2023 ISSUE

EDITOR-IN-CHIEF
COLLETTE MELVINA AWANO

EDITORIAL BOARD 2023

THE MAKERERE LAW JOURNAL

The Makerere Law Journal is a free-access online publication that considers, reviews and publishes submissions on a rolling basis all year round. Contributions are primarily from students, but submissions are open to everyone on all matters of legal or quasi-legal relevance. Collectively, all submissions published within a month form an issue and the issues within a calendar year constitute a volume.

The Journal is manned by students of law and is independent of the school of law administration. Submissions are reviewed, edited and published by the student editors who are specifically selected, trained and equipped with the requisite skills. Through an intense editorial process, they work with the author to edit a submission until it is ready for publication.

The views herein expressed are solely attributable to the authors, and do not reflect the views of the Journal, Makerere Law School or the Makerere Law Society.

Articles may be submitted to the Journal here;
editorial@makererelawjournal.org
For more information regarding the Journal, visit
makererelawjournal.org

Editor-in-Chief's Note

Writing this note, I am filled with a mix of emotions—pride, gratitude, and excitement. This Issue is not just a compilation of scholarly papers; it is a journey—one that began with a love for writing and a commitment to doing great work. Joining the Makerere Law Journal as an editor, I could never have imagined the incredible experiences that awaited me. From starting as an editor to becoming Deputy Chief Editor and eventually taking on the role of Chief Editor, each step has been a learning experience filled with growth and inspiration.

One of the greatest joys of being Editor-In-Chief has been witnessing the wide range of legal scholarship our journal has had the privilege to publish. From constitutional law to international law, from human rights to commercial law, the papers in this volume cover a diverse array of legal disciplines. Each article reflects the dedication and expertise of its author.

However, none of this would have been possible without the steadfast support of my Deputy, Mr. Reagan Siima Musinguzi, and our exceptional team of editors and associate editors. Their dedication, professionalism, and passion for legal scholarship have been the driving force behind the success of this journal.

As a scholar, I know the importance of sharing knowledge and fostering curiosity. That is why I am thrilled for readers to explore the pages of this Issue and discover the wealth of ideas and perspectives within. I hope these papers will spark conversations, inspire new research directions, and contribute to the advancement of legal scholarship.

I am incredibly proud of what we have achieved together, and I am excited to share our accomplishments with the world. To everyone who has been a part of this journey—authors, editors, reviewers, and readers—I extend my heartfelt gratitude. Thank you for helping make the Makerere Law Journal a symbol of excellence in legal scholarship.

Collette Melvina Awano
Editor-in-Chief
2022/23 Editorial Board
Makerere Law Journal.

Table of Contents

MAKERERE LAW JOURNAL OCTOBER 2022

Volume 51 Issue 12

UGANDA'S LAND TENURE SYSTEMS AND THEIR IMPACT ON DEVELOPMENT

Nampwera Chrispus

Recommended Citation: Nampwera Chrispus (2022); "Uganda's Land Tenure Systems and Their Impact on Development" Volume 51 Issue 12, Makerere Law Journal, pp. 1- 29.

UGANDA'S LAND TENURE SYSTEMS AND THEIR IMPACT ON DEVELOPMENT

Nampwera Chrispus*

ABSTRACT

The article explores the historical, legal, institutional and enforcement structure of Uganda's existing land tenure systems, criticizing their relative impact on economic development, and emphasizing the quintessential role of an effective and efficient tenure system. Improvement of the current system is both directly and indirectly proportional to development. Further traversed are critical economic issues such as credibility of land from various frameworks, which develop into a rich blend of perspectives on the overall impact of the system on development in Uganda. As a major factor of production and a carrier of economic activities, the land resource in Uganda is an indispensable factor in economic development, and, being a prerequisite for both human and economic activities, its governance is therefore essential for development and growth.

