out about many weeks later will not give backing to a plea of provocation.

In the case of *Okwang William v Uganda*,[65] the appellant was convicted of murder and sentenced to death. He stabbed the deceased in the abdomen with a knife and claimed to have been provoked by having found the man who had earlier spoilt his wife and made her pregnant. The court explained that:

> *"Knowledge of previous adultery would ordinarily disentitle a husband from pleading provocation without any other intervening insult or unlawful act. The plea of provocation would therefore, not be available to an accused who assaults a paramour of his wife many weeks after hearing that he had committed adultery with his wife. However, knowledge by a husband that his wife and her paramour had committed adultery makes the plea of provocation available to the husband if he finds his wife and her paramour in the act of adultery."*

The court therefore found that he had ample time for his passion to cool down from the time he knew of the pregnancy to when he assaulted the deceased and the defence of provocation was therefore not available to the appellant.

However, there are cases where years of abuse are endured and eventually culminate into murder. The application of the objective test for provocation presupposes that everyone must react in the same particular way, yet these women suffering from what is commonly known as 'battered women's syndrome' would present different reactions. The majority of women who successfully use this defence of provocation do so in response to killing a violent partner.

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that for the defence of provocation to succeed the assault must be done in heat of passion before the accused has had time to cool down and the provocation must be sudden.

65 [2007] UGCA 59

In contrast, almost exclusively, successful pleas of provocation in response to a relationship breakdown and/or infidelity are raised by men (although of course this does not mean that these are the only cases in which men are successful in pleading provocation).[66] In Uganda, among ever-married women who had experienced physical violence, the most common perpetrator was the current husband/partner (56%), followed by a former husband/partner (29%).[67]

Similarly, among ever-married men who had experienced physical violence, the most common perpetrator of the violence was the current wife/partner (33%).[68] These statistics go to show how common it is for the continued assault inflicted onto them by their partners to culminate overtime into one final act that results into murder of the perpetrators, even when it happens after an incident that may make the final act seem disproportionate. As a result, the requirement of the provocative act needing to be sudden or immediate ignores this aspect.

It is unconscionable that such victims are not able to seek protection under the law, yet those that act in a sudden rage are. Carline notes that:

> "acting due to a fear of serious violence defence is not about a loss of self-control but based upon recognition that some domestic violence victims live in desperate situations in which extreme fatal action may seem to be the only means by which to survive."[69]

3.0 MENTAL HEALTH AND THE LAW OF TORTS

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66 Thomas Crofts and Arlie Loughnan, Provocation: the Good, the Bad and the Ugly [37(1) Criminal Law Journal, 2011] 23

67 Uganda Bureau of Statistics, Uganda Demographic and Health Survey (2016) Kampala, Uganda, the DHS Program ICF Rockville, Maryland, USA January 2018. 316

68 Ibid

69 Anna Carline, 'Reforming Provocation: Perspectives from the Law Commission and the Government' (2009) Web Journal of Current Legal Issues, Volume 2, Issue 2 Web JCLI, <http://webjcli.ncl.ac.uk/2009/issue2/carline2.html > [accessed 4 July 2021]

A tort is generally a civil wrong. Just like the prior section, this one highlights and discusses those aspects of the law of tort with disputed consequences on mental health/illness.

3.1 Period of limitations

Section 3 of the Limitation Act[70] dictates that no action founded on tort shall be brought after the expiration of six years from the date on which the cause of action arose.

In *Stubbings v Webb & Anor*[71], the respondent issued a writ on 18 August 1987, when she was over 30 years old, claiming damages against the appellants, her stepfather and stepbrother, for mental illness and psychological disturbance allegedly caused by the former's sexual and physical abuse of her as a child between the ages of 2 and 14 and rape by the latter when she was aged 12.

The respondent's case was that although she knew that she had been raped and persistently sexually abused by the appellants she did not realise she had suffered sufficiently serious injury to justify starting proceedings for damages until September 1984, when she realised that there might be a causal link between her psychiatric problems in adult life and her sexual abuse as a child. However, the respondent's action was time-barred and as such, it failed.

This case goes to show how the statutory period of limitation restricts dispensation of justice, especially and particularly when it comes to mental afflictions that present themselves at later stages of adult life. A good example is *Post Traumatic Stress Disorder*.

This arises as a delayed and/or protracted response to a stressful event or situation (either short- or long-lasting) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost

70 Cap 80 of the Laws of Uganda

71 [1993] 1 All ER 322

anyone.[72] So, individual A, on whom violence is actuated at the ages of 5 through 12 that suffers post-traumatic stress disorder with violent tendencies, would not be able to seek justice against his attackers, presenting a reprehensible result of the law's application.

4.0 AGGRAVATING FACTORS

Under this section, the paper will examine factors that exacerbate the issues with mental health. We will look at the causes of these factors, all in effort to show how the state/government, the law and its implementation have contributed to, worsened, failed or fallen short in terms of mental health/mental health disorders.

4.1 The legal considerations

The 1995 Constitution of the Republic of Uganda is the supreme law in the country and any other law which is contrary to it is null and void to the extent of its inconsistency.[73] The Constitution provides for the deprivation of liberty of persons with 'unsound mind' or those addicted to drugs and alcohol.[74] This provision creates a few issues with regards to people with mental illnesses and disorders.

Firstly, it is discriminatory, a violation ironically outlawed by the same Constitution.[75] It could make it very difficult for those persons with mental disabilities who have learned to cope in their society from enjoying their basic right of liberty like every other citizen and would be a failure on the part of the State, which has a duty to ensure that these people realise their full mental and physical potential.[76]

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72 World Health Organization, The ICD-10 Classification of Mental and Behavioural Disorders Clinical Descriptions and Diagnostic Guidelines, <https://www.who.int/classifications/icd/en/bluebook.pdf> [accessed 15 July 2021]

73 Article 2(1) and 2(2) of the 1995 Constitution of the Republic of Uganda.

74 Article 23(1)(f)

75 Article 21

76 Article 35

Secondly, while the mischief that the provision tries to remedy is security of the person and the community, the catch-all term "persons of unsound mind" is vague[77], and ignores the complexities and severity of particular mental illnesses and disorders over others. Depression, for example, which is a mental disorder that could just about affect anybody, could be reasonable grounds to deprive one of their liberty.

While every human right[78] has to meet the tri-partite limitation test[79], of being legal, necessary and proportionate[80], where would the law stand in grey areas like postpartum depression which affects many mothers today? Could someone deprive a mother of her liberty because her depression could potentially be a danger to her new-born child?[81]

The Mental Health Act, similarly, has provisions that raise a few concerns. To start with, the mental health tribunals that the Act provides for to investigate, arbitrate or advise on complaints concerning decisions made in relation to patients[82] are established when necessary by the Board[83]. Concerns about the administration of justice are raised since the Act seems to overlook delayed

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77 Additionally, the term is also derogatory.

78 Except those listed in Article 44 of Constitution.

79 Charles Onyango Obbo and Andrew Mwenda v Attorney General, [2004] UGSC 81

80 Ibid. Mulenga JSC quoted the case of *Mark Gova and Another v Minister of Home Affairs and Another [SC. 36/2000: Civil Application No. 156/99]* where the criteria laid out was that the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right, the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations, the means used to impair the right or freedom must be no more than necessary to accomplish the objective.

81 The argument would become even more lopsided in favour of the deprivation of liberty of such a mother when you consider the Constitution's anti-abortion stance that shows just how much the law in Uganda values the lives of children. *See* Article 22(2) of the 1995 Constitution of the Republic of Uganda.

82 Section 14(3) of the Mental Health Act

83 Section 14(1) of the Mental Health Act

justice[84], particularly when you consider the fact that the Board is mandated to meet at least once every three months.[85]

The Act also provides for emergency admission and treatment, including in cases where the person has behaviour which may lead to serious financial loss to him or herself.[86] Specifically, the Act provides for cases where a relative, concerned person or the Police can initiate emergency admission to a health unit or a mental health unit.[87] This provision raises great concerns with regard to the right to liberty and non-discrimination of persons with mental illnesses and disorders.

Would persons with addictions qualify to have their liberty stripped away through emergency admission, simply because their behaviour may lead to financial loss to themselves or to others? The provision also seemingly overlooks the freedom that such persons are entitled to in as regards their finances.

Concern has also been raised with regard to the derogatory language used to refer to persons with mental disabilities in various statutes that are still operating in the country. This debate found its way to the Constitutional Court, in the case of *CEHURD and Another v Attorney General.*[88] The petition challenged the laws, practice and usage towards persons with mental disabilities as far as criminal justice was concerned, in provisions in the Trial on Indictments Act[89] and the Penal Code Act.[90]

The petitioners averred that the terms "idiots" and "imbeciles" used in these laws were discriminatory and amounted to inhumane and degrading treatment,

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84 Contrary to the popular adage that 'Justice delayed is justice denied.'
85 Section 11(1) of the Mental Health Act
86 Section 22(1)(b) of the Mental Health Act
87 Section 22(3) of the Mental Health Act
88 Constitutional Petition Number 64 of 2011.
89 Section 45(5) of the Trial on Indictments Act, Cap 30 of the Laws of Uganda.
90 Section 130 of the Penal Code Act, Cap 120 of the Laws of Uganda.

in addition to being contrary to the international instruments that Uganda had ratified.[91]

The Constitutional Court found that these provisions were indeed derogatory. Despite the aforementioned judgment in the CEHURD case, there are laws and statutes that have similar language but are still in use today, providing a continuing violation to the dignity of persons with mental disabilities. These include the Constitution[92], Evidence Act[93] and the Contracts Act[94], to mention but a few.

4.2 The economic considerations

Outpatient care is growing but can be expensive. A WHO survey found that approximately 37% of the daily minimum wage was needed to pay for one day's worth of antipsychotic medication while approximately 7% of the daily wage was needed to pay for one dose of antidepressants.[95] With these exorbitant prices, many choose not to seek medical assistance, while the few that do seek it, fail to afford it. As a result, the statistics of unresolved, untreated cases continues to grow or stay stagnant.

4.3 Neglect of psychiatry and mental health

Every year, the Parliament sits and a budget for that financial year is read, dictating how much revenue or money is apportioned to various sectors of government and the state. Change has been slow, with psychiatry and mental health remaining one of the most neglected areas of medicine.

As of October 2017, there were 33 registered psychiatrists to serve a population of approximately 38 million, over half of whom were based in or on the

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91 The United Nations Convention on the Rights of Persons with Disabilities and the African Charter on Human and People's Rights.

92 Article 23(1)(f)

93 Section 117

94 Sections 11 and 12

95 World Health Organization, WHO proMIND: Profiles on Mental Health in Development: Uganda (Geneva, 2012) 40

outskirts of Kampala.[96] Approximately 1% of the government's national health care expenditure is directed towards mental health, and this seems unlikely to change in the near future. Of this, just over half is directed towards Butabika.[97]

With such few resources it is undoubtedly hard for these institutions to ably handle treatment of so many mental health patients, let alone implement outreach and sensitization programs to those in need of assistance.

4.4 Ignorance

In a study of severe mental illness in two districts in Eastern Uganda, Catherine Abbo reported that just as communities drew on multiple explanatory models for psychosis, they also sought multiple solutions. "Traditional healing and biomedical services", she noted, "were used concurrently by over 80% of the subjects".[98]

While there are only 32 western-trained, psychiatrists in the country, there is a ratio of one witch doctor for every 290 Ugandans.[99] This coupled with the expenses associated with professional mental health services leaves no wonder as to which alternatives patients opt for.

There is a lot of unfamiliarity regarding the many facets of mental health and disorders. There are, in existence a number of metal disorders, the complexities of which are not known or understood by everybody. This can be attributed to limited circulation of information regarding these conditions. However, it can also be accredited to the small number of facilities dealing with mental health related issues.

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96 Uganda Medical and Dental Practitioners Council, Specialist Register. <www.umdpc.com/registers/Specialist%20Register.xls > [accessed 10 June, 2021]

97 Kigozi et al., An Overview of Uganda's Mental Health Care System, 3

98 C. Abbo, Profiles and Outcome of Traditional Healing Practices of Severe Mental Illnesses in Two Districts of Eastern Uganda (Global Health Action 2011) 11.

99 Ibid.

Further, there is a lot of stigma surrounding Butabika hospital[100] and mental health as a whole based on the misguided belief among some communities that all mental illness results from witchcraft. This drives people to resort to either traditional healers or not to seek medical guidance whatsoever to avoid being ostracized by their societies. The state has therefore not done enough sensitization and education of the general population in regards to mental health, a constantly growing concern.

4.5 Challenges faced by psychiatrists and psychiatric institutions

Most general health workers are ill- and equipped, with very few having had some training in mental health care. With the limited knowledge on mental health, many general health workers admitted knowing mental illness only by the severe forms – characterised by psychotic features. They thus fail to identify and attend to those whose mental health problems do not present with obvious psychiatric symptoms, resulting in fewer cases being reported. This has implications regarding resource allocation, to the disadvantage of mental health.[101]

The numbers of psychiatric nurses is still dismal. According to David Kyaligonza, assistant commissioner nursing services at Butabika hospital, the ideal mental hospital setting would have a ratio of one nurse to six patients but at Butabika, this number is one nurse for every 55 to 60 patients.[102]

According to a study conducted by the World Health Organization, only 57 percent of clinics had at least one psychotropic medication in each class, meaning the medication someone needs is highly unlikely to be available in Uganda.[103] In other cases, the drugs are too expensive and are thus scarce, yet

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100 Farida Bagalaaliwo, 'Inside Butabika: The fear of mental treatment' (Daily Monitor, 2015) <https://www.monitor.co.ug/uganda/magazines/healthy-living/inside-butabika-the-fear-of-mental-treatment-1619294> [accessed 19 June 2021]

101 Kigozi, supra

102 Bagalaaliwo, supra

103 Byrne Maura, '5 ways Uganda is improving mental health care' (The Borgen Project, 21

the same drugs are sometimes to be taken by patients even for life. For example, Samuel Malinga, the clinical officer in charge of Tiriri health centre said a month's supply of carbamazepine for Ewunyu (a patient) would cost about UShs 12,000 (around $5.40) which he could not afford.[104] As a result few patients get the requisite treatment.

4.6 Failures of government institutions

Butabika National Referral Mental Hospital was established in 1955 and provides general and specialized mental health treatment for mental health patients. It is currently the only National Referral Mental Health Institution in the Country.[105]A lot of criticisms over the years have been made regarding the treatment of patients admitted in the hospital. In 2016, for example, with support from CEHURD, a patient, Benon successfully lodged a civil complaint against the Attorney General for mistreatment at Butabika Hospital during two periods of admission, in 2005 and in 2010.

While at Butabika, Benon was undressed and locked in seclusion—a small cold dark room measuring about two square metres, and that supposedly helps 'cool' the patient when they are agitated. The room had no windows or source of light, bedding, toilet or urinal. He was forced to urinate and defecate on the floor, sleep on a concrete platform and received no medical attention during this time. The case highlighted how seclusion practices violated the human rights of patients at Butabika Hospital, and were in contravention both of Uganda's Constitution and numerous international conventions on disability rights.[106]

July 2019) <borgenproject.org/5-ways-uganda-is-improving-mental-healthcare > [accessed 19 June 2021]

104 Daily Monitor article that report questioning handling patients in Butabika

105 < https://www.butabikahospital.go.ug/about-us > [accessed 19 June 2021]

106 Pringle Y. (2019) Conclusion. In: Psychiatry and Decolonisation in Uganda. Mental Health in Historical Perspective. Palgrave Macmillan, London <https://doi.org/10.1057/978-1-137-60095-0_8 209-219> [accessed 15 June 2021]

The Mental Disability Advocacy Centre(MDAC) published a report titled: "Breaking point," that also detailed other criticisms of the Hospital. The hospital wards were found to be dirty, overcrowded and lacked basic protections of human dignity such as privacy and personal beddings. There was evidence of malnutrition in many wards and many residents had skin conditions, cuts and poor general hygiene.

The report also found that mentally-ill patients are overdosed with drugs even when they are not violent and asked police to open investigations into the allegations of torture and ill-treatment at the facility.[107] These and many others not only worsen the conditions of the in-patients, but also discourage intending patients from seeking help they need from what should be the best facility in the country.

There is also the challenge posed by the unaffordable services provided, even at government health institutions. In *Center for Health, Human Rights & Development & 2 Ors v The Executive Director, Mulago Referral Hospital & Anor*,[108] the 2nd and 3rd Plaintiffs were a lay Ugandan couple, the 3rd Plaintiff a Non-Governmental Organization working on health and other human rights awareness and enforcement.

The action was brought against the 2nd Defendant in representative capacity for the actions or inactions of staff of Mulago National Referral hospital (a government hospital) in the unlawful disappearance of one of the babies delivered. Here, the judge discussed the entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health. He noted that the case pointed to a bigger problem in the country:

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107 Daily Monitor, Report Questions Handling of Patients in Butabika (Butabika National Referral Mental Hospital, 1 July 2017) <https://www.butabikahospital.go.ug/news/14-report-questions-handling-of-patients-in-butabika > [accessed 19 June 2021]

108 [2017] UGSC 10

> *"PW1 explained that for the 9 months of her pregnancy, she only went for antenatal care once in the early stages and for the rest of the pregnancy she was in the village taking local herbs. PW1 did not even know that she was carrying two babies in the pregnancy. In the circumstances of this case, it is easy to infer that the reason PW1 had only one antenatal visit and did not know she had twins was because she could not afford the costs of accessing health care services. This points to a violation of the obligations of Uganda enumerated above…In particular it points to a violation of the obligation to fulfil the right to health…It also reflects a violation of Article 2(a), (b) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of women in Africa which requires state parties to take appropriate measures to provide adequate, affordable and accessible health services..."*

This is just one case out of the many others existent in Uganda. Time after time, those in need of these services are failed by government health institutions, even when the state is obligated to provide these services, more so at affordable rates.

4.7 Reliance on international funding

Uganda is one of the 3rd world countries that is heavily dependent on foreign aid. For instance, in 2019 Uganda received over 2 billion USD in net official development assistance and official aid received.[109] This foreign aid almost always comes with strings attached, with requirements for Uganda to prioritise other sectors over health care, and in particular mental health care. This leaves many gaping holes in the system, affecting implementation of related and relevant policies, establishing outreach programs and many other things that

[109] Net Official Development Assistance And Official Aid Received (current US$) – Uganda, World Bank <data.worldbank.org > [accessed 15 July, 2021]

ideally would push the drive towards better mental health facilities and mental health in general.

4.8 Largely centralized approach to mental health care

Worldwide, a number of reforms have been undertaken with the intention of improving access to mental health services. Notable among these is the integration of mental health services into primary health care (PHC), which has been one of the most fundamental healthcare reform recommendations globally.[110]

Primary health care is an overall approach which encompasses the three aspects of: multisectoral policy and action to address the broader determinants of health; empowering individuals, families and communities; and meeting people's essential health needs throughout their lives. "Primary care" is a subset of PHC and refers to essential, first-contact care provided in a community setting.[111]

Providing mental health services in PHC involves diagnosing and treating people with common mental disorders within the general framework of available health services, putting in place strategies to prevent mental disorders, ensuring that primary healthcare workers are able to apply key psychosocial and behavioural science skills, as well as ensuring an efficient referral system for those who require more specialised care.[112]

The efforts towards decentralization can be seen in section 20(1), Mental Treatment Act 2018, and despite the dominance of decentralised approaches and the policy of mental health in primary care within international mental health, psychiatric services remained highly centralised with Butabika Hospital

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110 Fred N Kigozi, Joshua Ssebunnya, 'Integration of mental health into primary health care in Uganda: opportunities and challenges' Mental Health in Family Medicine (Radcliffe Publishing, 2009)

111 What is PHC? World Health Organization <https://www.who.int/activities/what-is-PHC> [accessed 10 June 2021]

112 Kigozi and Ssebunya, supra

as the focal point of psychiatric provision and expertise.[113] As a result, interested and affected people from far districts for whom accessibility is difficult lose out on these services. It also contributes a great deal.

4.9 COVID-19

With the emergence of the COVID-19 pandemic, the government of Uganda instituted and enforced a lockdown effective 18th March 2020 that saw closure of schools, halting of all nonessential services and businesses and so on in an effort to control the spread of the disease.

However, owing to a number of factors, the frustration that came with this has been seen to have staggering negative effects on mental health especially the urban and periurban dwellers who mostly "live from one pay check to another" with barely any savings made.[114] Sustained stress exposure causes people to turn to damaging behaviour like crime, reckless sexual acts, violence, domestic abuse, and substance abuse.[115]

Given the social-economic impact of the corona virus, the mental health of all individuals, families, and society has been affected.[116] This has increased anxiety of contracting the disease among vulnerable populations like the ill-equipped frontline health workers, elderly persons, people with underlying chronic illnesses (HIV, tuberculosis).[117] Persons believed to have been exposed

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113 Pringle Y. Psychiatry and Decolonisation in Uganda. Mental Health in Historical Perspective. (Palgrave Macmillan, 2019) <https://doi.org/10.1057/978-1-137-60095-0_8>209-219 [Accessed 15 June 2021]

114 Index Mundi, Uganda population below poverty line—Economy (2017) <https://www.indexmundi.com/uganda/population_below_poverty_line.html> [accessed 15 June 2021]

115 Kagaari James PhD, 'Mental health in Uganda' (Global Insights Newsletter, February 18, 2021) <https://www.apa.org/international/global-insights/uganda-mental-health#> [accessed 12 June 2021]

116 Ainamani, H. E., Gumisiriza, N., and Rukundo, G. Z, 'Mental Health Problems Related to COVID-19: A Call for Psychosocial Interventions in Uganda. Psychological Trauma: Theory, Research, Practice, and Policy.' Advance online publication, (2020) 12(7) <http://dx.doi.org/10.1037/tra0000670> [accessed 24 June 2021]

117 Ainamani supra

to COVID-19 were being hunted down and shamed by the communities in which they live, and even those that have recovered still face stigmatization.[118] Law officers like the police and military reportedly used violent means to enforce lockdown measures.[119]

5.1 SUGGESTIONS FOR REFORM

There should be quicker and more deliberate measures for integration of mental health care into PHC. The advantages of integrating mental health services into PHC include, among others: reduced stigma for people with mental disorders and their families, improved access to care, human rights protection, reduced chronicity and improved social integration, as well as improvement in the human resource capacity for mental health.[120]

The integration has been noted to improve access, availability and affordability of services, thereby producing better outcomes.[121] While the government has undertaken inclusion of mental health as one of the components of the National Mental Health Care Package[122], training and recruitment of mental health professionals, in-service training of general health workers in mental health, and making psychotropic medicines readily available, the integration is still lacking.

Amendment of statutes to reflect respect for dignity of the persons suffering from mental illnesses should be undertaken. The potential of persons living with disability cannot be realized if their dignity is not ensured. Therefore, the language used in all statutes must respect the dignity of such persons, and

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118 The Independent Uganda, COVID-19 recovered patient decries hostility, stigma (2020) <https://www.independent.co.ug/covid-19-recovered-patient-decries-hostility-stigma/> [accessed 24 June 2021]

119 Esagala, A., Mabala, R., Lubowa, A., & Buule, G, Canes, Tears in Kampala over Coronavirus, Daily Monitor (2020) <https://www.monitor.co.ug/News/National/Photos-that-willcompel-you-cancel-your-journey-Kampala/688334-5505362-g3u0ib/index.html> [accessed 15 June 2021]

120 Kigozi, supra

121 ibid.

122 Cluster 4 of the Ministry of Health National Health Policy

indeed of all individuals. It must also uphold their equality with is other persons.

The provisions of the Constitution and Mental Health Act should also recognise the liberty of persons with mental illnesses and the fact that they should not be deprived of their liberty arbitrarily. This right should be approached cautiously and limited in a manner that is legal, proportional and necessary. Similarly, the Mental Health Act should be amended to provide a stricter punishment for the torture of mentally ill persons[123] in order to match the aggravated status that these persons are accorded in other statutes like the Penal Code Act. This could reduce their stigmatization and mistreatment in both their communities and in the mental health units.

There should be the adoption of a broader spectrum for establishing liability for crimes or torts. Looking into defendant's upbringing will allow the state to appreciate these factors and deal with the causes of criminal behaviour from the root, rather than punishing criminals after the milk is already spilled.

More flexible methods of reform for convicted criminals that include therapy or counselling even with incarceration to address early trauma, abuse and other factors that contribute to later aggressive or violent behaviour that led to these crimes. The state needs also to look at the adjustment of the defence of provocation to include even culminate factors/effects and not just the constraint of sudden and temporary loss of control.

5.2 CONCLUSION

There are a lot of loopholes, inconsistencies and oversights in as regards to how mental health and mental illnesses are handled by the law and by the practice of the State. This article set out to uncover some of these murky areas in order to expose instances and situations in which people with mental

[123] Section 11(a) and (b) of the Mental Health Act prescribe a fine or a term of eighteen months' imprisonment.

disabilities face/may face grave injustices. Fortunately, the 2018 Mental Health Act shows that the State is recognizing the need to provide reform for protection of these persons.

However, with the laws and practices that have been pointed out in this article still in place today, and with no framework in place for reform, what we consider enough *just* may not be. We risk committing injustices against a group that deserves our utmost attention—and, just like the high depression rate during the COVID-19 lockdown has shown, a group that could include anyone of us.

UGANDA'S MISSED OPPORTUNITIES FOLLOWING THE REJECTION OF THE SEXUAL OFFENCES BILL

Jenipher Tuyiringire[*]

ABSTRACT

The consolidated sexual offences bill in Uganda has been tabled about 4 times in a span of 20 years. The most recent, the 2019 Sexual offences Bill which introduced aspects like a sexual offenders' registry, was approved by Parliament on 3rd May this year but the president declined to assent to it on 17th August. The author asserts that this statute is a much needed one owing to the increasing numbers of sexual offenders and the complexity and emotional nature of sexual offences. This paper seeks to look into the missed opportunities in not having the sexual offences bill passed as law. The author discusses possible amendments to the 2019 Sexual Offences bill which if not adjusted might culminate in unintended consequences and violations.

1.0 INTRODUCTION

On 3rd May 2021, the 10th parliament approved the Sexual Offences Bill, 2019.[1] The object of this Bill is/was to enact a specific law on sexual offences for the prevention of sexual violence; to enhance punishment of sexual offenders; to provide for the protection of victims during sexual offences trials; to provide for extra territorial application of the law; to repeal some provisions of the Penal Code Act, Cap 120 and for other related matters.[2]

The year 2019 registered 1528 rape cases, 13,613 cases of defilement and 497 other sex related offences. Of the 13,613 defilement cases, 3,124 were aggravated defilement. Only 5,732 of these cases made it to court and only 1,021 of these secured convictions with the majority of the 13,592 pending in

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[1] Concerns about Sexual Offences Bill in Uganda- LawyersforLawyers available at https://lawyersforlawyers.org/en/concerns-about-sexual-offenses-bill-in-uganda/ [Accessed 24 July 2021]

[2] Sexual Offences Bill 2019

court.[3] Needless to say, these figures are grossly alarming considering the devastating consequences of sexual offences.

It is in this spirit that the 10th parliament thought it wise to consolidate laws against sexual offences.[4] The Bill repeals outdated provisions of the penal code and consolidates laws to even cover the new and more sophisticated forms that sexual violence and exploitation has taken such as sex tourism among others.[5]

This paper asserts that some provisions of this bill are however vexatious and might do more harm than good. Cases in point are the provisions on the sex-offenders' registry which are largely lacking. Under section 32 of the bill, registration of a sexual offender shall go on for their natural life unless conviction is appealed against. In practice, much as this seemingly provides a certain level of public safety and protection from recidivism, it could potentially be precarious. It suggests a similar time frame for sexual offenders to appear in the registry despite the gravity of the offence, as will be discussed extensively later in this article.

The bill does not provide for marital-rape yet this would have been a timely intervention to settle the long standing debate on the same. It also fails to look into the deep-rooted causes of sexual offences such as gender inequality and inadequate sex education. This is likely to cause a gap in the law and its implementation.

This paper analyzes some provisions of the bill while suggesting subtractions, additions and other general possible amendments to boost and ensure practicability of the bill. It then discusses the missed opportunities in failing to pass the bill. Recommendations are fronted before the conclusion.

2.0 BACKGROUND OF THE SEXUAL OFFENCES BILL

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3 The 2019 Annual police report (latest police report)

Sexual Offences Bill 2019 available at https://parliamentwatch.ug/wp-content/uploads/2021/09/Sexual-Offences-Bill-2019-1.pdf [accessed 30 July 2021]

5 Explanatory memorandum of the sexual offences bill, 2019

The first attempt to create a Sexual Offences Act for Uganda traces back to 2000. The government spearheaded the deliberation of the Sexual Offences (Miscellaneous Amendments) Bill. This was after a field research by the Uganda Law Reform Commission that was concluded in 1997.[6]

Eleven years later, the Sexual Offences Bill was gazetted and later tabled before parliament in 2012 as the Sexual Offences Bill 2012.[7] It was a private members' bill spearheaded by Uganda Women's Parliamentary Association (UWOPA). However, five years down the road, the process had not yielded any results. This prompted the tabling of the bill again by Hon Amoding (Member of Parliament representing Kumi district) on behalf of UWOPA.

This bill was tabled before the committee on Legal and Parliamentary Affairs for review, which presented a report four years later in 2019.[8] Too many amendments were proposed during Parliamentary debates which had Hon. Jacob Oulanyah, the then Deputy speaker advising that the bill be withdrawn and a new one published.[9]

It is to that effect that the Sexual Offences Bill, 2019 was approved by Parliament on 3rd May 2021. The Bill was sent to the president for assent, which assent was denied on 17th August 2021.[10]

3.0 ANALYSIS OF THE KEY PROVISIONS OF THE SEXUAL OFFENCES BILL

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6 Criminal Law in Uganda: Sexual assaults and Offences Against morality by Lillian Tibatemwa Ekirikubinza, 101

7 Legal Analysis of the Sexual Offences Bill 2015 and it's Implications on LGBTI Persons, sex workers and persons living with HIV/AIDS: Human Rights Awareness And Promotion Forum(HRAPF) with support from Open Society Initiative for Eastern Africa(OSIEA), 10th May 2016

8 Ibid

9 Sexual Offences Bill to be re-tabled | Parliament of Uganda available at https://www.parliament.go.ug/news/3159/sexual-offences-bill-be-re-tabled [accessed 30 July 2021]

10 Ibid

The Bill is divided into six parts; the preliminary, sexual offences, sexual offences against children, court powers and jurisdiction, sexual offenders' register and miscellaneous provisions. It provides an elaborate means of dealing and curbing the vice of sexual offences except for some provisions that are either lacking, vague, uncalled for or are likely to lead to unintended adverse consequences.

These provisions and their predicted unfortunate outcomes (where necessary) include but are not limited to the ones discussed in the following chapter.

3.1 Clause 2 on rape

"We must call the ravening act of rape, the bloody, heart-stopping, breath-snatching, bone-crushing act of violence, which it is. The threat makes some female and male victims unable to open their front doors, unable to venture into streets in which they grew up, unable to trust other human beings and even themselves. Let us call it a violent irredeemable sexual act" ~ Maya Angelou[11]

The penal Code gives a myopic and out of reality view of rape.[12] It does not account for the realities in which rape is committed. The consolidated Sexual Offences Bill 2019 on the other hand gives a wider definition and meaning of rape.[13] The Penal Code[14] uses words like "carnal knowledge" in reference to a sexual act that is not clear to a lay man. It also limits rape to penetration of a victim's sexual organ by the perpetrator's. It does not foresee circumstances where a perpetrator uses an object or hands to rape the victim.

On a positive note, the Bill comprehensively defines a sexual act as;

(a) "Penetration of a person's sexual organ, mouth or anus by a person's or animal's sexual organ or object;
(b) Contact or stimulation of a person's or animal's sexual organ or object; or

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11 Maya Angelou, Letter to my daughter, Random house 2008
12 Penal Code Act, Cap 120, section 129
13 Sexual Offences Bill, Clause 2
14 Penal Code, Section 129

(c) Insertion of a person's or animal's body part or any object into the sexual organ, anus or mouth of another person;"

This does not include the penetration of a person's sexual organ, mouth or anus, contact, or stimulation of person's sexual organ, or insertion of a person's sexual organ, anus or mouth of another person for sound health practices or proper medical procedure.[15]

Clauses 2(1)(2)(3) of the Bill prescribes imprisonment for life and 8years imprisonment for attempted rape in sub-clause (4).[16] Clause 3 provides for aggravated rape and the offender is liable to suffer death. The Bill also extensively provides for Sexual offences against children in part IV.[17]

3.2 Clause 11 on unnatural sex offences

Clause 11 provides for the offence of "unnatural offences". This provision has received backlash from human rights activists because it criminalizes same sex relations. Activists have asserted that this provision is intended to incite violence against the LGBTQ community in Uganda.

For example, according to Human Rights Watch (HRW), same sex relations are already criminalized under the carnal knowledge against the order of nature with up to life imprisonment. Recriminalizing it further entrenches discrimination against LGBTQ persons.[18]

3.3 Clause 20 on Child tourism

Clause 20 introduces the offence of child tourism with a punishment of imprisonment not exceeding ten years or a fine of two thousand currency

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15 Clause 1, Sexual Offences Bill 2019

16 Ibid, clause 2

17 Ibid, Clauses 13-22

18 Uganda: Reject Sexual Offenses Bill available at https://www.hrw.org/news/2021/05/06/uganda-reject-sexual-offenses-bill [accessed 9 August 2021]

points or both.[19] This clause clearly defines child tourism and lays down its ingredients.[20]

Under the Penal Code Amendment Act 2007, the felony of defilement is defined as unlawful sexual intercourse with a person below 18years of age (was amended to include boys) with up to life imprisonment and the death penalty in some cases[21].

The Act however does not prohibit the use of children in sexual activities for remuneration or any other consideration which is critical.[22] The Sexual Offences Bill seeks to bridge this gap through Clause 20 which criminalises any kind of arrangements for sexual acts with children.[23]

This provision would represent a major improvement, bringing Uganda's legislation more in tandem with international standards that have established that children exploited through prostitution should be recognized as victims in international and regional treaties (that Uganda has already ratified).[24]

3.4 Part V—Sex Offenders' register

Clause 28 establishes a sex Offenders' register that is to be managed and maintained in electronic or other form by National Identification and

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19 Sex Offences Bill Clause 20

20 Ibid

21 ECPAT International Global Monitoring Report on the status of action against commercial sexual exploitation of children 2007. The death penalty may be imposed in aggravated circumstances: if the offender is a parent, guardian or has authority over the victim (Penal Code Act cap 120, section 129)

22 ECPAT International Global Monitoring Report on the status of action against commercial sexual exploitation of children 2007. Available at www.ecpat.com [accessed 9 August 2021]

23 Section 20 of the Sexual Offences Bill 2019

24 Convention on the Rights of the Child – August 1990 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC) – 30 November 2001, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – 2000 (supplementing the UN Convent I on against Transnational Organized Crime),African Charter on the Rights and Welfare of the Child - 1990 17 August 1994 among others(the dates against these treaties represent when they were ratified in Uganda)

Registration Authority (NIRA). Provisions on this register go on up to clause 33.[25]

Sex Offender registration is a system of monitoring and tracking sex Offenders' following their release into the community.[26] Sex offender registries originated from the United States in 1994.[27] The UK adopted one in 1997 as well[28] and several countries all over the world have established the same since then. Sex offender registries are run differently depending on the laws of a country.

In the US, all states have registries that are accessible by the public as opposed to the United Kingdom where only a few authorized officials can access it[29]. In the US, the law requires all sex offenders in all the 50 states to register while most countries only register sex offenders of grave sex offences[30] for example South Africa only registers sex offences against children and mentally disabled persons.[31]

The law creating a sex offender registry is retroactive in some countries like Nigeria where sex offenders from three years before establishment of the registry get registered[32] while in other countries like the UK, it is not retro-

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25 Clause 28 of the Sexual Offences Bill 2019

26 Sex Offender Registration And Notification Act (SORNA) (justice.gov) available at https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna [accessed 6 August 2021]

27 Global Overview of Sex Offender Registration and Notification Systems available at https://www.icmec.org/wp-content/uploads/2015/10/US-Global-Overview-of-Sex-Offender-Systems.pdf [accessed 6 August 2021]

28 What is the sex offenders register and when will someone be put on it? - InBrief.co.uk available at https://www.inbrief.co.uk/offences/the-sex-offenders-register/ [accessed 6 August 2021]

29 N Mollema "The viability and constitutionality of the South African National Register for Sex Offenders: A comparative study": LLB LLM LLD (University of South Africa). Senior Lecturer of Department of Criminal and Procedural Law, University of South Africa.

30 http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000700010 [accessed 6 August 2021]

31 Justice/Criminal/NRSO available at https://www.justice.gov.za/vg/nrso.html [accessed 6 August 2021]

32 Aljazeera : Nigeria launches first national sex offenders register available at

active except in very limited circumstances.[33] It varies with the history, law, socio economic standing of a country among others.

The Uganda sex offences register would be a great win towards strengthening the system to curb sex offences and protect potential victims. Even when sex offender registries have been criticized for being ineffective, creating fear and insecurity in society and violating human rights, the author believes it is good law. It is definitely better than having none. It is however imperative to note that the provisions on the sex offender registry in the sex offences bill are ambiguous and have some leaks. Chances of achieving the desired goal are minimal with these provisions.

The Bill provides that a person convicted of an offence under this Act shall have his or her particulars captured in the register.[34] This means that this register will capture even assaulters and children below the age of 12 that commit sex offences according to sections 5 and 16 respectively.[35] This is quite problematic because the purpose of sex offender register is to protect would be victims from sexual predators, reduce recidivism and have a deterrent effect. It is not meant to be a punishment.[36]

Therefore, the offenders registered should be criminals that present a big risk to society. If assaulters are registered, then the registry might not be taken as seriously as the law framers intend/intended it to be. It is also unfair to keep children in the registry for child to child sex (criminalized under clause 16).

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https://www.aljazeera.com/amp/news/2019/11/26/nigeria-launches-first-national-sex-offenders-register [accessed 6 August 2021]

33 How long is someone on the Sex Offenders Register - IBB Claims available at https://www.ibbclaims.co.uk/site/services/child-abuse-and-trafficking/child-abuse-compensation-claims/how-long-on-sex-offenders/ [accessed 6 July 2021]

34 Clause 29(2)

35 Clauses 5 & 15 of the sex offences bill

36 What Is The Purpose of Sex Offense Registries? - The Appeal available at https://theappeal.org/what-is-the-purpose-of-sex-offense-registries/ [accessed 6 July 2021]

Additionally, registration of all sex offenders as opposed to registration of those that present a big risk to society requires more resources to be run if it is to always be up to date. Uganda, being a third world country and considering our socio-economic status, it is obvious that there will be challenges running and maintaining this registry.

Clause 32 provides that, "The registration of a person in the register shall, unless the conviction is successfully appealed against, be for the natural life of the offender."[37] This provision is likely to have absurd implications. Having an offender of aggravated rape under clause 3 and an assaulter under clause 5 stay in the register for the same period of time (for life) raises questions as to what the intention of this law is. Even if the aim was punishment and not protection, keeping offenders of different offences with varying gravities in the register for a similar period does not seem reasonable.

A comparative study with other countries' registries evidences this. In the United Kingdom, only sex offenders that have been punished by life sentence or imprisonment for 30 months or more get registered for life. The rest are removed after a certain period of time depending on the gravity of the sex offences they committed.[38]

The US has Megan's law that categorizes crimes under "tiers" and it prescribes how long the offenders will spend in the register[39].

Additionally, keeping a child offender in the register for life sabotages their future more than it protects society as the register intends. Generally, keeping offenders in the register for life is punishing people through their entire lives for an offence whose sentence they have served. This defeats the purpose of

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37 Clause 32, Sexual Offences Bill 2019

38 How long is someone on the Sex Offenders Register - IBB Claims, available at https://www.ibbclaims.co.uk/site/services/child-abuse-and-trafficking/child-abuse-compensation-claims/how-long-on-sex-offenders/ [accessed 6 August 2021]

39 TermsDefinitions - Megan's Law Public Website (state.pa.us) available at https://www.pameganslaw.state.pa.us/InformationalPages/TermsDefinitions [accessed 9 August 2021]

criminal law to reform culprits into responsible members of society and neither is it deterrent.

Therefore, in as much as the register provides great prospects in the fight against sexual offences, the provisions providing for the same need to be amended so that it is pragmatic and effective in addressing the purpose for its introduction.

3.5 Clause 40 on Extra-Territorial Application

Clause 40 provides for sex offences committed by a Ugandan national or permanent resident of Uganda outside Uganda and for sex offences partly committed in Uganda and partly outside Uganda.[40] This is unprecedented and is one of the provisions introduced by this bill. However, the scope of the provision is still limited as it does not provide for sex offences committed by Ugandan nationals and residents against non-nationals especially children.