1.0 INTRODUCTION

According to the Food and Agriculture Organisation, land tenure is the relationship, whether legally or customarily defined, among people as individuals or groups concerning land. Land tenure as an institution refers to rules invented by societies to regulate behaviour which define how property rights to land are to be allocated within societies. They also define how access is granted to rights of use, control, and transfer of land, as well as associated responsibilities and restraints. In simple terms, land tenure systems

* LLB. MAK (Hons), PGD (Law Development Centre) Email- <cknampwera@gmail.com>

determine who can use what resources, for how long and under what conditions.[1]

There was no umbrella land tenure system for Uganda in the pre-colonial era, because of the varying practices of customary tenure that differed from one ethnic group to another.[2] In Buganda for instance, the rights of clans over land were comprised of ancestral grounds and not alienable to strangers, while the Kabaka held a paramount title to all land in Buganda. Scholarly researchers have however indicated that whatever the differences, none of the communities in Uganda recognized individual ownership of land.[3]

The individual only had the right to utilize the land as he/she thought best. He could rent it out, pledge crops on the land (but not the land itself), sell land subject to the approval of the family, dispose of the land according to the customary laws of inheritance and dispose of trees growing on the land, among others.

However, when the British came to Uganda, they introduced a new landholding system that altered the way land was held. They introduced three more types of land ownership; mailo, freehold, and leasehold.[4] Margaret Rugadya has noted that the colonial administration thought customary land holding was not a good system of land rights ownership. When signing the agreement, she thought that they would be able to introduce freehold as a unified system of landholding in Uganda, as it was in Britain at that time.[5]

The 1995 Constitution of Uganda and the Land Act then introduced a land regime, which not only recognized everyone's right to own land, but also provided for tenures as means of land ownership. The Uganda National Land Policy was also adopted, which recognizes the role of land in development and its ability to transform the Ugandan peasant society into a modern,

---

1 Lilian Mono W Oryema; Changing Face of Land Tenure in Uganda: Period before 1900 to date. <https://www.researchgate.net/publication/307631527> Accessed 4 February 2022

2 Margaret Rugadya; Land use and villagisation 1999 land reform: the Ugandan experience

3 *supra note 1*

4 *ibid.*

5 *supra note 2*

industrialized, and urbanized society through poverty reduction, wealth creation, and socio-economic transformation. This has however been hindered by issues like the existence of multiple interests over the same land, evictions, fraud, and ineffective dispute resolution mechanisms.

Secure property rights are important. They give confidence to individuals and businesses to invest in land, enable borrowing using land as collateral, enable governments to collect taxes, are essential for urban development and are crucial for private sector development.

This article discusses the origins and incidents of the four land tenure systems in Uganda, their continued impediment on development that would otherwise be through investments, agricultural production and productivity, access to credit, empowering women among others. The paper also discusses the current land regime, makes recommendations regarding secure tenure and then the conclusion.

2.0 LAND TENURE SYSTEMS IN UGANDA

The Constitution of Uganda is to the effect that land in Uganda belongs to the citizens of Uganda, and shall vest in them in accordance with the land tenure systems provided for in the Constitution.[6] It provides for four land tenure systems, which are customary, freehold, mailo, and leasehold.[7] The four tenures are reiterated in the Land Act, together with their respective incidents.[8]

The Ministry of Lands, Housing and Urban Development, claims that 68.6 percent of all households are on customary land, 18.6 percent on freehold, 9.2 percent on mailo and 3.6 percent on leasehold.[9]

2.1 Mailo Land Tenure System

This resulted from allotments made out of the 1900 Buganda Agreement. The system entails the holding of registered land in perpetuity and roots in the

6 Article 237(1)
7 Article 237(3)
8 Section 3 of the Land Act Cap 227
9 A 2010 statistical abstract from the Ministry basing itself on the 2002 Uganda Population and Housing Census Analytical Report

allotment of land pursuant to the 1900 Uganda Agreement between Buganda and the British.[10] Under the agreement, the total land of Buganda was divided amongst the Kabaka and other notables in the protectorate including the royal family, high-ranking officials, chiefs and other private notables.[11]

Peasants or cultivators previously settled on the land were however not recognized, at least until they rioted in 1927 and the Busuulu and Envujju Laws were enacted. Its incidents include the holding of registered land in perpetuity and permitting the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant. It also enables the holder, subject to the customary and statutory rights of those persons lawful or bona fide 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 owner of land held of a freehold title.[12]