3.6 No provision for marital and corrective rape

Despite efforts by judges to recognise marital rape as a crime through judicial activism, it is not expressly provided for in Ugandan statutes.[41] This emanates from the common law principle that a husband could not rape his wife as the contract of marriage gave irrevocable consent.[42] The exemption of marital rape is attributed to the remarks of British judge Sir Matthew Hale in 1736, viewing women as the contractual property of their husbands, which became part of the common law that Britain exported across the world.[43] This principle was

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40 Sexual Offences Bill, Clause 40

41 Human Rights Watch: Domestic Violence and HIV/AIDS (hrw.org) available at https://www.hrw.org/legacy/campaigns/women/aids/factsheet.htm [accessed 9 August 2021]

42 R v R (Rape: marital exemption) [1991] 4 All ER 481: https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_29.htm [accessed 9 August 2021]

43 HDT-LegalSnapshot_05_2021_single-page10.pdf (humandignitytrust.org) available at https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-LegalSnapshot_05_2021_single-page10.pdf [accessed 9 August 2021]

long overturned in England in 1992 R v R[44] where Lord Keith held that "rape is rape regardless of the relationship between the rapist and the victim."

A number of sub-Saharan jurisdictions like South Africa[45], Namibia[46], Rwanda,[47]Angola[48], and Zimbabwe[49] among others have long criminalized marital rape.[50] This has enabled these countries to put up a good fight against gender based violence for example Namibia. Marital rape is usually a repeated offence and leads to a pattern of gender based violence. Spread of sexually transmitted infections like HIV/AIDS and Post traumatic stress disorders are some of the significant costs of non-criminalization of marital rape.[51]

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44 [1992]1 AC 599

45 Kaganas, Felicity, and Christina Murray. "Law Reform and the Family: The New South African Rape-in-Marriage Legislation." *Journal of Law and Society*, vol. 18, no. 3, [Cardiff University, Wiley], 1991, pp. 287–302, https://doi.org/10.2307/1410196. Available at https://www.jstor.org/stable/1410196?seq=1#metadata_info_tab_contents [accessed 20 October 2021]

46 Canada: Immigration and Refugee Board of Canada, *Namibia: Domestic violence, including state protection, services and recourse available to victims*, 3 August 2012, NAM104141.E, available at: https://www.refworld.org/docid/5034fbc82.html [accessed 21 October 2021]

47 Social Institutions & Gender Index Rwanda. Available at https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/RW.pdf [accessed 20 October 2021]

48 Social Institutions & Gender Index: Angola, available at https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/AO.pdf [accessed 20 October 2021]

49 Country Policy and Information Note Zimbabwe: Women fearing genderbased harm or violence Version 2.0 February 2017 available at https://www.refworld.org/pdfid/58a2fd9c4.pdf [accessed 20 October 2021]

50 The New Humanitarian: The Push to Get Every African Country to Criminalize Marital Rape available at https://deeply.thenewhumanitarian.org/womenandgirls/articles/2016/10/21/push-get-every-african-country-criminalize-marital-rape [accessed 20 October 2021]

51 https://observer.ug/component/content/article/73-lifestyle-entertainment/people- [accessed 9 August 2021]

There has been a long-standing debate on the issue of criminalizing marital rape in both the social and legal set up in Uganda.[52] The bill would have been a good place to have it settled.

The bill also doesn't provide for corrective rape yet we have seen instances where lesbians are forced to have sex with men in order to make them heterosexual.[53] Even when homosexuality is illegal, perpetrators should not be punished with rape under the guise of correction since two wrongs don't make a right. A number of people are victims of corrective rape but they fear to report because of the stigma around lesbianism in Uganda.[54] To have a sexual Offences Act that does not provide for some sexual offences evidences an unpreparedness to fight sexual violence.

4.1 MISSED OPPORTUNITIES IN FAILING TO HAVE A CONSOLIDATED SEXUAL OFFENCES ACT

On 17th August 2021, President Museveni declined to assent to the Sexual offences Bill, 2019.[55] This decision does not only set us miles backwards in the fight against sexual offences but also shows indifference towards the crisis of sexual violence.

His reason was that the draft had a collection of provisions that were already provided for in other legislation.[56] He also noted that instead of carrying out piece-meal amendments, the Uganda Law Reform Commission should be given

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52 Daily Monitor: Marital rape: Is it a crime or a conjugal right? Friday March 15 2013available at https://www.monitor.co.ug/uganda/special-reports/marital-rape-is-it-a-crime-or-a-conjugal-right--1538020?view=htmlamp [accessed 9 August 2021]

53 Uganda: Violence against women unabated despite laws and policies | Africa Renewal available at https://www.un.org/africarenewal/news/uganda-violence-against-women-unabated-despite-laws-and-policies [accessed 9 August 2021]

54 Ibid available at https://www.un.org/africarenewal/news/uganda-violence-against-women-unabated-despite-laws-and-policies [accessed 9 August 2021]

55 "Museveni declines to assent to sexual offences, succession bills" https://observer.ug/news/headlines/70897-museveni-declines-to-assent-to-sexual-offences-bill-and-succession-bill [accessed 18 August 2021]

56 Ibid

an opportunity to review all the criminal laws and propose a comprehensive amendment of the relevant laws for parliament's consideration.[57]

The president's assertion that the sexual offences bill is a duplication of "Offences against morality" in the Penal code is untrue. The provisions of the Penal code on sexual offences are not only archaic and backward but are also vague and have seized to fulfil their purpose. They have no place in modern Uganda.

Furthermore, the Penal code doesn't cover for some offences like child prostitution and tourism which have become so rampant and the sexual offences bill seeks to give protection and redress to these vulnerable victims. The president's decision to reject the bill only leaves us with the option to amend the Penal code which is much more problematic.

The Penal code has been amended many times and the implementation of amendments has been weak. It is already overloaded with blurry laws. The president has given assent to other laws that break away from the Penal code such as the anti-corruption act, anti-terrorism act among others. Why has it become so difficult to do the same for the law on sexual offences even when the effects of the deadly offences that are committed evenly in all regions of the country are clearly grave? The urgent need for independent laws on sexual offences ought to be treated with the seriousness it deserves.

A consolidated Sexual Offences Act is a prerequisite for curbing sexual offences in a country with skyrocketing cases of sexual abuse. It will benefit everyone including women, men and children. Many commonwealth countries including Kenya and Tanzania have sexual offences acts in place which has made the fight a lot easier in these countries.[58]

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57 Ibid

58 The Sexual Offences Act No 3 of 2006 of the laws of Kenya and Sexual Offences Special Provisions Act, 1998 of the laws of Tanzania respectively

A Sexual Offences Act helps to reduce case backlog. It is easier for judges to refer to a consolidated act other than having to look for the law in different laws which can lead to confusion and inevitable delay in administration of justice. Namibia, which enacted a special Act for Rape, The Combating of Rape Act 2000[59] has been applauded for putting up a good fight against gender based violence[60] as this act has effectively helped in protecting young boys and girls from rape as their cases are regularly heard. Uganda could perhaps pick a leaf.

It is also easier and cheaper to have independent legislation on sexual offences, in case amendments have to be made. Further, the law is clearer and more accessible.

President Museveni's suggestion of the Law Reform commission reviewing all the criminal laws of Uganda is not one that is aimed at solving the problem of high rate of commission of sexual offences. Besides, the 1990 Uganda Law Reform Commission Report (on the request of government) culminated into the sexual offences bill[61] and the same government is requesting that a new study be made. The dynamics around sexual offences and the law in Uganda is slowly becoming a playground game of tag.

It is not contested that there is a countrywide outcry on the rise in sexual offences in many institutions with children and women being the most affected victims.[62] These offenders ought to be brought to book for deterrence reasons and in the long run to reduce or even erase sexual violence in Uganda.

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59 Combating of Rape Act (No. 8 of 2000)

60 Namibia: Domestic violence, including state protection, services and recourse available to victims available at https://www.refworld.org/docid/5034fbc82.html [accessed 20 October 2021]

61 Criminal law in Uganda: Sexual assaults and Offences against Morality, Lillian Tibatemwa Ekirikubinza

62 Tough penalties for sexual offenders | Parliament of Uganda available at https://www.parliament.go.ug/news/5101/tough-penalties-sexual-offenders [accessed 6 August 2021]

Figures of victims are so high and increasing steadily as earlier seen in this study and that is excluding the many unreported cases.[63] Curbing sexual offences without having consolidated laws on sexual offences is like mopping a floor with a leaking roof. The prospects of success are indeed very slim. In deliberately not having a sex offences Act, the government is laying ground for the orchestration of sex offences it is fighting to protect her people from.

Refusal to have a sexual offences Act in place is widening the gender equality gap. The Sex Offences Bill has been said to be a gift to the gender equality movement and indeed, it would be a big win if the bill is finally passed as an Act. According to statistics, women are more likely to face sexual violence than men are.[64] Women are abused in schools[65], work spaces[66], in homes[67]. A consolidated law on sexual offences will help to curb this prevalent abuse and create a safer environment for both men and women to thrive.

A sexual Offences Act will assuage the spread of HIV/AIDS. The prevalent spread of HIV is largely attributable to sexual violence as a prime factor.[68] Even when the Penal code Act provides for an aggravated punishment for people that intentionally spread HIV/AIDS, it does not cover for the same in marital

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63 The 2019 Annual police report

64 Women four times more likely to experience sexual assault at work (theconversation.com) available at https://theconversation.com/women-four-times-more-likely-to-experience-sexual-assault-at-work-108380 [accessed 14 October 2021]

65 UNICEF Statement at the National Symposium on Violence Against Children In Schools available at https://www.unicef.org/uganda/press-releases/unicef-statement-national-symposium-violence-against-children-schools [accessed 20 October 2021]

66 Effects of Sexual Harassment at the Workplace: A Ugandan Case Study Frank Kiwalabye, Youth Crime Watch Uganda/IgnitusWorldwide Uganda

67 Partners' controlling behaviors and intimate partner sexual violence among married women in Uganda, available at https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-015-1564-1#:~:text=In%20Uganda%2C%2055%25%20of%20ever,gender%2Dbased%20violence%20in%20Uganda [accessed 20 October 2021]

68 Gender-Based Violence Increases Risk of HIV/AIDS for Women in Sub-Saharan Africa | PRB available at https://www.prb.org/resources/gender-based-violence-increases-risk-of-hiv-aids-for-women-in-sub-saharan-africa/ [accessed 14 October 2021]

relationships. This has continued to affect the public health sector in grave ways that a sexual offences Act could believably put to an end.

4.2 WAY FORWARD

The Sexual Offences Bill should be amended to provide for different time periods for offenders of varying offences are to spend in the register. This will not only be fair but also help with tracking previous offenders and to check if they are reforming into responsible citizens.

The Bill should be amended to address the grass-root causes of sexual abuse such as gender inequality and poverty. Providing for marital rape is a good start. Marital rape is a grave abuse of human rights (on both local and international standards) and widens the gender equality gap. Having a sexual offences bill that does not address these underlying causes is treating symptoms and ignoring the real cause.

The government should allocate adequate funds to the fight against gender based violence and sexual crimes. Statistics show that most of the funds used in the fight against sexual violence is from donations which, in my view, is not sustainable. “While activities are listed in the budgets, there are no monetary allocations.

Most of the work on Sexual Violence against women and girls is donor funded and concentrated in project areas.” In 2016 and 2017 the Ministry of Gender, Labour and Social Development budgeted to spend UGX 1.68 billion ($450,000) on VAW programmes, a great deal of which has been coming from donors such as Irish Aid and the United Nations Population Fund.

The provisions on extra territorial jurisdiction should be amended to include Ugandans that commit sexual offences against non-Ugandans especially children, refugees and other vulnerable groups.

5.0 CONCLUSION

Conclusively, the sexual offences bill on the whole is a great and necessary law except for a few amendable shortfalls. If these are looked into by the parliament, the president should assent to it as it deserves a chance. This will save vulnerable women, men and children who are at the mercy of the escalating numbers of sexual predators.

TAXATION OF PETROLEUM OPERATIONS IN UGANDA:

A CRITICAL ANALYSIS OF THE PRINCIPLES GOVERNING TAXABLE INCOME AND STATUTORY INTERPRETATION OF THE INCOME TAX ACT

*Gerald Ndobya & Innocent J. Rwothomio**

ABSTRACT

This paper analyses the taxation of petroleum operations in Uganda, a leading revenue provider to the government of Uganda, whose tax regime both at law and practice is new and unique. The paper seeks to establish what the chargeable income is as well as the principles under which this income is ascertained and taxed for petroleum operations. The authors also seek to establish what rules of statutory interpretation are relevant in interpreting this unique tax legislation, cognizant of both the investor and government interests. This is by analyzing key provisions of the Income Tax Act and cases where court has attempted to interpret or give guidance on how such sections should be interpreted. The paper establishes the taxable income and illustrates the aggressive statute interpretation nature of the overall taxation regime and concludes that there is a need for relaxation in the rates of tax imposed so as to encourage investment.

1.0 INTRODUCTION

In designing the oil tax regime, the government faced significant trade-offs between various objectives,[1] while taking into account a combination of economic, socio-political and institutional factors. These factors included the desire to attract investment, maximize government revenues, enhance the developmental impact of oil while seeking to influence the behavior of the

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[1] Joseph Okuja, 'The Uganda oil tax regime why the hullabaloo' *Business focus* Available at< https://businessfocus.co.ug/the-oil-tax-regime-in-uganda-why-the-hullabaloo/> [Accessed 12 April 2021]

International Oil Companies in the implementation of environmental and procurement policies. The Petroleum operations tax regime under the Income Tax Act[2] seeks to address issues such as how to attract investment in the oil and gas sector, increase Government revenue through taxes collected and how to bring about economic development through development and use of local content while getting the most of this addition to the tax base. This is hinged on understanding the broader principles on taxable income and statutory interpretation as will be discussed in this paper

Given the fact that Government is moving closer to starting production in the oil and gas sector, this paper seeks to simplify the Income Tax Act issues that may arise for both local and international investors' downstream and upstream operations by giving a brief insight into the workings of this tax law regime.

The paper seeks to achieve its objective by firstly giving a general introduction to petroleum operations in Uganda wherein the various contracts and activities in a petroleum operation will be discussed. Secondly, the paper will discuss the principles of taxable income as they are important in understanding how tax will arise in petroleum operations. The paper will then appraise the rules of interpretation of tax statutes with the aim of assisting persons understand how the Income Tax Act is read and what the effect of some provisions will be and it concludes with recommendations for a fruitful government and investors engagement.

2.0 PETROLEUM OPERATIONS IN UGANDA

Petroleum refers to crude oil and natural gas, or simply oil and gas,[3] while petroleum operations on the hand refer to any undertaking that involves planning, preparation, installation or execution of activities related to petroleum including reconnaissance, exploration, development, production,

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2 Herein referred to as the 'ITA'.

3 Joseph O.Okuja, *Domestic and International Taxation in Uganda: The Law, Principles and Practice* (Self-published, second edition, 2019), 417.

transportation, storage and cessation of activities or decommissioning of facilities.[4] The entire property, control of petroleum in its natural condition in, on or under any land or waters in Uganda is vested in the government.[5]

Petroleum activities in Uganda are principally divided into three periods; that is, exploration, development and production. This is further divided into a supply chain of operations categorized as upstream that includes activities such as exploration development and production of crude oil and natural gas, midstream activities that include planning, preparation, installation, and execution of operations, related to refining, conversion, transmission and storage of petroleum products and downstream activities that include distribution and sale of refined oil products, distribution and the sale of gas to end-users.[6]

The operations can be undertaken either through concessions this is where a country benefits through taxes and royalties or contractual agreements that take the form of production sharing agreements,[7] and service contracts. This does not give the licensee ownership rights to the oil in the ground however guarantees cost recovery through cost oil.[8] Uganda has adopted the latter method and offers a license to whoever undertakes to explore the oil.[9]

In furtherance of this, during September/ October 2017, Government of Uganda signed three Production Sharing Agreements (PSA) and issued, One License for Petroleum Exploration, Development and Production over the Kanywataba Contract Area to Armour Energy Limited (AEL) from Australia and two Licenses for Petroleum Exploration, Development and Production over the

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4 S. 89(A)(1) ITA and S.2(1) of the Petroleum(Exploration, Development and Production) Act.

5 A. 244 of the 1995 Constitution.

6 Okuja, *supra* n.3.

7 Herein referred to as 'PSA's'.

8 Okuja, *supra*,n3.

9 S. 6, Petroleum (Exploration Development & Production) Act 2013.

Ngassa Shallow and Ngassa Deep Contract Areas to Oranto Petroleum Limited from Nigeria.[10]

This first licensing round was undertaken in line with the National Oil and Gas Policy for Uganda (2008) and in accordance with the Petroleum (Exploration, Development and Production) Act 2013.Following Cabinet approval, the Minister, Ministry of Energy and Mineral Development launched the second licensing round for petroleum exploration covering five blocks in the Albertine Graben with the aim of increasing international investment into Uganda's oil-rich energy sector at the 9th East African Petroleum Conference and Exhibition in Mombasa, Kenya during May 2019.[11]

The Oil produced in the operation is divided into Cost oil and Profit oil. Cost oil is the portion of oil produced that is retained by the licensee for purposes of recouping its investment while profit oil means the gross oil produced minus the cost oil and allowable deductions.[12] Profit oil is shared by the government and the licensee in proportions that they agree to.

Each person that signs a petroleum agreement is treated as a licensee for mineral or petroleum taxation.[13] Under the Model Petroleum Sharing Agreement,[14] the Government and the Licensee are parties to this agreement.[15] It is from this background that the principles of taxable income as discussed in the next section become relevant.

3.0 PRINCIPLES OF TAXABLE INCOME

10 Petroluem Authority of Uganda-Petroleum Exploration In Uganda Available at <https://www.pau.go.ug/petroleum-exploration-in-uganda/> [Accessed 12 April 2021.

11 Uganda Conducts 2nd Oil and Gas Licensing Round *Umaizi* Availble at <Uganda Conducts 2nd Oil and Gas Licensing Round | Umaizi> [Accessed 12 April 2021]

12 Okuja, *supra* n.3.

13 S.89(A) (2) ITA.

14 Model Petroluem Sharing Agreement Available at <https://www.unoc.co.ug/wp-content/uploads/2021/07/MPSA.pdf> [Accessed 12 April 2021]

15 ibid Preamble

Taxable income is the value of what a taxpayer could have consumed during the year without diminishing his or her capital wealth in the process.[16] Income tax applies generally to all types of persons who derive income, whether as an individual, bodies of individuals, or corporate entities.[17] The imposition of taxes in Uganda stems from Section 4 of the ITA which stipulates that taxes should be imposed on every person that has an income in a year of income.[18]

Therefore income tax, as of principle is intended to be imposed annually on a tax payer's chargeable income.[19] All the other provisions of the Act, specific exemptions, detailed rules and administrative procedures are derived from this basic principle.[20] However, the ITA takes a mutually exclusive approach that makes other provisions of the Act override this general tax imposing rule. This is true and pertinent for the petroleum operations tax regime in light of its gross income, allowable deductions and chargeable income.

Uganda's special provisions for the taxation of petroleum operations are incorporated in Part IXA of the ITA. This part stipulates that all incomes derived by licensees under PSA's constitute taxable income.[21] For purposes of taxation, petroleum operations income should be distinguished from its revenue, that is much broader, for it includes the government's share of production, signature bonuses, surface rentals, royalties, proceeds from the sale of the government's share of production, any dividend due to the government, proceeds from the sale of government's commercial interest and

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16 Bakibinga, *Revenue Law in Uganda* (Nairobi:Law Africa Publishing, 2012),21 referring to Meade, J.H *The Structure and Reform of Direct* Taxation (1976),30-33.

17 Bakibinga supra, 22

18 S. 2(zzz) and S.39(9) of the ITA define a "year of income" to mean twelve months ending on the 30th June, and includes a substituted year of income and a transitional year of income which are stipulated under Section 39(1) and Section 39(6) respectively

19 S.4 of ITA

20 Okujja *supra,* n3,218.

21 S.18 and S.89G ITA.

many others.[22] Only a few of these are taxable as will be discussed in this essay.

Various propositions have been rendered to establish whether a gain is an income or not for purposes of taxation.[23] These propositions are divided into positive and negative propositions of income.[24] These are discussed below under broader headings to ascertain taxable income in petroleum operations.

3.1 Gross income

The gross income of a person is the income of a person for a year of income except income exempt from tax.[25] Gross income of a resident person includes income derived from all geographical sources while that of a non-resident is income derived only from sources in Uganda.[26] Whereas the gross income of taxpayer consists of business income,[27] employment income,[28] as well as property income,[29] in petroleum operations, the gross income of the licensee includes firstly, cost oil which is a licensee's entitlement to production as cost recovery under the petroleum agreement.[30]

Secondly, a licensee's share of the profit oil earned by the licensee from petroleum operations.[31] This definition is intended to achieve certainty and simplicity in the income tax base to minimize administrative and judicial resources in resolving tax objections and litigation surrounding issues arising

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22 Henry Mugisha Bazira, 'UNDERSTANDING TAX JUSTICE IN THE CONTEXT OF TRANSPARENT AND ACCOUNTABLE OIL MANAGEMENT IN UGANDA: Is Tax and Oil Tax Justice a Myth or Reality' Available at <http://maketaxfair.net/assets/Uganda-action-reserach-oil-management.pdf> [Accessed 12 April 2021.

23 Okujja, *supra,*n3,188.

24 ibid.

25 S.17(1) ITA.

26 S.17(2) ITA

27 S. 18 ITA.

28 S.19 ITA.

29 S. 20 ITA.

30 S.89A ITA

31 S. 89A ITA.

there from,[32] and offer the starting point for ascertaining what income, then, is taxable.

3.2 Allowable Deductions

Chargeable income for a person for a year of Income is the gross income of the person for the year less allowable deductions.[33] Under the petroleum operations tax regime, these deductions include development expenditure, mining exploration expenditure,[34] mining extraction expenditure,[35] and rehabilitation expenditure.[36]

However, as a matter of accounting principle, the total deductions must not exceed the oil cost of that income year.[37] Where they exceed, they will be carried forward to the total gross income of the next year.[38] Therefore, whereas all expenses and losses incurred by a person during the year of income in production of income shall be deductible,[39] a limitation to what is deductible is clearly laid down under the Income Tax Act.[40]

Furthermore, through the principle of ring-fencing, tax-deductible costs or expenditure incurred in respect of a contractor's petroleum exploration and development expenditure in one contract area or block or oil field will only be deducted from income derived from that contract area only and not against profits or income of a different contract area held by the same contractor.[41] This principle prevents licensees undertaking a series of projects from allocating or deducting exploration and development costs to areas that are

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32 Okujja, *supra,*n3,
33 S.15 ITA
34 S.89D(3) ITA.
35 S. 89E(2) ITA.
36 S. 89F(1) ITA.
37 S. 89GA(1) ITA.
38 S. 89GA(2) ITA.
39 S.22 ITA
40 S.89D(3) ITA.
41 ibid.

already generating taxable income thus reducing their taxable income.[42] Therefore, companies are prevented from offsetting revenue from profitable projects against the costs of less profitable or unprofitable projects.

3.3 Chargeable income

Chargeable income is the gross income of the person for the year, less total deductions allowed under this Act for the year.[43] A receipt is deemed to be income where it is a gain to the person holding it.[44] The Chargeable income of petroleum operations is on a licensee's share of profit oil less allowable deductions at an income tax rate of 30%.[45] However, income tax losses from oil operations can be carried forward without a limit for set-off against later income profits, and this loss of the earliest year is allowed as the first allowable deduction.[46]

Amounts derived from carrying on a business are income,[47] and hence taxable. In petroleum operations chargeable income arises out of various circumstances and these include income derived by persons in the form of employment income which is subject to withholding tax.., a participation dividend paid by a resident licensee to a non–resident company is taxed at 15%.[48] Lastly payouts for goods and services including royalties made to a resident contractor are taxed at a rate of 6% of the gross sum.[49]

Residence is a central feature in the taxation of income under the Income Tax Act.[50] It is relevant for determining whether a person is liable to tax on

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42 Okujja,*supra,* n3, 430.
43 S. 15 ITA
44 Okujja *supra,*(n3, 191
45 S. 89G(3) and Para 2 of the 3rd Schedule to the ITA.
46 S. 89GA(3) ITA.
47 Okujja, *supra,*n3, 191.
48 S. 83(3) and S. 89H(1) ITA.
49 S. 89H(4&5) and S.119 ITA.
50 Okujja, *supra* (n3, 207.

worldwide income or only on income derived or sourced from Uganda.[51] In petroleum operations, a non-resident contractor who derives a fee for the provision of services of mining or petroleum operations is liable to pay a tax of 10% on the gross sum paid.[52] Under petroleum operations, an interest held by the licensee is a business asset,[53] and therefore attracts a tax at the time of disposal,[54] under Section 18(a), as well as Part VI of the ITA, apply.

The foregoing discussion lays down the principles of taxable income in petroleum operations and what constitutes chargeable income in the case of petroleum operations, how it arises and what rate of tax is imposed for the different persons engaging in petroleum operations.

4.0 INTERPRETATION OF TAX STATUTES

Interpretation is the process by which the courts determine the meaning of a statutory provision and apply it to the situation before them.[55] These are purely guidelines for the judiciary to solve problems with statutory interpretation.[56] In Uganda, the constitution is the supreme law.[57] It is Sui Generis,[58] therefore all the laws derive their legitimacy from it and hence also guides in matters pertaining statutory interpretation. This was discussed in Uganda Revenue Authority v Meera Investments Ltd,[59] where it was stated that tax laws are "ticked" against the Constitution.

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51 S. 9-14 & 17(2) of the ITA.

52 S. 89GG(1) of the ITA.

53 S.89GF(3) ITA.

54 S.51(I) of the ITA provides that a taxpayer is deemed to have disposed of an asset when it has been exchanged, sold, redeemed, distributed, transferred by way of gift, destroyed or lost.

55 Rupert Cross, *Statutory interpretation*, (3rd Edition),34.

56 James Holland and Julian Webb, Learning Legal Rules (Seventh edition).

57 A. 2(1) Constitution of Uganda,1995.

58 *Dunway v. New York*,442 U.S. 200 (1979). In which that Sui Generis is a term of art used to identify a legal classification that exists independently of other categorizations, either because of its singularity or due to the specific creation of an entitlement or obligation.

59 Civil Appeal No. 22 of 2007.

Various principles of statutory interpretation, such as the literal rule, the purposive rule, the mischief rule and the harmonious rule as discussed below, have been used in discussing tax matters and they are also important and applicable in petroleum operations.

4.1 Literal Rule.

The literal rule requires courts to interpret statutes in their plain, literal and ordinary sense.[60] This rule is used frequently as judges are not authorized to make laws and by following the statute to the letter judges cannot be accused of making law. This rule embodies three more rules of language that is *'Ejusdem Generis'* that means 'of the same kind', *'noscitur a sociis'* that means 'meaning of a word can be known from associates' and '*expressio unis est exclusion alterius'* meaning 'the express mention of one thing is the exclusion of another.

In tax matters, this is the general rule of interpretation as stated in Rowlatt J's dictum in *Cape Brandy Syndicate v. IRC*,[61] where he stated that;

> '*in taxation, you have to look clearly at what is said. There is no room for any intendment; there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and that is the tax.*

This position was reiterated in *Tullow v Heritage oil and others,* [62] where it was stated that it is a general principle of Ugandan statutory construction that no tax is to be imposed except with clear statutory language.[63] The rationale of this rule was stated in *Heritage Oil and Gas Limited v. Uganda Revenue*

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60 Tindal CJ in the *Sussex Peerage Case* (1844) 11 Cl&Fin 85.

61 IRC [1921] 1 KB 64,71. Also see *Canada Trustco Mortgage v Canada*[2005] 2 S.C.R, 601 at paragraph 11 where it was held that taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs where the words are precise and unequivocal, those words still play a dominant role in the interpretative process.

62 [2013]EWHC 1656(comm) Available at <https://www.casemine.com/judgement/uk/5a8ff74860d03e7f57eaad02> [Accessed 12 April 2021]

63 *ibid* Para 90(i).

Authority,[64] in which the tribunal stated that in defining the 'natural construction of words' the tribunal should look at what the ordinary man in the street would constitute them to be so that the ordinary man on the streets can understand their tax liability. In Petroleum operations disputes recourse shall therefore be made to this rule to interpret provisions of Part IXA of the ITA.

4.2 Purposive approach

The purposive approach promotes the general legislative purpose underlying the provisions.[65] This rule asserts that words in law should be interpreted not only in their ordinary or literal sense but also concerning their context and purpose to promote the general legislative purpose underlying the provisions.[66]

Whereas equity and taxation are strangers,[67] this rule has been applied in petroleum operation matters specifically in *Tullow oil v. Heritage oil* (supra), wherein Tullow purchased Heritage's stake for 1.45 billion US dollars after which Heritage ceased to operate within Uganda. URA made a tax assessment of 404 million US Dollars in capital gains tax. Heritage disputed the tax, because it believed that the sale was not taxable given that the Production Sharing Agreement which the company signed with the Government failed to mention such a payment.

Heritage further argued that the sale of its assets to Tullow Oil was not taxable in Uganda because the sale itself took place outside Uganda and because the company itself is not incorporated in Uganda. URA argued that the assets sold were located in Uganda and that their sale was done with the consent of

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64 [2011] UG CommC97.

65 per Lord Denning's judgement in *Notham v London Borough of Barnet* [1978] 1 WLR 220 Also see *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, in which Lord Browne-Wilkinson referred to "the purposive approach to construction now adopted by the courts to give effect to the true intentions of the legislature". Also, see *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 999 (HL).

66 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 , Also see Okuja, *supra* n4, 79.

67 *Grey v Pearson* [1857] 6 HL.

Uganda, making the transaction taxable under Ugandan law. The issue before the court was whether Ugandan law would consider that the claimant was in possession of the escrow account for the purpose of section 108 of the ITA.

In response to this, the court held that section 108 of the ITA provides that the Commissioner may, by notice in writing, require any person who is in possession of an asset, including money, belonging to a non-resident tax payer to pay tax on behalf of the non-resident up to the market value of the asset but not exceeding the amount of tax due.

In light of the purposive interpretation rule, the court in reliance to Prof. Bakibinga's interpretation of Uganda's tax law regime indicated that construction of section 108,[68] reflects the aggressive approach of the ITA towards the collection of tax from non-resident persons.[69] Prof. Bakibinga further stated that courts are also required to construe it aggressively,[70] and the court agreed with him. In interpreting Section 89GF(2) of the ITA the above discussed approach should be taken by the courts..

Furthermore, the reasoning behind this rule was stated in *Crane Bank v. Uganda Revenue Authority,*[71] to converse circumstances where the meaning of the term in a statute is ambiguous. The court stated that courts no longer adopt a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt the purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at how much extraneous material that bears on the background against which the legislation was enacted. This approach will therefore be of great importance in ensuring that petroleum activities are encouraged for both the investors and the government.

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68 This provision made a licensee an agent of a non-resident person disposing of their interest for any tax payable. S. 89GF(2) has a similar wording.

69 *supra* n55,Para 82.

70 *supra* n55,Para 91(i).

71 (2012) UGCOMM. 42

4.3 Mischief Rule.[72]

This rule is normally invoked by the court when interpreting a statute whose provisions are unclear.[73] Reference is made to former law and the existing gaps therein, as well as what the present law is trying to remedy. This rule allows for the adaption of statutes in a progressive society and closes loopholes. This rule gives courts the power to effectively decide on parliament's intent.[74]

This rule was applied in *Tullow oil v. Heritage oil*(supra), in which the mischief sought to be remedied was the occurrence of non-resident companies running away with the tax owed to the host country as well as dealing with challenges of difficult steps for seeking indemnity required to be taken in a foreign jurisdiction since such steps would amount to indirect enforcement of foreign debt.[75] Prof. Bakibinga in illustrating this explained that the approach of Uganda's tax regime is one of '*pay now and argue later.*'[76] So in cases where a provision of a law is subject contention it will be interpreted in line with the mischief which it seeks to address.

4.4 Rule of Harmonious construction

This rule requires that provisions of a statute be read harmoniously in order to give effect to harmonious goals. It requires that when there is a conflict between two or more parts of the law, one provision of the law should not be construed in a manner that defeats another provision of the same law.[77] This rule was discussed and applied in *URA v. Rabbo Enterprises and another,*[78] wherein Art. 139 of the constitution made the original jurisdiction of the high

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72 *Heydon's Case* (1584) 76 ER 637, This rule seeks to establish What the law was before the statute was passed, What problem (or mischief) the statute was trying to remedy; What remedy Parliament was trying to provide, The true reason of the remedy.

73 Sussex Peerage Case [1844] 11 Clark and Finnelly 85, 8 ER 1034 Available at http://www.geocities.ws/englishreports/8ER1034.pdf [accessed 12 April 2021]

74 Okuja, *supra* n3, 80.

75 *supra* n55,Para 91(vi).

76 *supra* n55,Para 82.

77 Commissioner *Of Income Tax v M/S Hindustan Bulk Carriers* (2003) 3 SCC 57.

78 Civil Appeal No.12 of 2004.

court subject to Art. 152(3) that provides for establishing a Tax Appeals tribunal that was later created. This rule is therefore relevant in the interpretation of petroleum operations tax provisions such as section 89MA that provides for the application of the Tax procedures code Act in light of provisions of the ITA.

5.0 CONCLUSION

The taxation of petroleum operations in Uganda is premised on a tax regime that is aimed at making the sector an attractive investment while at the same time attempting to generate as much revenue as possible for the government. These competing interests inform the court's use of tools such as statutory interpretation in an attempt to give the tax laws efficacy.

The presence of a business arrangement in form of a profit sharing agreement calls for a business efficacious approach from both the legislature in drafting laws as well the judiciary in interpreting the same. In bringing such approaches to fruition, Tax rates under the Income Tax Act can be revised and made lower from 30% to at least 15%. This initiative will go a long way in making the petroleum explorative industry a very attractive investment arena in the Ugandan investment eco-system and would not be detrimental for the government since it is entitled to a portion under the profit sharing agreement.

THE RIGHT TO HEALTH AND THE COVID 19 PANDEMIC IN UGANDA: AN APPRAISAL OF STATE OBLIGATIONS REGARDING THE RIGHT TO HEALTH DURING A PANDEMIC

Kevin Nakimbugwe & Sabiti Edwin[**]

ABSTRACT

The unprecedented Covid-19 pandemic has taken a gruesome toll on every country's healthcare system. However, a special malignant threat is faced by developing nations whose healthcare system has always been so fragile, like the case of Uganda. The devastating effects of the pandemic should be a wakeup call for the state to rejuvenate the public health care system as well as regulate private healthcare providers. Unfortunately, there exists a persistent indifference towards the realization of Social and Economic rights, especially the right to health. As such, the call to move state machinery towards the beefing up of the healthcare system is overlooked. Where this state of affairs leaves the state as regards its constitutional and international obligations is in stark violation of its international obligations. The same must therefore be remedied.

1.1 INTRODUCTION

The right to health, as a fundamental human right, forms the foundation of human existence. This right is intertwined with several other human rights, especially the right to life and as such, the absence of proper health care threatens the lives of citizens.

Although the 1995 Constitution of the Republic of Uganda does not expressly guarantee the right to health, Objective XIV and XX of the National Objective and Directive Principles of State Policy direct the state to provide basic medical services to the people. Additionally, Uganda ratified international human rights treaties[1] that impose obligations on states to promote the enjoyment of the

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[1] According to The World Vision Stakeholder Report on Uganda on The Right to Health in Uganda, accessible at http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/WV-WorldVision-eng.pdf, [accessed 16 August 2021], Uganda is a state party to the Covenant on

highest attainable standard of physical and mental health. Key to mention is the International Covenant on Economic, Social and Cultural Rights.[2] The right to health has come to be justiciable with the 2005 Constitutional Amendment Act which introduced Article 8A that elevated the National Objectives and Directive Principles of state policy from mere guidelines to justiciable principles directing state policy.[3]

Important to note is that economic, social and cultural rights receive minimal attention while state budgets, laws and policies are being made in Uganda. With the unprecedented wave of the deadly Corona virus, the already struggling health care system of Uganda crumbled. With public hospitals full to maximum capacity, citizens have been rendered no option but to turn to private health facilities.

However, given the rise in poverty levels by a 10% point[4], attributable to the spill over effects of a total lockdown of over four months, most individuals have not been in position to seek refuge at private health facilities because of the hefty charges levied there. An overwhelming portion of the citizens has been and continues to be locked out of both the public and private health care facilities in the country, yet the unforgiving pangs of the corona virus continue to strike.

Economic, Social and Cultural Rights, the Convention on the Elimination of Violence against Women and other international, regional and national agreements enshrining the human right to health.

2 Article 12, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 5 July 2021]

3 See Amooti Godfrey Nyakaana v Nema & 6 ors, Constitutional Appeal No 5 of 2011 where Katureebe, CJ while referring to the National Objectives & Directive Principles of State Policy observed that "to my mind, this means that these objectives have gone beyond merely guiding us in interpreting the constitution, but may in themselves be justiciable."

4 Reduce rising level of poverty in Uganda, 'Daily Monitor, 30 January 2021'. Available at https://www.monitor.co.ug/uganda/oped/editorial/reduce-rising-level-of-poverty-uganda-3211864. [accessed 16 August 2021]

The fate of the citizens hangs in the balance and yet the state maintains a standoffish position with regard to the handling of Covid 19 patients who get admitted in private health facilities as well as the closure of their doors on those who cannot meet the costs as will be elaborated on later in this paper.

This status quo poses questions as to the scope of obligations imposed on states with regard to the right to health; whether the state's nonchalance towards the questionable handling of Covid 19 patients in private health facilities is justifiable and ultimately, the possible solutions to the defectiveness of the health care system during the pandemic. This paper is purposely scripted to answer these questions. The first section of the paper will provide a concrete legal basis of the right to health followed by an examination of its normative content and the nature of obligations it attracts for its proper enjoyment.

The paper will further address in detail the effect of the Covid 19 pandemic on the health care system of the country in real data and examine whether the state has appropriately dispensed its obligations in the handling of the Covid 19 crisis. Lastly, the paper will front possible and feasible solutions for the betterment of the treatment of Covid 19 patients.

1.2.1 DEFINITION AND LEGAL BASIS OF THE RIGHT TO HEALTH

Every individual has a right to health. It relates to both the right of individuals to obtain a certain standard of health or health care and the state's obligation to ensure a certain standard of public health with the community generally.[5]

The Preamble of the 1946 Constitution of the World Health Organization defines Health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. It further postulates that the enjoyment of the highest attainable standard of health is one of the

[5] The Right to Health | ESCR-Net, available at https://www.escr-net.org/escr-net-listservs/right-health. [accessed 16 August 2021]

fundamental rights of every human being without distinction of race, religion, political belief**,** economic or social condition.

The World Health Organization definition has been reaffirmed and broadened to the extent that the attainment of the highest possible level of health is an extremely important worldwide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector.[6] In General Recommendation 24, the CEDAW Committee also defines the right to health to include socio-economic factors.[7]

The African Commission on Human and Peoples' Rights shares this view. In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*,[8] the Commission found that the failure of a state party to provide basic services necessary for a minimum standard of health such as safe drinking water and electricity as well as the shortage of medicine constituted a violation to the right to enjoy the best attainable state of physical and mental health.

Therefore, the right to health is in fact a short form of the highest attainable standard of physical and mental health.[9]

1.2.2 Constitutional Basis of the Right to Health in Uganda

The Ugandan constitution does not expressly provide for the right to health.

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6 1978 Declaration of Alma Ata on Primary Health Care

7 The Committee notes that the full realization of women's right to health can be achieved only when States parties fulfil their obligation to respect, protect and promote women's fundamental human right to nutritional well-being throughout their life span by means of a food supply that is safe, nutritious and adapted to local conditions.

8 (Communication Nos. 25/89, 47/90, 56/91, 100/93, Ninth Activity Report 1995-1996, Annex VIII)

9 What is the Right to Health? | Icelandic Human Rights Centre, available at https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health. [accessed 16 August 2021]

However, the right to health is implicit in other complementary rights that are expressly provided for in the constitution such as the right to life, equality, safe working conditions and freedom from torture.[10]

Objective XIV of the National Objectives and Directive Principles of State Policy asserts that the state shall ensure that all Ugandans enjoy rights, opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security, pension and retirement benefits. Additionally, objective XX directs the state to take all practical measures to ensure provision of basic medical services to all citizens. The recognition of the right to health in Uganda is further reinforced by three indicators.