2.2 Freehold Tenure System

This tenure grants absolute right of ownership, which is the greatest interest in land for an indefinite period of time.[13] In Uganda, this was first introduced in the Kingdoms of Toro and Ankole by agreements with the British and tenancy terms between the tenants on this land. In the same spirit, the British also issued adjudicated freeholds to some people and religious institutions under the Crown Ordinance of 1803.[14] The Land Act is to the effect that freehold involves the holding of registered land in perpetuity or for a period less than perpetuity which maybe fixed by a condition, and enables the holder to exercise, subject to the law, full powers of ownership of land.[15]

2.3 Leasehold Tenure System

This was born out of the Crown Lands Declaration Ordinance 1922, where all customary land outside Buganda was declared crown land, and, leasehold

---

10 *supra note 1*
11 Article 15 of the Agreement
12 Section 3(4) of the Land Act.
13 Section 3(2) of the Land Act.
14 Section 24(4) of the Ordinance
15 *supra Note 11*

titles would be granted out of that land.[16] Leasehold has since independence in 1962, been granted from public land vested in the government (the state). It is a tenure system which makes access to land on contract possible.[17] The above individualization of ownership of the land changed the focus of land use in Uganda from communal grazing and farming, into a means of supporting the industrial revolution in Europe and America, and it was the case, at least until the enactment of the Public Land Act 1969.

Justice Mubiru has noted that under section 11 (1) (a) of the 1962 Act, all "Public Land" (land that had not been demised by way of lease under the provisions of The Crown Lands Ordinance, 1903), was vested in the Uganda Land Commission.[18]

Then came the 1975 Land Reform Decree which vested all land in Uganda in the state in trust for the people to facilitate its use for economic and social development. It also declared all land in Uganda public land to be administered by the Uganda Land Commission, and abolished freehold interests in the land, except those where this interest was vested in the State through the Commission. In addition, all mailo ownership, which existed immediately before the enactment of the decree, was converted into leasehold for 199 years for public bodies and 99 years for individuals.[19]

Leasehold tenure is either created by contract or by operation of law and the terms and conditions may be regulated by law to the exclusion of any contractual agreement reached between the parties. It also includes a landlord or lessor, granting or deemed to have granted another person, a tenant or lessee, exclusive possession of land usually but not necessarily for a period defined, directly or indirectly, by reference to a specific date of commencement, and usually but not necessarily in return for a rent.[20]

---

16 A Fit-for-Purpose Approach to Register Customary Land Rights in Uganda Hans-Gerd Becker, Uganda

17 Land Tenure and Economic Activities in Uganda: A Literature Review. DIIS Working Paper 2012:13. Section 3(5) of the Land Act

18 Atunya v Okeny HCCA No. 51/2017

19 *supra note 1*. Section 3 of the and Reform Law Decree.

20 Section 3(5) of the Land Act

2.4 Customary Tenure System

This is a system of land ownership based on customary rules formed from norms and cultures of clans, families or communities of which these rules are applicable to. Customary land tenure is wide spread throughout the country and covers more than half of the country (MoLHUD, 2010). Rights to control, use and ownership of customary land are derived from being a member of a clan, family, tribe or a given community.[21]

It is estimated that approximately 70 percent of all available land in Uganda is administered as customary land.[22] In the past, the recognition of customary land rights was only marginally important and also undermined by civil conflicts, demographic and socio-cultural changes. The passing of the 1975 Land Reform Decree, for instance, altered the fundamental legal status of tenants by abolishing the Busuulu and Envujju Laws of 1927, the Ankole Landlord and Tenant Law, and the Toro landlord and Tenant law of 1937.

Customary tenants on public land therefore became tenants at sufferance, had no transferable interest on land, and developments on land could only be transferred after giving notice of three months to the controlling Authority.[23] According to Mugambwa, the implementation of the Decree was not possible because there was the difficulty of identifying on a national or even regional level appropriate development conditions to suit all manner of land and circumstances.