First, Article 8A emphasizes the enforceability of the national objectives and directive principles of state policy[11] thus making the directive principles relating to the right to health enforceable. Secondly, there is a paucity of knowledge on implementing implicit constitutional provisions on the right to health in Uganda.[12] Lastly, public health is one of the recognized permissible grounds for the restriction of other rights.[13]

1.2.3 The Right to Health under International and Regional Instruments.

Uganda is party to several international instruments which recognize the right to health. These include the Universal Declaration of Human Rights (UDHR),[14]

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10 Review of constitutional provisions on the right to health in Uganda: CEHURD 2008, available at https://www.equinetafrica.org/sites/default/files/uploads/documents/CEHURD%20Constitutional%20Review%20Sep2018.pdf. [accessed 16 August 2021]

11 Ssekikubo & 4 Ors V Attorney General & 4 Ors, Constitutional Appeal No. 1of 2015

12 Review of constitutional provisions on the right to health in Uganda: CEHURD 2008, available at https://www.equinetafrica.org/sites/default/files/uploads/documents/CEHURD%20Constitutional%20Review%20Sep2018.pdf. [accessed 16 August 2021]

13 Article 26(2) (a)

14 Article 25

International Covenant on Economic, Social and Cultural Rights (ICESCR),[15] The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),[16] The Convention on the Rights of Persons with Disability (CRPD)[17] and Convention on the Rights of the Child (CRC) et al.

At the regional level, Uganda is party to The African Charter on Human and Peoples Rights (ACHPR),[18] Protocol on the Rights of Women in Africa,[19] the Treaty for the Establishment of the East African Community (EAC),[20] the East African Community HIV and AIDS Prevention and Management Act of 2012.

Uganda is also a member state of the World Health Organization,[21] a body specifically set up to globally govern health and disease and to ensure universal health coverage.

In relation to the international policy framework, the Sustainable Development Goals (SDGs) provide a policy regime aimed at transforming the world for sustainable development by 2030, and goal number three caters for good health, well-being and in overcoming inequalities within and between countries globally.[22]

From the foregoing, it is safe to say that the right to health is justiciable and indispensable in Uganda.

2.0 THE NORMATIVE CONTENT OF THE RIGHT TO HEALTH.

15 Article 12
16 Article 12 and 14
17 Article 25
18 Article 16 and 14
19 Article 14
20 118
21 WHO | Members and partners in WHO African Region
22 21252030 Agenda for Sustainable Development web.pdf (un.org)

The right to health is an inclusive right.[23] Usually, the right to health is solely associated, albeit wrongly, with unconstrained access to health care and the building of hospitals. Whereas this is correct, the right to health also encompasses other factors that are necessary to lead a healthy life which the Committee on Economic, Social and Cultural Rights refers to as *'the underlying determinants of health.'*[24] These include; safe drinking water and adequate sanitation, safe food, adequate nutrition housing healthy working and environmental conditions health-related education and information; gender equality.[25]

The Committee on Economic, Social and Cultural Rights postulated the essential elements of the right to health in its General Comment No. 14 on the Right to Health (CESCR 2000).[26]According to the Committee, the right to health does not mean the right to be healthy since being healthy is determined in part by health care but also by genetic predilection and social factors.[27]

Thus, the right to health contains both freedoms and entitlements. The scope of the right covers firstly, the specific elements of the health system and secondly, the realization of other human rights that contribute to health.

2.1 Elements of the health care system

As earlier stated, the right to health means the right to uninterrupted access to conditions necessary for the realization of healthy lives. Therefore, the state

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23 World Health Organisation, The Right to Health Fact Sheet No. 31 https://www.ohchr.org/documents/publications/factsheet31.pdf. [accessed on 16 August 202]

24 General Comment 14 paragraph 4

25 General comment 14 Paragraph 3. See also the decision of the African commission In Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire (Communication Nos. 25/89, 47/90, 56/91, 100/93

26 General Comment 14 paragraph 12

27 General comment 14 Paragraph 8

has a duty to ensure the presence of these conditions through government services and regulated markets.

The committee of ICESCR has enunciated a framework of how to measure existence of these determinants of health. They must be available, accessible, acceptable and of good quality.[28] These are briefly discussed.

a) Availability;

The right to health requires sufficient availability of public health and health-care facilities, goods and services, as well as programs within the state.[29] However, the nature of what amounts to sufficient facilities, goods and services depends on several factors such as the State party's development level. Notwithstanding this, states are mandated to provide underlying determinants of health such as safe drinking water, adequate sanitation facilities, hospitals, clinics or other health-related buildings, trained professional medical personnel receiving domestically competitive salaries and, as termed by the WHO Action Program, essential Drugs.

b) Accessibility;

Health facilities, goods and services have to be accessible to everyone within the state without discrimination.[30] Accessibility has four overlapping dimensions: these are accessible without discrimination, physical accessibility, economic accessibility (affordability), and accessibility of health-related information.

c) Acceptability;

This requires respect for medical ethics and cultural sensitivities.

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28 General comment 14 paragraph 20

29 Availability of Effective Primary Health Care Services | PHCPI (improvingphc.org) [accessed 14 July 2021]

30 General comment 14 Paragraph 12

d) Good quality.

The quality-of-care dimension relates to health facilities, goods and services being scientifically and medically appropriate or of good quality. This includes having skilled medical personnel, scientifically approved unexpired drugs and hospital equipment, safe water and adequate sanitation.

2.2 Health related human rights.

The right to health is closely related to and dependent upon the realization of other human rights.[31] The ICESCR committee listed 14 rights as integral components of the right to health. These are the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, the freedoms of association, assembly and movement. Thus, a violation of any of these rights may ipso facto violate the right to health.[32]

3.0 THE OBLIGATION OF THE STATE TO RESPECT, PROTECT, PROMOTE AND FULFIL HUMAN RIGHTS.

A discussion of the right to health inextricably requires an analysis of duties or obligations that accrue to the state with regard to the right to health.

The African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter has explained that all human rights including economic, social and cultural rights generate a combination of negative and positive duties on States.[33]

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31 General comment 14 Paragraph 3

32 ibid

33 The Centre for Health, Human Rights and Development (Cehurd) And Others Vs. the Executive Director, Mulago National Referral Hospital and Attorney General, Civil Suit No. 212 Of 2013

The popular framework for analysing the nature of the duties imposed by Economic, Social and Cultural Rights is the duty "to respect, protect, promote and fulfil" these rights.[34]

a) Obligation to respect.

The obligation to respect requires a State to refrain from interfering directly or indirectly with the enjoyment of the right to health. This entails respecting the freedom of individuals to use all of the resources at their disposal to meet their health needs and obligations.[35]

Further, the obligation to respect also requires States to take positive measures to ensure that all branches of government (legislative, executive and judiciary) at all levels (national, regional and local), as well as all organs of state, do not violate the right to health.[36]

b) Obligation to protect

The obligation to protect requires the State to take positive measures to ensure that non-state actors such as multi-national corporations, local companies, private persons, and armed groups do not violate the right to health. This includes regulating and monitoring the commercial or non-commercial activities of non-state actors that are likely to affect people's access to or equal enjoyment of the right to health. Lastly, this obligation entails ensuring the effective implementation of relevant legislation and programs while providing remedies for such violations.[37]

c) Obligation to promote

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34 African Commission on Human and People's Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October 2011. See also the Commission's Communication No. 155/96 Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria. ICESR General comment 14 Paragraph 33

35 ibid

36 ibid

37 The Social and Economic Rights Action Centre, et al v Nigeria, Communication No. 155 of 1996.

The duty to promote economic, social and cultural rights requires States to adopt measures to enhance people's awareness of their rights and to provide accessible information relating to the programs and institutions adopted to realize them. In this regard, the African Charter explicitly places an obligation on States Parties to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter in order to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.[38]

d) Obligation to fulfil

The duty to fulfil the right to health requires States parties to take positive steps to advance the realization of the rights. Such measures should be comprehensive, coordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress.

This obligation is a positive expectation on the part of the State to move its machinery towards the actual realization of the rights. The State should continually aim at improving both the range of individuals, communities, groups and peoples who have access to the relevant rights as well as the quality of enjoyment.[39]

3.1 Progressive Realization of the Right to Health

The African Commission in its Principles and Guidelines explained that the obligation to progressively and constantly move towards the full realization of economic, social and cultural rights within the limits of the resources available

38 ibid

39 ibid

to a State, including regional and international aid, is referred to as progressive realization.[40]

While the African Charter does not expressly refer to the principle of progressive realization, this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with Articles 61 and 62 of the African Charter.

State parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights.[41]

The concept of progressive realization means that States must implement a reasonable and measurable plan, including set achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party.

States need sufficient resources to progressively realize Economic, Social and Cultural rights. Unfortunately, states like Uganda are constrained in terms of resources. In *Purohit and Moore v. The Gambia*,[42] the African Commission expressed that "it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.

Notwithstanding resource constraints, some obligations have an immediate effect such as the undertaking to guarantee the right to health in a non-discriminatory manner, to develop specific legislation and plans of action or

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40 African Commission on Human and People's Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October, 2011.

41 General comment 14 Paragraph 31

42 Communication No. 241/2001 (2003)

other similar steps towards the full realization of this right as is the case with any other human rights. Secondly, the general existing standard, expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), is that States must realize the right to health not only within existing resources but 'to the maximum of its available resources.'

It is not enough to show that a state is utilizing the existing resources because for the obligation to be dispensed, the state must utilize the available means to the maximum capacity. Clearly, the notion of progressive realization within available resources must not be viewed as an excuse to defeat or deny economic, social and cultural rights like the right to health.

4.1 THE STATUS QUO AS REGARDS THE EFFECT OF COVID-19 ON THE HEALTH CARE SYSTEM OF UGANDA.

According to data uploaded by the Government of Uganda COVID 19 Response Information Hub[43], there were 84,592 confirmed cases of Covid-19 then 57,147 recoveries and 1,995 Covid 19 related deaths as of 4th July, 2021. This data reflects only the documented cases and as such, there exists an undetected portion of people infected by the virus and those who have succumbed to it.

By 1st July, 2021, 990,902 people had received at least 1 dose of the Covid 19 vaccine which is only 2.2% of the total population. Additionally, 4,129 had been fully vaccinated which is less than 1% of the total population.[44] There is an upward progression in the curves of the total number of confirmed cases and deaths. It is expected that the curves will further progress upwards given the unexpected resurgence of the pandemic with a new wave which is picking

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43 The Government of Uganda COVID-19 Response Information Hub. Available at https://covid19.gou.go.ug/. [accessed 16 August 2021]

44 World health Organisation, Map of Vaccination, available at https://support.google.com/websearch/answer/10339795?p=cvd19_vaccine_stats&hl=en-UG&visit_id=637612482792918448-2633654725&rd=1. [accessed 16 August 2021]

up speed, spreading faster and hitting harder as reported by the World Health Organization.

The treatment of Covid 19 patients is undertaken by both the public and private health facilities. Uganda's doctor-patient and nurse-patient ratio is approximately 1:25,000 and 1:11,000 respectively,[45] which is below the 1:1000 doctor-patient ratio recommended by the World Health Organization. Public health facilities are characterized by under staffing and inadequate medical supplies.

The staffing level in public health facilities in Uganda were pegged at 71% in the financial year 2017/2018[46] which is below the acceptable standard. The national budget allocation to the health sector is 3.1% for the financial year 2021/2022.[47] This allocation is 11.9% lower than the acceptable health sector allocation according to the Abuja Declaration of 2001 to which Uganda is signatory.

In Uganda, there are 2 national referral hospitals, 4 specialized government hospitals, 14 regional referral hospitals and hundreds of lower rank hospitals.[48] Of these, only one of the national referral hospitals, one of the specialized government hospitals and the 14 regional referral hospitals have

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45 Mwesigwa A, Lule BB, Nakabugo z. Cost of sacking 1, 000 doctors. The Observer, 2017. Available: https://observer.ug/news/headlines/56053-cost-of-sacking-1-000-doctors.html. [accessed 16 August 2021]

46 Uganda Bureau of Statistics: 2020 Statistical Abstract. Available at https://www.ubos.org/wpcontent/uploads/publications/11_2020STATISTICAL__ABSTRACT_2020.pdf. [accessed 16 August 2021]

47 On 7 May 2021, the parliament of Uganda approved a Shs44.7 trillion budget for 2021/2022 of which the ministry of health was allocated only Shs1.4 trillion. Read more at https://www.parliament.go.ug/news/5110/parliament-approves-shs44-trillion-budget-20212022. [accessed 16 August 2021]

48 Esther Ejiroghene Ajari and Daniel Ojilong: Assessment of the preparedness of the Ugandan health care system to tackle more COVID-19 cases. Available at http://www.jogh.org/documents/issue202002/jogh-10-020305.htm. [accessed 16 August 2021]

been designated as COVID-19 treatment sites by the Ministry of Health as at May 30, 2020.[49]

Most of these facilities, especially the regional referral hospitals, are ill equipped to handle COVID-19 cases.[50] On top of all these, there is limited accessibility to critical care services in Uganda[51] as of February 2020 yet studies report that 5%-7% of patients sick with Covid 19 require Intensive Care Unit admission. Moreover, 83% of these ICU facilities are located in Kampala city and 75% in private hospitals.[52] The uneven distribution of these facilities further impedes access to intensive health care.[53]

By September, 2022, the 1,300 hospital beds set aside for the treatment of Covid 19 were no longer sufficient to handle the rising numbers.[54] With the designated public hospitals filled to capacity, desperate patients have had to turn to private health care facilities.[55] Unfortunately, in many private health facilities, a patient will not be touched until a huge upfront payment is made.[56] These charges range from UGX 2 million to UGX 5 million per day which is largely unbearable to many Ugandans.

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49 Ibid

50 Ibid

51 Patience Atumanya & Peter Agaba: Assessment of the current capacity of intensive care units in Uganda; A descriptive study, available at https://pubmed.ncbi.nlm.nih.gov/31715537/. [accessed 16 August 2021]

52 Ibid

53 Ibid

54 Uganda's health system overwhelmed with COVID-19 cases- Experts, 'The Independent,' available at https://www.independent.co.ug/ugandas-health-system-overwhelmed-with-covid-19-cases-experts/. [accessed 16 August 2021]

55 The Daily Monitor reported on 23 June, 2021 that many families of Covid-19 patients end up in private facilities after failing to get admission in public health facilities due to lack of space. Available at https://www.monitor.co.ug/uganda/news/national/covid-treatment-hospitals-defend-shs5m-per-day-bill-3447714. [accessed 16 August 2021]

56 Hamza Kyeyune: Ugandan health facilities charging COVID-19 patients a fortune, 01.07.2021. Available at https://www.aa.com.tr/en/latest-on-coronavirus-outbreak/ugandan-health-facilities-charging-covid-19-patients-a-fortune/2290793. [accessed 16 August 2021]

In other cases, relatives of patients have been presented with extremely high bills which the hospitals demand total clearance of before the discharge of those who recovered or the bodies of those who did not make it. This state of affairs raised numerous grievances which have culminated into the dragging of the Ugandan government to the high court for failure to regulate the exorbitant fees for the management and treatment of COVID-19 patients in private health facilities.[57]

Private hospitals have, on the other hand, defended the charging of these high prices arguing on basis of the high the cost of essential drugs used in the treatment of COVID-19 and other supplies. The high charges have also been pinned on the greatness of the risk as well as the requirement of critical attention involved in the treatment of the disease.[58]

4.2 The status quo visa v the performance of the state in its obligations pertaining to the right to health.

Discussion of the extent to which the state has complied with the stipulations to uphold the right to health laid down by the 1995 Ugandan Constitution and international human rights instruments is done in a three-part manner. First, we examine the performance of the public health system followed by that of private health system and lastly the aspect of vaccination equity.

4.2.1 Performance of the public health system.

The statistical data contained in the preceding section of this paper reveals that public hospitals in Uganda are understaffed, ill-equipped and under-funded to handle the treatment of Covid 19.

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57 https://www.cehurd.org/regulate-the-rates-hospitals-are-charging-for-management-and-treatment-of-covid-19/. [accessed 16 August 2021]

58 https://www.monitor.co.ug/uganda/news/national/covid-treatment-hospitals-defend-shs5m-per-day-bill-3447714. [accessed 16 August 2021]

This directly speaks to the fact that the state has failed to execute its duty to fulfil the right to health which in itself is a positive duty that requires taking active steps to achieve availability, accessibility and provision of good quality health services. The availability and accessibility requirements have been offended by the fact that public hospitals designated to treat Covid 19 are now full to maximum capacity and turning away patients[59] while the good quality requirement is breached by absence of the necessary medicines and equipment to treat the patients.

The state machinery has barely been moved towards the creation of more treatment centres, provision of personal protective equipment as well as proper stocking of health facilities with the essential drugs necessary in the treatment of Covid 19.

While the government may argue that it is acting within the limits of the available resources, the fronting of such an argument requires demonstration of maximum allocation of the available resources and those that can be solicited from the international community. This is not the case with the Ugandan government simply because the country's resources are not being maximally utilized for the fulfilment of the right to health.

This is reflected in the FY2021/2022 budget allocation where more funds were moved to sectors like defence and transport as compared to the allocation made to the health sector yet the state of the health sector is in urgent need of refurbishment to enable the combating of the deadly virus[60]. More of resource

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59 On 15 June 2021, The Guardian reported about an interview where Mukuzi Muhereza, the Uganda Medical Association secretary general confirmed that there is a dire inadequacy of oxygen and human resources from public hospitals hence turning away of patients. Available at https://www.theguardian.com/global-development/2021/jun/15/vaccines-and-oxygen-run-out-as-third-wave-of-covid-hits-uganda. [accessed 16 August 2021]

60 The health sector was allocated only 3% of the total budget funds in the financial year 2021/2022. This is much lower than the 6% that was allocated to it in the financial year 2020/2021. See, David Rupiny, 'Uganda National Budget 2020/2021: Key

squandering is reflected in the continued payment of allowances to members of parliament despite the suspension of parliamentary sittings.[61]

Similarly, an argument may be made that the state is progressively realizing the fulfilment of the right for example by making attempts to increase supply of oxygen tanks in Mulago Hospital.[62] However, as earlier mentioned, some obligations under the right to health have an immediate effect such as the undertaking to guarantee the right to health in a non-discriminatory manner. As the number of oxygen tanks was being increased at Mulago hospital, Kabale Hospital stopped oxygen supply to neighbouring health facilities due to inadequacies.[63] There have been minimal efforts to create equitible access to the necessary equipment to treat Covid 19 in all designated treatment centres which can be said to be discriminatory.

It is irrefutably evident that the public health system has not been empowered to appropriately handle the treatment of Covid 19 patients and as such the state fails to meet the obligations imposed by the Constitution and international human rights instruments.

4.2.2 Private Health Facilities and the State Obligation to Protect the Right to Health

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Investment Takeaways' available at https://www.ugandainvest.go.ug/uganda-national-budget-2020-2021-key-investment-takeaways/. [accessed 16 August 2021]

61 On 5 July, 2021, a section of Members of Parliament questioned the continued dishing out of payments and allowances to Members of Parliament without work. See MPs question their continued payment without work (independent.co.ug). [accessed 16 August 2021]

62 Nobert Atukunda, 'Mulago to install new plant as oxygen crisis worsens,' Daily Monitor,Friday June 18 2021. Available at https://www.monitor.co.ug/uganda/news/national/mulago-to-install-new-plant-as-oxygen-crisis-worsens-3441914. [accessed 16 August 2021]

63 Robert Muhereza, 'Covid-19: Kabale hospital stops oxygen supply to neighboring health facilities, Daily Monitor,Friday June 25 2021. Available at https://www.monitor.co.ug/uganda/news/national/covid-19-kabale-hospital-stops-oxygen-supply-to-neighboring-health-facilities-3449232. [accessed 16 August 2021]

As earlier stated,[64] the state has an obligation to protect through taking positive steps to ensure that non-state actors such as local businesses and private persons do not violate the right to health.

This can be done through the creation and maintaining of a framework or atmosphere through legislation or any other appropriate measures to ensure that private actors do not render health facilities unavailable or unaffordable to the citizens.[65]

Businesses and private persons can affect the right to health in several ways. Private healthcare providers, at least, under the UN Guiding Principles have a direct responsibility to respect the right to health.[66] Such responsibilities rise to the level of legal human rights duties in some domestic jurisdictions as the UN Committee on Economic, Social and Cultural Rights has acknowledged.[67] At the most essential level, this means adhering to recommended standards while delivering affordable and accessible health-related goods and services on a non-discriminatory basis.[68]

This responsibility of businesses to 'respect' the right to health can be converted into a domestic legal requirement pursuant to the State's obligations to protect.[69] Whereas private health facilities contribute positively to the enjoyment of the right to health, they may also make health care more difficult to access or afford, for instance by keeping the price of medicines or health services high.[70] Following the privatization of the health care system through liberalizing the receiving and treating of covid patients in Uganda, private

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64 supra

65 ICESCR General comment 14 at Paragraph 35

66 UN Guiding Principles on Business and Human Rights Principle 13-16

67 General comment 14 para 42

68 UN Guiding Principles on Business and Human Rights

69 Gorik Ooms and Rachel Hammonds: Global constitutionalism, responsibility to protect, and extra-territorial obligations to realize the right to health.