For example, it was impossible to specify the percentage of land that had to be cultivated in a particular period or crops to be planted because there were many variables such as the ecology of the land, weather patterns, and value

---

21 Section 3(1) of the Land Act

22 *supra note 15*

23 John Mugambwa; A Comparative Analysis of Land Tenure law reform in Uganda and Papua New Guinea. Journal of South Pacific Law (2007) 11 (1). Also, the term "tenant at sufferance" refers to a person who initially entered in possession with the consent of the landowner, and remains in possession, after the period for which the consent was given expires, without the consent or dissent of the landowner (Butterworths Australian Property Law Dictionary (1997)).

of the land. Moreover, the cost of enforcing the conditions was likely to be disproportionate to the benefit.[24]

The other main criticism of the Decree was that it rendered the status of customary tenants vulnerable and caused panic throughout the country with landowners fearing losing their land to the rich and well connected people. This made the Decree's implementation partial, because it was politically unpalatable.[25]

With all free land converted into leaseholds, there was no tenure security, and evictions from land became rampant. Customary occupants could be evicted at any time, despite the condition of payment of compensation prior, as the decree empowered the government to lease any land occupied by customary tenants to any person (including the occupants) without the consent of the occupants. According to Mugambwa, during its existence, government activities were almost at a standstill and it was not until the mid-1980s when relative peace was reinstated and indeed, the government declared land tenure reform one of its major policy initiatives.[26]

This was the case until 1995 when Uganda created a legal framework for the registration and recognition of the prevailing customary land tenure. Legislation and policies have also since been put in place promoting official land titles and modernizing land law for customary ownership and land governance.[27]

3.0 CURRENT TENURE REGIME.

The current land regime is majorly governed by the 1995 Constitution and the Land Act Cap 227. The two collectively abolished the alluvial or radical title to land in Uganda that had been introduced by the 1975 Reform Decree.

The present principal constitutional provisions vest land in the citizens of Uganda, recognize and protect private property rights and recognize

---

24 *ibid*
25 *ibid*
26 *Supra Note 23*
27 *supra Note 14*

customary, mailo, leasehold, and freehold land tenures. Leasehold and customary tenures have to be converted to freehold to guarantee the security of lawful and bona fide occupants. On the latter, the Land Act espouses provisions on the security of tenure of all land users, especially regarding the relationship between registered landowners as well as lawful and bona fide occupants.[28]

The current land laws' primary objective is to operationalise the land reforms in the 1995 Constitution, the latter having brought about fundamental reforms in ownership, tenure management and control of land in Uganda. At the forefront is Article 237 of the Constitution, which provides that land shall belong to the citizens of Uganda and shall vest in them in accordance with the four tenure systems. This provision is reiterated in section 3 of the Land Act. This position totally reverses the old system where land was vested in the state. The state no longer controls ownership of land in Uganda.[29]

The current land regime also recognises people's right to hold communal land, form themselves into a communal land association, form a common land management scheme by which the members agree to manage the communal land and to set out their rights and duties. Under the Land Act, any person, family or community holding land under customary tenure on former public land may acquire a certificate of customary ownership in respect of that land in accordance with this Act.[30]

The regime also provides protection of family land by requiring spousal consent before any transaction on such a land can take place and makes void any customary provisions or practices that may deny women and children their land rights, thereby ensuring that the rights of these vulnerable groups are protected.[31]

At the start of the reform process, it was stated that the most appropriate goals for tenure reform in Uganda were that the land tenure law and practice

---

28 Sections 29 and 30 of the Land Act
29 *supra note 2*
30 Sections 4,5,6,7 and 8 of the Land Act
31 Section 38A and 39 of the Land Act.

contribute to the economic and social development of agriculture. The tenure had to protect the land rights of farmers with no alternative source of income and contribute to the evolution of a uniform, efficient and equitable tenure system for the nation. Whether or not the current reform will achieve these expected results still remains to be seen.[32]

4.0 LAND AND DEVELOPMENT.

Here, I interrogate the link between land and development, examining how secure tenure contributes to development. To understand development in this context, reference is made to the Land Policy 2013, whose objective was to transform Uganda's society through the optimal use of land resources into a prosperous and industrialized economy. Its goal was to ensure efficient, equitable and optimal utilization and management of land resources for poverty eradication, wealth creation and socio-economic development.