70 supra

healthcare providers have become key players in the fight and treatment of COVID19.

The government is thus obligated to intervene and regulate private practices that affect the right to health such as regulating fees charged to such reasonable levels and also ensuring that the services provided in these facilities are of good quality. This stance is legally fortified by Sections 28 and 29(k) of the Public Health Act,[71] under which the Minister of Health is mandated to make statutory orders for the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations.

Similarly, the Medical and Dental Practitioners Act[72] in Section 46 mandates the Minister, on the recommendation of the Medical and Dental Practitioners Council, to make regulations which include prescribing the fees as indicated under the Act[73] a case in point being the fees charged by medical practitioners for their services.

The current medical fees are overly exorbitant, inspired by profiteering and do not commensurate with the services given. The result of this is that medical services are unaffordable by the significant majority of the citizenry. This engages the state's responsibility. Indeed, different governments around the world have adopted different measures to ensure health services remain available, accessible, acceptable and of good quality to people.

Various Governments in the world have enlisted the support of private health providers while at the same time effectively regulating their operations. In Spain, for instance, the government has 'nationalized' private hospitals to

71 Cap 281
72 Cap 272
73 Section 46(a)

increase treatment capacity, which may better allow it to fulfil its obligations.[74] In the United Kingdom, there have been agreements between the government and private hospitals where these hospitals have been contracted to work 'at cost' and without profit to bolster the State's capacity to combat COVID-19.[75]

Further, other states have taken measures to prevent profiteering from COVID-19 by those operating in the private health sector. In Bangladesh, for example, the government has prevented private laboratories from conducting COVID-19 tests for fear that it would be unable to assure quality control of such testing.[76] With private businesses involved, there is always a fear of profiteering as historically experienced with HIV and other epidemics.

In anticipation of the potential for such abuses, the South African government has enacted regulations to empower it to 'set maximum prices on private medical services relating to the testing, prevention and treatment of the COVID- 19 and associated diseases.[77]

A state might also, in accordance with heightened 'social expectations' arising in the crisis situation of the pandemic, compel more proactive measures to assist in the fulfilment of the rights. This could mean measures such as converting production priorities and eliminating or adopting lower profit margins for certain goods and services.

It follows therefore, that the state as the primary custodian has a duty to protect its citizens against exorbitant medical fees through either partnering with private entities to provide subsidized services or enact legislations fixing the criteria of charges.

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74 Coronavirus: Spain Nationalizes All Private Hospitals, Enters Lockdown (businessinsider.com) [accessed 16 August 2021]

75 REVEALED: The Tories' deal with private hospitals amounts to a government bailout | Left Foot Forward: Leading the UK's progressive debate [accessed on 16 Aug. 21]

76 4 Dhaka laboratories banned from conducting Covid-19 tests for travellers | Dhaka Tribune [accessed 16 August 2021]

77 Regulations to the Disaster Management Act 2020

To this end, the Ugandan government has been indifferent towards the extortion by private health facilities by failing to take any positive measures to check on the freedom of private medical practitioners in the pandemic and thus failing in its obligation to protect.

4.2.3 Vaccine equity

It has been observed that the most effective way to recover from the Covid19 crisis is ensuring access to vaccination to as many people as possible.[78] Therefore, there is need to vaccinate more people quickly.

However, due to the inequitable vaccine distribution, people in rural areas have been left vulnerable to the virus. The biggest threat posed by inequitable vaccine distribution is that the virus is capable of ricocheting. The virus mutates and renders first generation vaccines ineffective in a short period.[79] Whereas vaccine equity has been predominantly advocated for at the global scene to ensure equitable distribution of vaccines between wealth countries and low developed countries,[80] there is need to examine the equal distribution of vaccines at the national level.

It is argued that there has been no equitable distribution of vaccines in Uganda.[81] The vaccination sites are situated in urban centres and thus not physically accessible to rural dwellers.[82] Most vaccination sites are at health Centre III hospitals or above with a maximum of only 4 centres in 138 districts.

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78 Human Rights and Access to Covid-19 Vaccines: OHCHR. Available at https://www.ohchr.org/Documents/Events/COVID-19_AccessVaccines_Guidance.pdf. [Accessed 9 July 2021].

79 COVID-19 Vaccines And Coronavirus Mutations: Shots - Health News: NPR [accessed 16 August 2021]

80 Vaccine Equity. Available at https://www.who.int/campaigns/annual-theme/year-of-health-and-care-workers-2021/vaccine-equity-declaration. [Accessed 9 July 2021].

81 The Last Mile: Uganda's Covid-19 vaccine struggle (nbcnews.com) [accessed 16 August 2021]

82 COVID-19 VACCINATION SITES BY DISTRICT IN UGANDA, available at https://www.health.go.ug/2021/03/30/covid-19-vaccination-sites-by-district-in-uganda/. [accessed 16 August 2021]

Moreover, most of these centres are not stocked with the vaccine. This means that the greater majority of Ugandans in rural areas stay far away from health Centre III. There are also reports of payment for vaccination which is supposed to be free of charge.

Furthermore, the government has not carried out educational and other health related awareness programs to counter misleading narratives as regards to the effect of the vaccine.[83]This generally affects people's willingness to turn up for vaccination as many continue to harbour stereotypes like the vaccine causing death.[84]

The state has a duty to ensure that people are aware and have access to educational and health related information. To this end, Uganda has relented in its obligation and by extension has facilitated the misguided attitude towards the effects of the vaccination which has kept only elites and a lucky few willing to be vaccinated.

5.1 RECOMMENDATIONS

This section recommends the possible practices and solutions on how to enhance the realization of the right to health in Uganda during the Covid19 pandemic.

The provision of adequate and accurate information about health treatment to patients and the general public is vital in enhancing the realization of the right to health. The committee on economic, social and cultural rights in general

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83 Therapeutic Advances in Infectious Disease: COVID-19 vaccine acceptance among high-risk populations in Uganda.

84 Kelechukwu IRUOMA, 'How misinformation drives low uptake of COVID-19 vaccine in Nigeria.' Available at https://www.icirnigeria.org/how-misinformation-drives-low-uptake-of-covid-19-vaccine-in-nigeria/.[Accessed 9 July 2021].

comment 14 stated that information accessibility includes the right to seek, receive and impart information and ideas on health.[85]

In *Green watch (u) limited v Attorney General and Anor*,[86] the right to access information was found to be applicable to information in possession of the state. Court further noted that, if accurate and adequate information is availed, the right to health and clean environment would be promoted.

Therefore, providing education and health related information about vaccination and its benefits would exponentially change the attitude and numbers of people submitting to vaccination. The government should therefore conduct educational and other awareness programs to correct the narrative and thus improve vaccine equity.

In *Centre for health, human rights and development and 2 others v the executive director v Mulago referral hospital and Anor*[87], it was held that realization of the right to health requires an improved financing of the health system. As earlier showed, the major challenges in the healthcare system mainly result from under resourcing. Therefore, there is an urgent need for improved financing, so as to actualize the effectiveness of health facilities through quality, quantity of and equity in service delivery.

This may, for example, be through increasing the salaries and allowances given to medical workers so as to increase their willingness to attend to patients. Further, the state should consider ensuring that even remote areas have at least one vaccination site to improve people's access to vaccine. A case in point is that health center II hospitals should be gazetted as sites for administering vaccines.

There is also need to monitor and enforce accountability in the implementation of the right to health to ensure an effective mechanism. There have been cases

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85 paragraph 12

86 High court Miscellaneous Cause No. 139 of 2002

87 Civil suit No. 212 of 2013

and allegations of corruption and mismanagement of funds allocated to improve health facilities.[88] However, the government has not carried out its due diligence obligation to investigate or prosecute those involved.

The existence of a slow and unenthusiastic response to resource misdirection makes it close to impossible to realize the right to health. While pursuing this end, the funds allocated to the health sector should be increased in preference of allocating much greater funds to sectors that are not in urgent need of refurbishment.

There is need for the government to intervene and regulate medical charges by private health facilities. This can, for example, be done through enlisting the support of private health facilities through agreements to subsidize health charges. This practice has proved to be effective in Spain and United Kingdom. This would greatly enhance the realization of the right to health.

The government should also intervene with a regulatory framework which is scientific, location sensitive and accurate in terms of the actual costs incurred to deliver covid19 treatment. This would make costs reasonable as opposed to being exorbitant.

6.2 CONCLUSION

The efforts of the government to sustain its citizenry in the face of a pandemic by putting in place stringent measures like total lockdowns are commendable. However, what ideally crowns the attempt to avert the crisis is a healthcare system that is readily available, affordable and most importantly of a good quality.

The absence of such a healthcare system in Uganda, not only breaches legally imposed obligations on the state but also makes the target of economic development elusive. It is very unlikely that an already destitute population

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88 U.S. Ambassador, Deborah Malac. 'It's Time for the Government to Invest in Ugandans' Health and Future,' Available at https://ug.usembassy.gov/its-time-for-the-government-to-invest-in-ugandans-health-and-future/ [Accessed 10 July 2021].

whose life is now threatened by a novel mutating disease would later on come to be productive.

The absence of reality-based policies in the governance of this country is a conversation that should not be avoided. The priorities of the government reflect aloofness towards the general wellbeing of the citizenry at large. This reality not only works to the detriment of the citizens but also to those who benefit from the society-insensitive policies of the state. At the end of the day, the cow they are milking will have nothing left to give.

THE LEGAL RISKS OF CRYPTO CURRENCY ON STATE SOVEREIGNTY; A CASE STUDY OF UGANDA

Ntamugabumwe Victor and Joshua Kingdom[*]

ABSTRACT

State sovereignty is conventionally known to mean that all states are equal under Public International Law, the decisive criterion being effective power over territory and people. Indeed, the most rudimentary definition of a state is the organization of power over territory and people within that territory. However, sovereignty today depends much on the state's monetary independence – the state's capacity to control the flow of money and currency in their jurisdiction. With the constant evolution of money transactions from Cash to credit and then to crypto, the state must always be ready for each revolution so that sovereignty is kept. Crypto currencies work outside the existing legal financial framework and as such avoid the state's invented structure to control their monetary policies, stability to achieve sovereignty.

1.0 INTRODUCTION

The world of money has increasingly evolved from time to time. It has moved from cash to cashless transactions over time. This has evidently been facilitated by the advancement in technology and the pursuit of a peer to peer cash transaction without middlemen.[1] On October 31, 2008 the pseudonymous Satoshi Nakamoto released his proposal for an electronic cash system known as Bitcoin.[2] This has opened up countless block chain systems known as crypto currencies which have gained popularity in the international community as a medium of transaction transcending current financial institutions and cross border regulation. A blockchain is a database encompassing a physical chain of fixed-length blocks that include 1 to N transactions, where each

[*] Special thanks to Barry Ainomugisha, Kenneth Kiapi Kotura and the Makerere Law Journal Editors, your help during our preparation of this paper is duly noted.

[1] Maria D, Guntram B. W. "The Economic Potential and Risks of Crypto Assets: Is a Regulatory Framework Needed?" Policy Contribution. Issue No. 14| September 2018.

[2] Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System" (White Paper, Bitcoin 2008). 1 http://bitcoin.org/bitcoin.pdf [accessed 23 March 2021]

transaction added to a new block is validated and then inserted into a new block. When the block is completed, it is added to the end of the existing chain blocks.[3] As such blockchains are an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way. This new blockchain technology in crypto currency has been noticed in Uganda as various crypto currency exchanges have opened up offices. These include Crypto Savannah[4], Binance, One Coin and others.

State sovereignty is conventionally known to mean that all states are equal under International Public Law.[5] The decisive criterion is effective power over territory and people. Indeed, the most rudimentary definition of a state is the organization of power over territory and people within that territory.[6] However, state sovereignty today depends much on the state's monetary sovereignty – the state's capacity to control the flow of money and currency in their jurisdiction.[7] Therefore, the control over money and finance determines monetary sovereignty, which, arguably, is the actual sovereignty.

In February 2017, the Bank of Uganda (BoU) issued a warning against the use of crypto currencies citing the absence of investor protection schemes and the relevant regulatory mechanisms.[8] The bank warned that the entity "ONE COIN DIGITAL MONEY" is not licenced by Bank of Uganda under the Financial

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3 Joseph J. Paul R. BLOCKCHAIN. A PRCTICAL GUIDE TO DEVELOPING BUSINESS, LAW AND TECHNOLOGY SOLUTIONS. McGraw-Hill Education 2018 1st Edition

4 For More on Crypto Savanah, visit https://cryptosavannah.com/ [accessed March 23, 2021]

5 James R Crawford. Brownlie's Principles Of Public International Law. 8th Edition. Pg. 447

6 The so-called "three-element theory." See Georg Jellinek, Allgemeine Staatslehre (1905).

7 Robert A. Mundell, "Money and the sovereignty of the state." Columbia University.

8 Bank of Uganda. Warning to General Public about "One Coin Digital Money" operations in Uganda. Feb 14, 2017 http://www.bou.or.ug/bou/bou- downloads/press releases/2017/Feb/ Bank-of-Uganda-warning-on-One-Coin-Digital-Money-in-Uganda-pdf [accessed 23 March 2021]

Institutions Act 2004 and is, therefore, conducting business outside the regulatory purview of the bank and that "the public is strongly encouraged to do business with only licenced financial institutions. The bank also warned that "whoever wishes to invest their hard-earned savings in crypto currency forms such as Bitcoin, one coin, Ripple, Peer coin, Name coin, Doge coin, Lite coin, Byte coin, Prime coin, Black coin, or any other forms of digital currency is taking a risk in the financial space where there is neither investor protection nor regulatory purview."

Crypto currencies like Bitcoin challenge the post Bretton woods system of financial control on worldwide transaction.[9] The Bitcoin currency is decentralised and therefore is neither issued by any government nor is it stored in one location. They utilise a Distributed Public Ledger barring the need for a trusted third party such as a bank. With crypto currencies, mints do not print them, banks are not required to store crypto currency and escrow agents are unnecessary to verify transactions.

To many consumers, crypto currency appears to be a superior method of transaction in terms of efficiency and transaction cost. However, to the state, the removal of a trusted and regulated third party carries significant drawbacks concerning government's control of commerce.[10] This weakens sovereign state's capacity to protect their citizens from harm because they sidestep the regulations that monitor monetary transactions. This continuously reduces the government's legitimacy and thereby their fall.

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9 The Bretton Wood system was established by agreement in July 1944 with an aim to create international currency exchange regime. More importantly, this agreement established the International Monetary Fund and the World bank which still stand up to day decades after the Bretton Woods system collapsed. This is the system that introduced the modern-day financial frameworks. For more on this refer to. https://www.investopedia.com/terms/b/brettonwoodsagreement.asp last accessed on March 22, 2020 at 16:00 hrs.

10 Ryan L. Frebowitz, "Crypto Currency and State Sovereignty." Thesis. Naval Post Graduate School. Monterey, California. June, 2018

During fiat[11] transactions, trusted third parties like banks, credit card companies and escrow agents restrict and report transactions with ties to criminal or terrorist entities. As a result, individuals and organisations transacting with fiat are required to register with a trusted third party. This is different with the Public Distributed Ledger transactions of crypto currencies.

Crypto currencies are an attractive means of fundraising for terrorists due to their anonymity. This does not take away the idea that the transactions stored in the public ledger provide an easy audit trail that traces the donations back to the source.[12] While bitcoin is still not a reliable source of fundraising for terrorists and jihadists, this may change in the near future due to a future potential acceptance of a new crypto currency offering more, or the creation of, online exchanges that do not adhere to the money laundering laws.

This will not be the first time the government of Uganda has had to deal with a technological advancement in money transactions like the current one. However, it will be interesting to see how it copes-up. Similar debates ensued when the state took to mobile money regulation following more than a decade of its existence.[13]

As such, there is need for a systematic regulation. A peer-to-peer transaction without a third party and without regulation would certainly lead to criminality and the loss of the legitimacy of the current system of government. If a government is incapable of regulating money transactions then it's a matter of time before unsupervised and unregulated transactions lead to criminality, loss

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11 According to Investopedia, "Fiat Currency is a currency that a government has declared to be legal tender but it is not backed by a physical commodity." Fiat Money. Investopedia Nov 20, 2003. http;//www.investopedia.com/terms/f/fiatmoney.asp/ [accessed 22 March 2021]

12 Yaya F," The New Frontier in Terror Fundraising; Bitcoin." The Cypher Brief(blog) August 24, 2016.
Available at
http://ucscu.coop/index.php/media-centre/news/53-mobile-money-tax-proposal-may-have-a-negative-impact [Accessed 7th February 2021]

of legitimacy and sovereignty.[14] This paper looks at viable ways under which crypto currencies can be regulated by the state and then offers recommendations for the same.

2.0 CRYPTO CURRENCY - FROM WHENCE HAVE WE COME?

In order to understand how we come to a currency that uses cryptography, we shall go back in time to understand the need to use crypto currency. First though, a simple elaboration on what money actually entails.

2.1 What is money?

Money is any item or verifiable record that is generally accepted as payment for goods and services, repayment of debt and advancement of credit.[15] But simply put, money is just a medium of exchange, a unit of account and a store of value.

a) Money as a medium of exchange

Money acts as an intermediary between a seller and a buyer. For example, instead of exchanging accounting services for shoes, the accountant now exchanges accounting services for money. This money is then used to buy shoes. To serve as a medium of exchange, money must be very widely accepted as a method of payment in the markets for goods, labour, and financial capital.[16]

b) Money as a unit of account

Due to its ability to be a medium of exchange, money is also used as a unit of account. A unit of account is something that can be used to value goods and

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14 supra n4

15 Yuval N. H. MONEY – Vintage Minis. You may also refer to Wikipedia. Available at https://en.wikipedia.org/wiki/Money [accessed 22nd January, 2021]
PRINCIPLES OF ECONOMICS, Chapter 27 – Defining Money by its functions. Available at https://opentextbc.ca/principlesofeconomics/chapter/27-1-defining-money-by-its-functions/ [Accessed 25th January, 2021]

services, record debts, and make calculations. In other words, it is a measurement for value. A unit of account has three important characteristics relevant to money.[17] These characteristics include; - Divisibility, Fungibility and Countability.

Divisibility requires that a unit of account can be divided so that its component parts will equal the original value. If you divide a shilling into four quarters, the total value of the four quarters still equals a shilling. Likewise, if you cut a bar of gold in half, the two pieces together will equal the same value as the original bar as a whole.

Fungibility requires that a unit is viewed as the same as any other with no change in value. A shilling is the same as any other shilling, and 12 ounces of 24-carat gold are not different from another 12 ounces of 24-carat gold. On the other hand, all real estate is unique, and diamonds vary by colour, cut, clarity, and carat.

Countability requires that a unit of account is also countable and subject to mathematical operations. You can easily add, subtract, divide, and multiply units. This allows people to account for profits, losses, income, expenses, debt, and wealth.

Therefore, for any money to count as a unit of account it must possess the above discussed qualities.[18]

c) Money as a Store of value

A store of value is the function of an asset that can be saved, retrieved and exchanged at a later time, and be predictably useful when retrieved.[19] Money

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17 Available at https://study.com/academy/lesson/money-as-a-unit-of-account-definition-function-example.html [accessed 26th January, 2021]

18 Mathias D and Martin S," Money as a Unit of Account." Econometrica Vol. 85 No.5 2017 Available at https://www.jstor.org/stable/44955172?seq=1

has been one of the greatest stores of value due to its liquidity and stability. This is what guarantees a person to have savings and be sure that at the end when they want to spend those savings, they are worth what they saved or even more.

From the above discussion, it can be concluded that there are three functions of money; a medium of exchange; a unit of account; a store of value. In a cash or credit-based economy, the above functions are what legitimise the money at function.

2.2 Barter Trade – Cash based and Credit Based systems

The earliest form of exchange was barter trade.[20] It worked on a very simple principle. If Victor wanted medicine and Joshua wanted food, they would just exchange the food for medicine and the transaction would have happen.

The transaction would also happen this way. If Victor has food that he is willing to trade for medicine. However, Joshua has the medicine but no need for food, but instead wants cattle, a meeting could be arranged with a third person who has cattle (Jane) and three would get what they want.

However, it should be noted that it was crucial to look for someone who had something that you needed and you had something they needed for the transaction to go through – the famous double coincidence of wants issue.[21] Two systems emerged to solve this issue of double coincidence of wants – Credit and Cash.

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20 Barter Trade was the earliest form of exchange in purchase of goods. Available at https://www.investopedia.com/insights/what-is-money/ [accessed 22 January, 2021]

21 Introducing Money available at https://courses.lumenlearning.com/boundless-economics/chapter/introducing-money/ [Accessed 23 January, 2021]

In a cash-based system, Victor would be able to buy the medicine from Joshua, and only sell the food to Jane later. From there, Jane can sell her cattle to Joshua.