In agrarian societies, land is not only a means of generating a livelihood, but is also a means of accumulating wealth. In Uganda, it is a basic source of food, employment, a key agricultural input, and a major determinant of access to other production resources. The nature of land tenure therefore has profound implications for the development process of nations.[33]

The Land Act, which provides for land reform, therefore has far reaching implications on development, as it aims to do this through functioning land markets, establishing security of tenure, and ensuring sustainable utilization of land to bring about development.[34] These aspects will be discussed herein below. Because land is important for both human and economic activities, land governance is essential for development and growth.

Sustainable land governance is strongly and closely linked to economic development. As the carrier of economic activities, the land resource is an indispensable production factor of economic development. It is also the

32 *supra note 2*

33 John Anthony Okuku; The Land Act (1998) and land tenure reform in Uganda. Africa Development, Vol. XXXI No.1 2006 pp 1-26.

34 *ibid*

ultimate resource, for, without it, life on earth cannot be sustained.[35] It is a basic element to every country, since all activities of man take place in it.[36]

A nation's economic wealth is directly related to the richness of its natural resources.[37] This is so because land determines agricultural production, the industrial progress and prosperity of a country, its total production, influences its economic growth, maintains ecological balance, directly or indirectly fulfills the basic needs of the people, and influences trade, among others.[38] All primary occupations like agriculture, animal husbandry, poultry farming, fisheries, dairying, and forestry among others are land-oriented.[39]

Land tenure, meanwhile, determines who can use land, for what and how long, and under what conditions. Tenure arrangements may be based both official laws and policies and on informal customs. If those arrangements are secure, users of land have an incentive to not just implement best practices for their use of it, but also, to invest more.[40]

Secure property rights and efficient land registration institutions are therefore a cornerstone of any modern economy.[41] They give confidence to individuals and businesses to invest in land, allow private companies to borrow using land as collateral and expand job opportunities. They enable governments to collect property taxes necessary to finance the provision of infrastructure and services to citizens.[42]

With land at the heart of development therefore, secure land tenure is vital to building inclusive, resilient, and sustainable communities that will propel economic and social progress well into the future. The National Land Policy 2013 recognizes the role of land in development and its ability to transform

---

35 The United Nations Economic Commission for Europe, 1996
36 *supra note 1*
37 Land in Economics: Notes, Characteristics, Functions, Importance and Productivity. at <https://www.economicsdiscussion.net> Accessed 13 December 2021
38 *ibid*
39 *supra note 34*
39 *ibid*
40 *supra note 14*
41 <https://blogs.worldbank.org/voices/7-> Accessed 5 December 2021
42 *supra note 14*

the Ugandan peasant society into a modern, industrialized, and urbanized society.

The policy is to the effect that this can be done through poverty reduction, wealth creation, and socio-economic transformation. This has however been hindered by the existence of multiple interests over the same land, tribal land disputes, evictions, land grabbing, fraud, undue utilization, land fragmentation, environmental degradation, and ineffective dispute resolution mechanisms among others.[43]

Note that commercial dealings and population growth has intensified demand for formal recognition of land claims especially those transacted through market mechanisms, for example, tenancies purchased in urban areas or for land purchased in rural areas.[44] There is also evidence that tenure insecurity does have an impact on land use. For instance, compared with weak or insufficient property rights, tenure security increases credit use through greater incentives for investment, improved creditworthiness of projects, and enhanced collateral value of land.

It increases land transactions, facilitating land transfers from less efficient to more efficient users by increasing the certainty of contracts and lowering enforcement costs, reduces the incidence of land disputes through clearer definition and protection of rights, and raises productivity through increased agricultural investment.[45] It is therefore apparent that land tenure impacts investment, credit availability, poverty rates, land values, and agricultural productivity, which are all linked to economic performance.