In a credit-based system, Victor and Joshua would be able to transact. Victor would get the medicine but Joshua would get a favour owed to him. Victor would be in debt and therefore would get a new want - cattle. When Victor encounters Jane, they would trade cattle and food. Then Victor would go back to Joshua with the cattle to settle the debt.

However, even when this evolution happened – barter trade was still affected by two things; Transferability and Divisibility. It was hard for example for Victor to quantify how much of the food he would need from John in exchange for cattle. So there needed to be an agreement to determine this problem and as such the trade would be tiring inefficient and confusing. Therefore, commodity money came into the picture.

Commodity money solved the problem since it was much more mathematical and easier to deal with. In Uganda one such commodity was cowry shells.[22] For instance, two cowrie shells would buy a woman for a wife in the ritual of marriage.[23] It is from this background that the evolution of money continued to minting of coins and then to the fiat currency that we see today.

2.3 Money and E – Commerce

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22 Karin P. "Monetary Practices and Currency Transition in early colonial Uganda." The African Economic History Network. 18th July, 2016
Available at https://www.aehnetwork.org/blog/monetary-practices-and-currency-transitions-in-early-colonial-uganda/ [accessed 22 Jan, 2021]

23 When Two Cowrie Shells Could Buy a Woman? The East African Magazine. Available at https://www.theeastafrican.co.ke/tea/magazine/when-two-cowrie-shells-could-buy-a-woman-1293988 Last accessed on 25th January, 2021 at 08:00 hours.

Electronic commerce or e-commerce is a business model that lets firms and individuals buy and sell things over the internet.[24] This necessitates the use of credit facilities such as credit cards.

An online credit transaction necessitates the involvement of a number of intermediaries, to be successful. This will involve banks, credit card companies and other intermediaries.[25] As such, it is a credit-based transaction that will necessitate one surrendering their credit card details hence a record of their identity and the nature of the transaction(s). One such intermediary is Pay Pal.[26] The intermediary and the vendor will settle the transaction at the end of the day.

This kind of transaction is different from a Cash-based system. In this system, transaction is by cash and there is no need for intermediaries. Therefore, the system guarantees anonymity, as a bank would track your expenditure in a credit-based system. When you pay in cash the vendor does not need to know who you and as such anonymity in as far as identity and nature of transactions will be quite guaranteed.

Since the 1990's very many companies have attempted to remove this risk of constant monitoring of people's transactions. We shall look at a few of these and what made them fail the attempt.

2.4 Fiat money and Currency.

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24 Investopedia Definition.
Available at https://www.investopedia.com/terms/e/ecommerce.asp [accessed 26 January, 2021]

25 https://www.tutorialspoint.com/e_commerce/e_commerce_payment_systems.htm [accessed 26 January, 2021

26 For reference, visit https://www.paypal.com/ug/home [Accessed 27 January, 2021]

Fiat money is government issued currency that is not backed by a physical commodity such as gold and silver, but rather by the government that issued it.[27]

- *How fiat money/currency works*

Fiat money or currency was introduced as an alternative to commodity money or representative money. The value for fiat money is derived from the relationship between demand and supply and the stability of the issuing government rather than the worth of a commodity backing it as it is the case for commodity money. It should be noted that fiat money has value only because the government controls that value and as such it lacks intrinsic value.[28]

Fiat currency is not supported by any physical commodity, but by the faith of its holders and virtue of a government declaration. acts as a storage medium for purchasing power and an alternative to the barter system. It allows people to buy products and services as they need without having to trade product for product, as was the case with barter trade. However, stability is key, and as such, there is need to control how much of the money is in circulation.[29]

- *Fiat money/currency and sovereignty*

Through the control of Fiat money and currency, its value and circulation – governments have immense control over and can monitor everything in the economy. Therefore, the control over money and finance determines actual

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27 https://www.investopedia.com/terms/f/fiatmoney.asp [accessed February 8, 2021]

28 Corporate Finance Institute, "What is Fiat Money?" Available at https://corporatefinanceinstitute.com/resources/knowledge/economics/fiat-money-currency/ [accessed 8 February 2021]

29 Jason Hall, "Fiat Currency. What it is and Why it's Better than a Gold Standard." The Motley Fool. Available at https://www.fool.com/investing/general/2015/12/06/fiat-currency-what-it-is-and-why-its-better-than-a.aspx [accessed 8 February 2021]

sovereignty.[30] It should be noted that only countries that issue their own currencies retain control over their monetary policies, a precondition for monetary sovereignty, hence the right to exercise state sovereignty. This is certainly different from states that decide to adopt a foreign currency or join forces with others to adopt a new common currency. These give up the control of their monetary policies, stability hence loss of monetary sovereignty.[31] To this date real sovereignty of states has come from their ability to control their financial institutions under fiat currency.

2.5 How Crypto currencies Work

While this paper seeks to discuss the sovereignty of the state in the wake of crypto currency, it's pertinent to discuss and understand this technology with basic technical issues. Crypto currency is a kind of digital money that is designed to be secure and, in most cases, anonymous.[32] It is mainly internet based and uses cryptography with blockchain. Crypto currencies work like any other money. As a medium of exchange – one can buy or sale goods using crypto currencies. However, one has to turn fiat money into crypto currencies in order to use them – for example as of February 9, 2021 a bitcoin cost 168,760,595.60 Ugandan shillings.[33]

- **The Road to 2008 – BITCOIN**

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30 Katharina Pistor, From Territorial to Monetary Sovereignty, Theoretical Inquiries In Law, Vol. 18, P. 491, 2017; Columbia Law School Center For Law & Economic Studies Working Paper No. 591 (2017). Available at "From Territorial to Monetary Sovereignty" by Katharina Pistor (columbia.edu)

31 See HYMAN P. MINSKY, The Financial Instability Hypothesis: An Interpretation of Keynes and an Alternative to "Standard" Theory, in Can "It" Happen Again? Essays On Instability And Finance 59 (1982) (originally published in 1977 on the tendencies of a financial system to destabilize endogenously).

32 Available at https://www.telegraph.co.uk/technology/0/what-crypto currency-why-how-work-bitcoin-ethereum/ [accessed 9 February 2021]

33 Available at https://www.google.com/intl/en/googlefinance/disclaimer/ [accessed 9 February 2021]

This Paper will rely on the Bitcoin ecosystem in order to explain how crypto currencies work. This is because of its market value popularity and being the first working crypto currency to have been created.[34] The domain name[35] was first registered on August 18, 2008. It was mainly a link to the Satoshi Nakamoto white paper that outlined bitcoin.[36] The major argument of the paper is that a purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution.[37] And after this we have come to see very many other crypto currencies commonly referred to as altcoins.

But where do the ideas behind bitcoin come from? What other payment systems preceded Bitcoin? What happened to them and more importantly what made them fail? This paper will give a few examples of failed systems to show where Bitcoin comes from.

The whole system is rooted in the rivalry between credit-based systems and cash-based systems in e-commerce. Cash based systems provide anonymity compared to the credit-based systems.

a) FirstVirtual, VISA, Mastercard and PayPal

In a credit-based system, the merchant required your data to be given to them before carrying out a transaction. That data included your bank details so that the merchant would be able to redeem their money. This was hard during the early days of the internet; in fact, it was considered unwise to hand over your credit card details to online vendors of unknown repute over an insecure channel. In such an environment, there was a lot of interest in the

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34 Available at https://bitcoin.org/en/
See also. Erik H. Nichola B. Supply Chain Finance And Blockchain Technology the Case for Reverse Securitization. Springer 2018

35 Ibid

36 "Bitcoin: A Peer-to-Peer Electronic Cash System."
Available at https://bitcoin.org/en/bitcoin-paper [accessed 9 February 2021]

37 Ibid, Pg. 1 Abstract.

intermediary architecture.[38] An intermediary would work as such, the buyer would provide their credit card details to the intermediary who would then help in the purchase of the products – the intermediary and the merchant would then settle themselves at the end of the day.

A company called FirstVirtual was among the earliest founded intermediaries.[39] With FirstVirtual, the customers had to establish an account with FirstVirtual using a credit card. To make an online purchase, the customers sent their First Virtual ID number to the participating vendor, who in turn emailed First Virtual and the customer for confirmation. The money was then transferred to the vendor via the Automated Clearing House (ACH). However, VISA and Mastercard developed the SET architecture at the time.[40] In SET, to make a purchase, your browser would pass your view of the transaction details to a shopping application on your computer which, together with your credit card details would encrypt it in such a way that only the intermediary would decrypt it. Having encrypted your data in this way, you can send it to the seller knowing that it's secure. The seller blindly forwards the encrypted data to the intermediary — along with their own view of the transaction details. The intermediary decrypts your data and approves the transaction only if your view matches the seller's view. This architecture was adopted by Cyber Cash[41] which apart from dealing in credit card payments also had virtual coins called Cyber Coins.[42] However Cyber cash and SET failed to work due to their requirement that each user had to acquire a certificate

b) Digi Cash, Hash Cash, Bi-money, Bitgold

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38 A. Narayanan et al, "Bitcoin and Crypto currency technologies" Feb 9, 2016

39 Information available at https://www.pcmag.com/encyclopedia/term/first-virtual [accessed 11 February 2021]

40 A. Narayanan et al, "Bitcoin and Crypto currency technologies" Feb 9, 2016

41 Founded in August 1994 by Daniel C. Lynch. More Information available at https://www.pcmag.com/encyclopedia/term/cybercash [accessed 11 February 2021]

42 This was a micropayment system — intended for small payments such as paying a few cents to read an online newspaper article.

In a cash-based system, the earliest ideas of cryptography to cash were from David Chaum in 1983. They were hinged on solving the issue of double spending and to keep the online system anonymous.

Digi Cash was started in 1989 to commercialise the ideas of David Chaum. This is one of the earliest companies to try and solve the issues with online payments.[43] So, let us say a person issues out pieces of paper saying that the bearer of one of those papers will redeem 1000 shillings when presented to that person with his signature. If people believe the promise will be kept and that the signature cannot be forged, they will pass around those papers as bank notes. However, if that was the case with digital notes, we would have a problem of double spending.[44] Hence, Digi Cash was a form of an electronic payment which required user software to withdraw notes from a bank and designate specific encrypted keys before it can be sent to a recipient. This advancement of public and private key cryptography allowed electronic payments to become untraceable by the issuing bank. It also had a system of blind signatures through which security of its users was improved.[45] Therefore the clients were anonymous, so the bank could not trace their transactions, whereas the merchants were not anonymous since they had to return to the bank with coins as soon as they received them.

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43 Will Kenton, "Digi Cash." Available at https://www.investopedia.com/terms/d/digicash.asp Updated on December 19, 2020 [accessed 11 February 2021]

44 Investopedia definition by Jake Frankenfield. Double spending Is the risk that a digital currency can be spent twice. This is because digital information can be reproduced relatively easily by savvy individuals who understand the blockchain network and the computing power necessary to manipulate it. It is a unique risk for crypto currencies as physical currencies cannot be easily replicated, and the parties involved in a transaction can immediately verify the authenticity and past ownership of the physical currency. That is of course excluding matters involving cash transactions. Available at https://www.investopedia.com/terms/d/doublespending.asp [accessed 11 February 2021]

Digi Cash was the first to try and solve the problems of cash payments in e-commerce using cryptography, or at least it is among the first. But it had one problem – it was hard to persuade the merchants and the banks to adopt it. It also did not support user to user transaction but rather user to merchant transaction

Digi Cash was then followed by other ideas. To create a free-floating digital currency, one needs to create something scarce by design. This is what gives it real value. Scarcity is the reason as to why, gold has been used to back money for a long period.[46] The earliest company to solve this scarcity issue was Hash Cash.[47] This Hash Cash proof of work function has a complex mathematical understanding that is irrelevant for this paper. However, our pick is that bitcoin uses a similar computational puzzle as Hash cash with a few improvements.[48] Observe that in Hash cash, your cost to solve a number of puzzles is simply the sum of the individual costs, by design.

Another key element in the bitcoin system is the ledger system of record keeping. This is made possible through blockchain technology. This technology is quite old but it was first proposed by Haber and Stornetta.[49] Their scheme consisted of a proposal for a method of secure time stamping of digital documents not digital money. The goal of time stamping is to give an

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46 Principles Of Economics. Chapter 27 Available at https://opentextbc.ca/principlesofeconomics/chapter/27-1-defining-money-by-its-functions/ [Accessed 12 February 2021]

47 The Hash Cash proof of work function was invented by Adam Buck in 1997. Available at https://en.bitcoin.it/wiki/Hashcash#History [Accessed 12 February 2021]

48 Extract from the Satoshi Nakamoto White Paper, "To implement a distributed timestamp server on a peer-to-peer basis, we will need to use a proof-of-work system similar to Adam Back's Hash cash, rather than newspaper or Usenet posts. The proof-of-work involves scanning for a value that when hashed, such as with SHA-256, the hash begins with a number of zero bits. The average work required is exponential in the number of zero bits required and can be verified by executing a single hash." Page 3. Available at https://bitcoin.org/en/bitcoin-paper [accessed 12 February 2021]

49 S. Haber, W. S. Stornetta. Secure Names For Bistrings. CCS 1997

approximate idea of when a document came into existence and there is an order for these created documents.

Picking the above ideas, Bitcoin then combines the idea of using computational puzzles to regulate the creation of new currency units with the idea of a secure time stamping to record a ledger of transactions and prevent double spending.[50] There were earlier models like these way before Bitcoin – B-money[51] and Bitgold.[52] However, B-money and Bitgold were informal proposals Neither took off, nor was implemented directly.

Bitcoin has several important differences from b-money and Bitgold. In those proposals, computational puzzles are used directly to mint currency. Anyone can solve a puzzle and the solution is a unit of money itself. In Bitcoin, puzzle solutions themselves don't constitute money. They are used to secure the block chain, and only indirectly lead to minting money for a limited time. Second, b-money and Bitgold rely on timestamping services that sign off on the creation or transfer of money. Bitcoin, as we've seen, doesn't require trusted time stamping, and merely tries to preserve the relative order of blocks and transactions.

Combining all these features, Bitcoin would morph up into a sophisticated engine representative of consumer best interests as it is today.

- **Crypto currency Trust**

For any money form to work, that money form should be able to gain trust. Therefore, the concept of trust is essential for the adoption of any currency.[53]

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50 An extract from the Satoshi Nakamoto White Paper, "We propose a solution to the double-spending problem using a peer-to-peer distributed timestamp server to generate computational proof of the chronological order of transactions." Pg.8 Available at https://bitcoin.org/en/bitcoin-paper [accessed 12 February 2021]

51 This was by Wei Dai in 1998.

52 This was by Nick Szabo – there is still confusion as to whether it was as early as 1998 or 2005

53 Vigna and Casey, The Age of Crypto currency.

In the fiat model of currency, governing bodies create and sustain public trust through different regulations and a central authority, in Uganda's case, – Bank of Uganda.

Through the central authority, the governing authority through monetary policy will control the use of fiat money to avoid inflation and deflation, hence keeping the trust.

Some have argued that without trust, Crypto currencies would be worthless as they lack intrinsic value contrary to gold as it has intrinsic value.[54] There are two or more ways in which Crypto currencies have come to gain trust from the public. The first is through its own system[55] and the other is through the concept of Universal acceptance.

In order to achieve its goal of a peer-to-peer transaction, Crypto currencies replace the central authority – trusted third parties responsible for creation of trust with an electronic cash-based system that uses cryptographic proof instead of trust.[56] This is achieved through the inviolable decentralised block chain system. Trust is therefore created at a decentralised level unlike in the fiat currency model that is centralised.[57]

The other concept is that of universal acceptance. For some time now, most governments have opted to ban crypto currencies as they try to understand the technology deeper.[58] However, on the other hand we have seen big tech Multi-

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54 Check the value-based arguments on https://www.investopedia.com/ask/answers/100314/why-do-bitcoins-have-value.asp [Accessed 7 March 2021]

55 Venkata M. Bikesh U. et al "Understanding the creation of trust in crypto currencies: the case for bitcoin." Available at https://link.springer.com/article/10.1007/s12525-019-00392-5 [accessed 5 March, 2021]

56 An example is found in the Satoshi Nakamoto white paper.

57 https://boycewire.com/fiat-money-definition/ [accessed 6 March, 2021]

58 Some have even gone ahead to experiment their own state backed crypto currencies such as the Russian Crypto rubble.

national companies – Tesla[59], Facebook[60]. adopt the crypto currency mode of financial transaction such as accepting payment in Bitcoin. This has shifted the whole conversation regarding the trust of bitcoin.[61] While governments may not be interested in this technology, Technology enthusiastic companies have gone ahead to accept, support and invest in crypto currencies and this builds trust that is even beyond any borders as these companies do not have limited jurisdiction that the ancient monarchs had in order to create trust in a currency.

The replacement of trusted third parties without removing the concept of trust is key to why Bitcoin and other crypto currencies offer a viable and attractive alternative to the conventional model of government backed fiat.

- **Transactions under Crypto currencies**

a) Virtual Wallets

In order to have a complete set of anonymity to their users, the crypto currencies have a concept for a virtual wallet. A virtual wallet is a software with a digital address that allows access to the crypto currency's block chain for purchases, transfers and storage of the currency.[62] Virtual wallets are comprised of two hash outputs of 64-digit strings which make up the public key and secret key. The virtual wallet allows users' identities to considered pseudonymous, because buyers and sellers are only identified by their public

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59 The company has already bought a large stock of Bitcoin and plans to accept it as a payment. Available at https://www.cnbc.com/2021/02/08/tesla-buys-1point5-billion-in-bitcoin.html [accessed 7 March 2021]

60 Facebook Co-founded the Libra project – a crypto currency that recently has changed its name from Libra to Diem. https://www.cnet.com/news/facebooks-controversial-crypto currency-gets-a-new-name-diem/ [Accessed 7 March 2021]

61 Read the effect of Tesla's purchase of bitcoin worth 1.5 billion on Bitcoin's stock and Trust on https://theconversation.com/bitcoin-why-a-wave-of-huge-companies-like-tesla-rushing-to-invest-could-derail-the-stock-market-154966 [accessed 7 March 2021]

62 Joseph J. Paul R. Blockchain A Practical Guide To Developing Business Law And Technology Solutions Mc Grow-Hill Education 2018 at pg. 18

wallet address; moreover, a user is not restrained to a single wallet. One may choose to create an unlimited number of wallets.

The public key is the identity of the user whereas the secret key is the secret signature one uses to verify any transaction on the blockchain. The secret key is supposed to be unforgeable at least theoretically. The virtual wallet details – the public key and the secret key may be kept electronically on the internet, computer or on a piece of paper. However, loss of these two means that the coins one has on such a wallet are lost forever and so is the case when one accesses someone else's virtual wallet for malicious purposes.

It should be noted that one can create a new identity whenever they want on the crypto currency ecosystem. It is also noteworthy that since there is a record of every transaction ever made, the law enforcement agencies can track transactions between known public keys to partially break the anonymity of the system. I say partially because the real challenge comes with connecting those keys to real world addresses. This would be a whole easy problem to address in the classic fiat model where there are trusted third parties to track all transactions and who is behind all the accounts that would be in question.

b) Crypto Currency Exchanges

These exchanges work just like any other financial exchanges. They accept storage of crypto currencies and promise availability on demand just like banks. They also offer a platform for exchanging fiat currency with crypto currencies, however, subject to regulation. The plus side here is that they provide a connection between the Crypto currency economy and the flows of crypto currencies, with the fiat currency economy, so that it's easy to transfer value back and forth. If one wanted to exchange fiat to crypto currency, they would have to first register with the crypto currency exchange and then use a wire transfer or credit card or bank account to exchange.

However, such exchanges may be easily monitored and the major objective of anonymity would be compromised.

The discussion above by no means does cover the fully mathematical – technological and history of the functionality of the crypto currency however gives an almost direct link to the functionality of crypto currencies and the potentially possibility of governments' control of the same. The next phase we will discuss the possible responses that states have to take or have taken to control crypto currencies and their different justifications.

3.0 POSSIBLE RESPONSES TO CRYPTO CURRENCIES BY SOVEREIGN STATES

With the ever-increasing popularity of crypto currencies as an alternative and unregulated form of transaction, there are three ways in which a sovereign state can respond - total ban, regulation or adoption of crypto currencies. A state may opt for one of the mentioned or can actually use any two of the mentioned. Uganda's response has been through the central bank, and the legislators are still quiet despite its growing popularity. This section will discuss the different responses and the rationale as such.