When land tenure and property rights are secure, individuals can make investments, secure credit, sell land, and make longer-term decisions about agricultural practices. On the other hand, in developing countries (like

43 Land reform: A source unending conflict in Uganda. Uganda sustainability Bulletin, A Publication of Uganda Coalition for Sustainable Development

44 Leatherdale and Palmer, 1999

45 Michael Roth and Dwight Haase; Land Tenure Security and Agricultural Performance in Southern Africa. June 1998

Uganda) where land tenure is insecure, people lack opportunities to invest in or profit from the land, and their transactions are not protected by the State.[46] Below, the author discusses how secure tenure encourages or can encourage development by improving agricultural productivity, encouraging investments among others.

4.1 Economic Growth.

The is an argument underpinning the theory on the formalization of land rights is that land can contribute to investment and increased productivity through several interrelated mechanisms. That security of tenure conferred by formal rights can make people more willing to invest in their land enabling them to access credit and also facilitate and even encourage transfers of land through land markets. Land can therefore have an impact on economic growth through agricultural productivity, and through its use as collateral for credit, through investments in land and non-land enterprises and through land markets.[47]

In rural areas, secure land tenure could lead to economic growth by allowing farmers to invest in better seeds or tools, see returns on those investments, making it easier to gain credit to finance investments in agriculture or other entrepreneurial activity. It may also free farmers to choose whether they want to use their land for agriculture, or lease it to someone else and pursue an alternate livelihood. This attracts the external investment necessary for broad-based economic growth.

In addition to the above, when governments seek to stimulate economic growth through foreign investment in large land areas, the lack of secure tenure presents a problem for the existing individuals or community holders who occupy that land but are unrecognized as rightful holders of property. These people are at risk of displacement and being denied fair, prompt, and adequate compensation for resources and livelihoods lost, which affects their investment in the land, agricultural productivity, and the land market.

---

46 Economic Growth Depends on Secure Land Tenure. at <https://www.land-links.org> Accessed 14 December 2021

47 Platteau, J.-P. 2000.

In recognition of this, the United States Agency for International Development supports the United Nations-negotiated Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and forthcoming Principles for Responsible Agricultural Investment. This is aimed at improving the security of property rights for all, facilitating the development of more economic opportunities for small, medium and large-scale producers, and contributing to food security and economic growth.

From the foregoing, it is clear secure tenure will stimulate economic growth and development through increased agricultural productivity, investments and a more competitive and rewarding land market.

4.2 Access to Credit

Finance/credit has been recognised as an important driver of economic growth (Claessens 2006). Access to financial services can be defined as broad financial inclusion or broad access to financial services in a specified location.[48] Several theoretical arguments are commonly advanced concerning the links between land ownership, land markets, security, and production incentives.[49]

It is argued that the presence of an efficient land market results in a more efficient allocation of land between producers which stimulates production. Secure land rights stimulate the credit market through the use of land as collateral, and, security of land rights is linked to increased incentives to invest in land and land-based production.[50]

Availability of credit in Uganda has tended to be relatively narrow, and uptake among rural households is not high. The formal credit system operates based on land as collateral, with a preference for urban and titled land that is more easily disposed of in cases of default. While financial services in Uganda have developed, the majority of smallholders "do not or cannot access the services

48 *ibid*
49 *Ibid*
50 Institutions, Social Norms and Economic Development, Jean Philipe Platteau, 2000.

they need to compete in the market and to improve their livelihoods."[51] Therefore, with majority of the land in the country untitled, coupled with insecure tenure, access to credit is limited, as the land cannot then act as security, thwarting attempts to invest in the land that would otherwise, lead to development.[52]

4.3 Agriculture

Secure land rights are an important pillar in agriculture.[53] Agriculture is the backbone of Uganda's economy and the most important source of income and livelihood for the predominantly rural Ugandan population. In just 2020, agriculture contributed around 23.93 percent to Uganda's Gross Domestic Product,[54] while according to the International Trade Administration, in the fiscal year 2020/2021, agriculture accounted for 31 percent of Uganda's total export earnings.

According to the International Labor Organization, employment in agriculture in Uganda was reported at 72.44 percent in 2020,[55] though the Uganda Bureau of Statistics puts the figure at 70 percent of Uganda's total working population.[56]

However, the International Trade Administration reports that Uganda's Agriculture sector growth is impaired by among others; a shortage of agricultural credit, the lack of all-weather feeder roads in rural areas, a complicated and inefficient land tenure system. Moreover, because of the significance of agriculture to rural livelihoods, the land is the most important asset for many Ugandan households,[57] with the average land holdings estimated at 2.2 hectares per household. Still there are inter and intra-

---

51 MAAIF 2010: 39
52 *supra note 15.*
53 <https://twitter.com/intent/tweet?text> Accessed 13 December 2021.
54 <https://www.statista.com Accessed 13 December 2021.
55 <https://tradingeconomics.com.> Accessed 11th December 2021
56 <https://www.trade.gov/country-commercial-guides/uganda-agricultural-sector.> Accessed 16 December 2021.
57 Agriculture: A Driver of growth and poverty reduction. The World Bank. Accessed at <https://www.worldbank.org > Accessed 26 April 2022.

regional inequalities in this distribution, though, evidence suggests much of this land is not cultivated.[58]

Additionally, there is evidence that agriculture can contribute to poverty reduction beyond a direct effect on farmers' incomes.[59] Agricultural development can stimulate economic development outside of the agricultural sector, and lead to higher job and growth creation. Increased productivity of agriculture meanwhile raises farm incomes and food supply, reduces food prices, and provides greater employment opportunities in both rural and urban areas[60]. Higher incomes can also increase the consumer demand for goods and services produced by sectors other than agriculture.

Such linkages between growth in the agricultural sector and the wider economy can then enable developing countries to diversify to other sectors where growth is higher and wages are better. In Uganda's first Poverty Eradication Action Plan (PEAP) in 1996 – 1997, access to land and sustainable use of land was recognized as critical issues for enabling the poor to increase their incomes. The strategies included in the plan recognized tenure security particularly that of smallholders, women, and tenant farmers, as a key objective of government policy towards land.

The plan based its strategy on the argument that tenure insecurity was a barrier to increased production by smallholders. In addition, the lack of acceptability of rural land as collateral by the banking system was believed to be a problem. Second, there is proof that as agricultural productivity increases, other sectors also develop and countries are less dependent on agriculture for their economy.

Agricultural growth, therefore, contributes to wider growth and poverty reduction. It is no secret that with secure land rights, farmers and others are more likely to develop their property, plant crops with longer time horizons, or use the land as collateral for bank loans to improve their standard of

58 McKinnon and Reinikka, 2000.
59 <https://www.soas.ac.uk/cedep-demos/> Accessed 15 December 2021.
60 The Current Aid Framework: Agriculture & Rural Development Investments; Agriculture and its contribution to poverty reduction. Accessed at <https://www.soas.ac.uk> Accessed 27 April 2022.

living.[61] It is estimated that roughly 2.5 billion people around the globe survive on less than 2 dollars a day, and about three-quarters of them live in rural areas and are dependent on the land they cultivate to survive. Yet, around 1 billion of them do not have secure rights to the land they till.[62]

Land reform has been established as having potential impacts on all the four PEAP goals of creating an enabling environment for rapid and sustainable economic growth, good governance, direct income-enhancing actions, and direct enhancement of the quality of life of the poor. This, and more, justify why, the World Bank, with current commitments of approximately 1.5 billion dollars, has supported more than 50 countries over the last 25 years to improve land tenure security. This has been through policy and legal support, institutional and capacity development, and financing efforts for land titling and digitalizing land registration systems, in addition to analytical products and technical assistance to many countries.[63]

Agricultural productivity can therefore be seen as a first step or engine of growth leading to greater income for a country.[64] It is interesting to note that historically, no poor countries have reduced poverty solely through agriculture, but almost none have achieved it without increasing agricultural productivity in the first instance. Agricultural growth is an essential complement to growth in other sectors.[65]

From the above, it is clear that most of Uganda's households depend directly or indirectly on agriculture creating a link between land and economic activity and justifying land tenure effects on agricultural productivity and investment and the need for secure tenures.