3.1 Ban/Prohibition Of Crypto currencies.

Most states' first response has been to totally ban/prohibit crypto currencies. States have to exercise control on crypto currencies in order to maintain their legitimacy. Therefore, a legislation or two are passed to target crypto currency users, designers or the crypto currencies themselves. Prohibition of crypto currencies happens for various reasons, inter alia, to reduce criminality, to protect civil rights of citizens, avoid weakening of the state's ability to control

capital flow of wealth, to prepare for the release of a state backed crypto currency.[63]

While we consider other legitimate reasons to ban crypto currency, preparation for a state backed crypto currency seems to be the profound reason for most states. The justification is profoundly attractive – there cannot be a total ban on crypto currency as most people that can access the internet can make transactions[64] unless the state can be able to shut down the internet for its citizens. This obviously is understandably not a very wise decision for any sovereign state. But for the reasons expounded on below banning stateless crypto currencies is justifiable.

a) State Backed crypto currency

Introduction of a state backed crypto currency is one reason why most state's first response is to ban stateless crypto currencies. The question is whether it's possible for a developing country to introduce a state backed crypto currency and whether it's justifiable.

The state backed crypto currency however has to look different from these other stateless crypto currencies in as far as having a central figure is concerned – they are centralised rather than decentralised with a controlling entity such as the national bank.

b) Increase state's capital controls

Crypto currencies have the ability to transact seamlessly across sovereign state's borders.[65] For states that are in an economic crisis, bypassing the capital controls can be disastrous as the economy may not be stabilised easily. Capital controls are rules or regulations that are put in place to limit the flow of

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63 Ryan L. Frebowitz, "Crypto Currency and State Sovereignty." Thesis. Naval Post Graduate School. Monterey, California. June, 2018 pg. 38

64 A. Narayanan et al, "Bitcoin and Crypto currency technologies" Feb 9, 2016

65 Supra FN 10 pg. 39

income in and out of the country. Through avoiding the fees, taxes and tariffs that are associated with traditional fiat currency, crypto currency transactions are much cheaper for both transacting parties hence their possibility of preference.

For a state to keep its legitimacy hence sovereignty, banning stateless crypto currencies to increase its capital controls and avoid Capital flight[66] is justifiable. Through legislation to ban crypto currencies states make exchange of fiat currency to crypto currency difficult hence complicating the process by which wealth is exported outside the nation.

3.1.1 Difficulties Associated with Ban or Prohibition of Crypto currencies.

So far, most states have opted for prohibition of crypto currencies – Uganda inclusive.[67] The question as to whether this is the best response is up for discussion as we evaluate its drawbacks. Regardless of the reason to ban or to partially ban, the end goal is to discourage the use of the crypto currencies. This eventually cripples innovation in itself and encourages illicit use of the crypto currencies as they have been widely accepted and popular.[68] Crypto currencies can easily be accessible by anyone with access to the internet either with a phone or a computer.[69]

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66 According to Investopedia, "Capital flight is a large-scale exodus of financial assets and capital from a nation due to events such as political or economic instability, currency devaluation or the imposition of capital controls." Elvis Picardo, "Capital Flight," Investopedia, January 5, 2004, https://www.investopedia.com/terms/c/capitalflight.asp also see "Capital Flight," Investopedia, https://www.investopedia.com/terms/c/capitalflight.asp#ixzz5Czwv8Th0 [accessed 15 October 2020]

67 Supra FN 3

68 Maria Demertzis & Guntram B. Wolf, "The economic potential and risks of crypto assets: is a regulatory framework needed?" Policy Contribution Issue n°14 | September 2018.

69 Global Legal Insights. Blockchain and Crypto currency Regulation. 2019 1st Edition.

For a ban or prohibition to be successful, it has to cause the essential shutdown of the internet. This, of course, may cause a civil uprising which would inevitably question the legitimacy of the government. For a government to ban crypto currencies, it must demonstrate the means to disrupt their domestic use, if it is to be successful. The size of the state needed and the punishments for these law breakers matter a great deal in order for the policies to work.[70] A total ban would in our view, be one that would pose difficult challenges both to the enforcers of the ban and to the essential growth of the innovation sector as far as crypto currencies are concerned.

3.2.0 Adoption Of Crypto currencies.

Previously, we looked at the rationale for prohibition of crypto currencies and one was to pave way for a state backed crypto currency. There are two ways through which a state can adopt crypto currencies – Recognition of prior existing stateless crypto currencies as legal tender and Introduction of a state backed crypto currency as legal tender.[71] There are various reasons for adoption of crypto currencies inter alia – to bypass sanctions, cheaper transaction costs but for the benefit of this paper two reasons are discussed.

a) To Incorporate the Unbanked

Theoretically, less developed countries like Uganda may opt for crypto currencies to incorporate the unbanked. The unbanked are those that cannot access banking services such as store or secure money in banks and can neither make purchases online nor transact outside their locality. With a state backed crypto currency by the central bank then the said crypto currency will cover this unbanked part of the population hence allowing them access to the state financial structure. There are a number of reasons for the existence of the unbanked, inter alia, lack of adequate access to and banking infrastructure,

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70 Joshua Hendrickson and William Luther, "Banning Bitcoin," Journal of Economic Behaviour & Organization 141 (September 2017): 194.

71 Supra FN 10 pg. 69

weak institutional identification process that makes investment in banking risky and unlikely. Therefore, making them a potential untapped potential market for goods and services.

Reference for this can be traced to the mobile money use in Uganda. The people that transact using mobile money Vis a vis those that use banks. There is a huge number of people that do fall in this category of the unbanked.

b) The Auditability of Crypto currencies

States can benefit much more from crypto currencies than anticipated when they first arrived. A state backed crypto currency has the ability to maintain every transaction through the ledger technology, centralised or decentralised. This will go far in auditing and enhancing Anti Money Laundering laws. This will, as well, be able to provide the legal evidence needed against the corruption and embezzlement of funds as these are easily trackable. The state backed crypto currency would also incentivise the users to register and transact peer to peer basis than other electronic methods of transaction, and in any case, a licit user of the currency would have no trouble with registration. Another added advantage is that a state backed crypto currency would theoretically encourage legal employment of the currency as against illegal employment of the other stateless crypto currency.

3.2.1 Difficulties Associated with Adoption of Crypto currencies

With adoption of crypto currencies, there is an assumption that every citizen has access to the internet in a working economy. This poses a great challenge to the adoption strategy. Internet coverage, for instance in Uganda, is about 48%.[72] There are various challenges that come with adoption of crypto

[72] It is estimated that internet penetration in Uganda is at only 48% (42% of Uganda's Population Now Connected to Internet https://www.newvision.co.ug) [accessed 13 March 2021]

currencies. Chief among them, and a concern for this paper, is the speculative attack, the domestic pushback and the domestic institutional pushback.[73]

A speculative attack on a currency occurs when an investor wishes to take advantage of a 'weak currency,' a currency that has depreciated in value relative to other currencies.[74] The objective of a speculative attack is to take advantage of the maturity mismatch of funds. This is a term used to describe a discrepancy when a bank is forced to buy a weaker currency at a loss. This eventually depletes the bank's supply of the weaker currency overtime thereby destabilizing the foreign currency exchange market. A solution to this would be for the IMF to hold a reserve stock of the crypto currency so as to get the affected state out of the danger.

Adoption of the crypto currency presents hurdles both in implementation and adoption. This is because the said currency may face a domestic pushback. Citizens may refuse to adopt the crypto currency due to its complexity over physical money that can be held.

3.3 REGULATION OF CRYPTO CURRENCIES

There are various justifications for the regulation of crypto currencies, however, the paper focuses on – consumer protection and protecting the monetary policy. For if the government loses these then there is loss of legitimacy and sovereignty. As of the writing of this article, there is no country that has issued out regulations for crypto currencies on a supranational level.

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73 Supra FN 10.

74 Plassaras describes the speculative attack, writing "the attack begins by taking what is known as a 'short position' in the currency. To do this, the attacker borrows a sum of the weak currency and sells it for a stronger (more valuable) currency, with the intention of buying the weak currency back for less than the attacker sold it for. If the currency continues to depreciate in value after the short sale, the attacker makes a profit when they buy it back." Plassaras, "Regulating Digital Currencies.

This has been largely because it is difficult to find a regulation that may not necessarily affect the rights of the citizens to own and transact in crypto currencies and at the same time keep the state's needs. Crypto currencies are also hard to define thereby hard to regulate. However, this paper proposes a new approach of regulation later that is elastic and progressive enough to make regulation much easier.

a) Consumer and Investor protection

The digital nature of crypto currencies makes them accessible to the general public provided that public is digitally aware. Broad access is obviously desirable, but exposes vulnerable groups. In a regular financial world such investments like Initial Coin Offerings should be done by venture capitalists who understand the risks.

However, beyond the risks, there have been possibilities of fraud in situations where the system has been beaten. For example, a group of hackers known as the "51 crew" took control of more than 51% of two blockchain clones shift and krypton thereby defrauding close to $65 million in bitcoin through taking over the verification process.[75] Such cases of fraud and uncertainty in the crypto currency world, therefore, call for policy framework on this fast-changing technology. The issues of consumer and investor protection need to be seriously considered.

b) Protection of monetary policy

This is undeniably a very essential creature of the legitimacy of any government. With the wide acceptance and use of a stateless crypto currency in a sovereign state, the citizens will eventually bypass the state and the central bank completely if there is no regulation. We need take consideration

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75 See: https://www.huffingtonpost.in/raja-raman/blockchain-can-transform-the-world-but-is-it-foolproof_a_21660586/ [accessed 17 March 2021]

that crypto currencies may take a high rise in Uganda in the next decade or so and as such regulation to protect the monetary policy is needed to avoid the significant drawbacks, once ignored

3.3.1 Difficulties Associated with Regulation of Crypto currencies.

Regulation of a destructive technology is, in itself, unrealistic and unattainable, as a result of the principle of technology neutrality.[76] Technology changes exponentially while regulation changes incrementally hence regulation often lags behind innovation. Regulation could hamper or prevent innovation.[77] Therefore regulation of crypto currencies should be approached with caution. The fundamentalists and crypto anarchists believe entirely in a system that is away from third party regulators and would eventually develop a more complex one to avoid the regulation. On the other hand, it is the tendency of the technology to evolve that is crucial in justifying regulation.

Therefore, there is need to strike a balance between an appropriate level of regulation that minimally infringes on the citizen's rights to own and use crypto currencies and a level of control on crypto currencies meeting the sovereign state's needs.[78] With regulation, there is a need to define and classify crypto currencies. The needs of individual states vary and are dependent upon the political, economic, and law enforcement requirements – a challenge to the sovereign state.

4.0 THE CASE FOR UGANDA – RECOMMENDATIONS

Having gone through the different ways in which the state can respond to the quickly emerging technologies, there is need to evaluate the best response for

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76 Joseph F. Borg & Tessa Schembri," The regulation of blockchain technology" GLI – Blockchain & Crypto currency Regulation 2019, First Edition. Global Legal Group Ltd, London.

77 Supra FN 15.

78 Supra FN 10.

the state of Uganda. This will be affected by different factors, political and socio economic.

For any state sovereignty to survive this technological innovation, two things must be taken into consideration – the state's monetary policy protection[79] and protection of its citizenry financial investment and consumerism. Therefore, with reference to the justification for a regulatory response discussed earlier – the recommendations will generally be of a regulatory nature, side-lining the ban and adoption with reasons given.

In order to carry on a ban on crypto currencies, enforcement would be impracticable as it would literally require shutting down the internet. One of the justifications for a ban is to prepare the crypto currency space for a state backed crypto currency. This ideally would not be a preferrable agenda for a 3rd world economy[80] like Uganda's.

For any country to adopt crypto currencies, there is a need for its citizenry to be capacitated to adopt the technology. There would be a need for every citizen to access internet cheaply, access a smart phone and a computer. This is not feasible in a country like Uganda. Internet usage and penetration in Uganda still remains at 48%,[81]his clearly does not favour the adoption of the technology unless that challenge is to be addressed which might take a long time.

- **Creation of a broad legal regime concerning Crypto currencies.**

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79 Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj4y5OnsZ7vAhVjqnEKHQ7BBGsQFjAAegQIARAD&url=https%3A%2F%2Fwww.imf.org%2Fexternal%2Fpubs%2Fnft%2F2006%2Fcdmf%2Fch1law.pdf&usg=AOvVaw0yy6O6aHX1GF7Si0Kw29YF [accessed March 2021]

80 Uganda has a 3rd world economy. Check data available at https://theconversation.com/whats-needed-to-take-africa-from-third-to-first-world-in-25-years-61418 [accessed 6 March 2021.]

81 Data provided by Data Reportal accessible at https://datareportal.com/reports/digital-2020-uganda [accessed 7 March 2021.]

The government, through its legislative arm, should create a broad regulation to regulate crypto currencies. Currently the Ugandan government does not recognize any crypto-currency as legal tender in Uganda.

The government of Uganda has not licensed any organization in Uganda to sell crypto-currencies or to facilitate the trade in crypto-currencies and so these organizations are not regulated by the Government or any of its agencies. As such, unlike other owners of financial assets who are protected by Government regulation, holders of crypto-currencies in Uganda do not enjoy any consumer protection should they lose the value assigned to their holdings of crypto-currencies, or should organization facilitating the use, holding or trading of crypto-currencies fail for whatever reason to deliver the services or value they have promised.[82]

However, it pays more if the regulators opted for a more open-minded stand as it's clear that crypto currencies have certain indelible features that can transform financing forever and in order to make a regulation, certain terms need to be considered.

e) Redefine Crypto currencies.

This is to avoid the absurdity that would be created while interpreting the regulation due to uncertainties. Take an example in what happened in *US v Ulbricht.*[83] This case involved a website that was used to sell illegal drugs and payment was wired through crypto currency. There was a huge contention on whether crypto currencies were property or money. The defendant was

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82 Public Statement On Crypto Currencies By The Minister Of Finance. Dated Tuesday October 1st 2019. Available at https://www.finance.go.ug/press/public-statement-cryto-currencies-minister-finance [accessed 17 March 2021]

83 The case is available at https://casetext.com/case/united-states-v-ulbricht-13 [accessed 6 January 2021]

acquitted because the law only construed crypto currency as property and not money.

It is our view that crypto currency is a revolutionary new step forward in innovative, open-source technology, and unless laws drastically change to regulate crypto currencies, companies and businesses are likely to continue refining blockchain technology well into the future. Therefore, rather than allowing individual regulatory bodies to interpret crypto currency under their jurisdictions, the creation of an all-encompassing categorization for virtual currencies with clearly distinct and subordinate legislation, specifically distinguishing licit and illicit crypto currency actions, would prevent confusion regarding crypto currencies among citizens and businesses.

Take a case of the State of Alabama.[84] The state of Alabama enacted The Alabama Monetary Transmission Act, effective August 2017. The act defines "monetary value" as "[a] medium of exchange, including virtual or fiat currencies, whether or not redeemable in money." Notably, Alabama's Securities Commission has emerged as one of the most active agencies to address fraud in the crypto currency industry.[85]

The Alaskan bill of 2017 defines crypto currencies to cover "digital units of exchange that have a centralized repository" as well as "decentralized, distributive, open-source, math-based, peer-to-peer virtual currency with no central administrating authority and no central monitoring or oversight."[86] Colorado through the Colorado Digital Token Act defines a Digital Token as a digital unit with specified characteristics, secured through a decentralized ledger or database, exchangeable for goods or services, and capable of being

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85 See https://www.coindesk.com/alabama-the-unlikely-frontline-for-americas-crypto-fraud-crackdown. [accessed 13 March 2021]

86 H.B. 180, 30th Leg., 1st Sess. (Alaska 2017)

traded or transferred between persons without an intermediary or custodian of value.[87] These are but a few definitions by different jurisdictions that can shape what our definitions can be.

Through such a legislation with a broader definition of crypto currencies, we will have gone as far as covering the technology that has not yet arrived but is on our door steps. The Ugandan legislature, therefore, needs to enact a law that clearly defines or redefines crypto currencies in a broader manner in order to avoid absurdity caused by the uncertainty nature of this technology.

f) Regulation of specific entities

A regulation of some specific stake holders is needed. These entities may include Crypto currency exchanges. Such a regulation may go as far as targeting the privately owned financial institutions functioning as key parts of a crypto currency network. Examples of what such a regulation may entail would be the creation of minimum consumer protection requirements to which the exchange or other institution would be subject or the requirement of locally owned exchanges to keep and provide records to regulatory bodies when necessary.

g) Acceptance of crypto currencies to work alongside the existing Financial Framework

While we think about regulation, we may also consider opening the existing financial space to accommodate crypto currencies. One justification even though unexplored is that the auditability of crypto currencies is both ideally and practically attractive especially for a country that is faced with a scourge of

87 see https://leg.colorado.gov/bills/sb19-023. [accessed 13 March 2021]

embezzlement and corruption[88] since there is evidence of every transaction. The technology will also supplement on the existing financial Frame work.

However, this will work through the following.

I. Creation of an Information and Moral suasion policy.

Crypto currencies, as earlier discussed, gain their trust through universal acceptance. Regulation will hardly work if crypto currencies are accepted but the people are unaware of what they are. The main objective for this policy is to protect consumers and investors in this new technological space through universal awareness. Uganda has not been spared as far as defrauding consumers and investors is concerned.[89] This is because the digital nature of crypto assets makes them directly accessible to the general public, provided people are digitally aware.

Broad access is desirable, but also exposes vulnerable groups. In a regular financial world such investments like Initial Coin Offerings should be done by venture capitalists who understand the risks. Elsewhere this technology has picked the interest of youths and entrepreneurs that seek to use it in various opportunities – to some it is an investment whereas to others, it is a medium of exchange that may come good for evading taxes.[90] Uganda's population has a

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88 Check https://www.ganintegrity.com/portal/country-profiles/uganda/ [accessed 7 March 2021]

89 Dozens Count Losses in Sham Crypto currency Scheme, Daily monitor;5/12/19 available at https://www.monitor.co.ug/uganda/news/national/dozens-count-losses-in-sham-crypto currency-scheme-1863024 [Accessed 6 March 2021]

90 For example, the March 2018 US Student Loan Report quotes the results of a survey, in which about a fifth of all participating students had used financial aid money to invest in crypto currencies, like bitcoin. Also available at https://studentloans.net/financial-aid-funding-crypto currency-investments/ [accessed 6 March 2021]

tendency of accommodating any technological business that makes it easier to work – take an example on how quickly sports betting arose.[91]

Without regulation there is no remedy for the thousands that may fall prey for this technology where fraud happens. This would be absurd for a country that may not guarantee consumer and investor protection hence losing legitimacy.

5.0 CONCLUSION

There is cause to believe that the emerging crypto sector has a bearing on the dramatic events worldwide not only in virtual currencies but e-commerce as a whole. Increasingly, physical space is becoming a concept of gone days.[92] And as such, the debate on devising a mechanism to oversee but also set a minimum standard is a much needed one.

We are looking at a still young technology that is evolving alongside the demand for it. The technology's future use is still unclear as is its place in the financial eco system. The unique investment characteristics and unfamiliar metrics make it impossible to apply traditional valuation mechanisms and techniques. Thus, the opinions given in this paper may even be obsolete by the near future but in any case, we should not wait for the worst to happen for us to start having discussions about this young but rapidly evolving technology.

Most states have not issued any regulations regarding to crypto currencies. Some states have issued guidance, opinion letters, or other information from their financial regulatory agencies regarding whether crypto currencies are "money" under existing state rules, while others have enacted piecemeal

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91 Reagan W, Sports Betting and Gaming; Our youths are losing out. Available at https://parliamentwatch.ug/sports-betting-and-gaming-our-youth-are-losing-out/ Published 6 years ago. [accessed 6 March 2021]

92 Airbnb for instance which is an online platform where property owners and visitors to over 100 countries agree on short term contracts generates over $1 billion annually without owning a single physical premise

legislation amending existing definitions, to either specifically include or exclude digital currencies from the definition.

Uganda itself has issued out statements through the Ministry of Finance and Bank of Uganda to state that crypto currency use should be done with caution a there is no consumer protection or any other protection. The authors of this paper are hopeful that over the next few years Uganda will craft a regulation that balances the dual needs of protecting consumers and investors from businesses operating in the fledgling industry while also promoting continued innovation.

This is by refraining from saddling crypto currency businesses with regulatory burdens that make it financially impractical to operate as it will be once acceptance becomes futile. Whether we like it or not Crypto currencies are a revolutionary currency structure that is here to stay. In order for the Government of Uganda to keep its legitimacy and the state sovereignty, they ought to first acknowledge this technology, and then provide an avenue in which the technology will be used in our financial space.