---

61 Why #landmatters for economic development; Deborah Horan. <https://www.devex.com/news/> Accessed 13 December 2021

62 *ibid*

63 <https://blogs.worldbank.org> Accessed 20th December 2021

64 Seven reasons for land and property rights to be at the top of the global agenda <https://landportal.org/node/81137> Accessed 7 January 2022

65 Department for International Development 2005

4.4 Private Sector Development.

Secure property rights and access to land are crucial for private sector development and job creation. The private sector needs land to build factories, commercial buildings, and residential properties, which of course fuel development.[66] According to a World Bank report that assessed private sector performance in the Middle East and North Africa, the top constraints to the region's private sector include the lack of access to land as well as issues related to land titling and registration.[67]

Additionally, companies often use land or property titles as collateral to finance operational costs and to expand existing businesses or open new ones, thus creating more jobs, a further testament to the relevance and importance of secure tenure.[68]

4.5 Empowering Women.

Secure property rights are important in empowering women. The World Bank Group's gender strategy highlights access to assets as one of the three main pillars for women's empowerment.[69] Unfortunately, a host of women around the world are still denied their land rights by inefficient legal frameworks that do not fully support women's equal access to property ownership or use of land titles as collateral without a male guardian,[70] and men not registering their properties as joint property, resulting in women often losing their home or land in the case of a divorce or the death of the husband.

In some cultures, women do not inherit land or properties, despite having legal rights to do so – they are often forced by male relatives to waive their rights.[71] Women in Uganda provide 80 percent of farm labor, yet own a paltry 7 percent of the land.[72] Therefore, the stake of Uganda's female farmers in

---

66 J. Bosworth: Integrating land issues into the broader development agenda: Uganda. <https://www.fao.org/3/y5026e/y5026e0f.htm> Accessed 26 April 2022

67 Laura Tuck and Wael Zakout: 7 Reasons for land property rights to be at the top of the world agenda. <https://blogs.worldbank.org> Accessed 5 December 2021

68 *supra note 63*

69 <https://documents.worldbank.org> Accessed 19 December 2021

70 *supra note 64*

71 <https://blogs.worldbank.org/> Accessed 19 December 2021

72 The Current Aid Framework: Agriculture & Rural Development Investments; Agriculture and its contribution to poverty reduction. <https://www.soas.ac.uk> Accessed 27 April 2022.

this critical productive asset is severely limited and the manner of accessing land for women perpetuates social and economic inequality.[73]

Besides the difficulties of divorced and widowed women in retaining access to marital land, a growing body of evidence points to the fact that married women are denied the opportunity to plant perennial cash crops or tree crops, and withdraw their labor from cash-crop production on fields they do not control.[74]

There are direct links between women's land tenure insecurity and household food insecurity. At the household level for example, there are growing indications that gender divisions of labor and control of income tend to undermine food security where the expansion of cash crops is at the expense of food crop cultivation.[75] The gender distribution of land rights has been linked to this phenomenon, specifically because where women own land or have a stronger stake in decision-making on the family farm, they also have a higher degree of control over production and income from cash crops.[76]

This therefore means low incentives to produce, exacerbates poverty and food insecurity as women who provide 80 percent of farm labor in the country own and control a paltry 7 percent of the land. With that, there is no way we can transform the poor society into an industrialized and modernized economy, create wealth and achieve socio-economic development.

5.0 CURRENT LAND SYSTEM SHORTCOMINGS

Globally, a measly 30 percent of the global population has legally registered rights to their land and homes.[77] Without land tenure systems that work, economies risk missing the foundation for sustainable growth, threatening the livelihoods of the poor and vulnerable the most.[78] According to the World

---

73 *ibid*
74 *ibid*
75 Ovonji-Odida *et al.*, 2000
76 *ibid*
77 <https://twitter.com/intent/tweet?text=> Accessed 2 February 2022
78 Why #landmatters for economic development; Deborah Horan. <https://www.devex.com> Accessed 13 December 2021

Bank, it is simply not possible to end poverty and boost shared prosperity without making serious progress on land and property rights.[79]

In Uganda, around 5 - 10 percent of households access land predominantly through borrowing or renting.[80] According to Bosworth,[81] such households are often among the poorest and supplement their incomes by casual labor, and, for those renting land, rental rates frequently represent a substantial proportion of the value of crop produced and this may contribute to poverty.[82] Nevertheless, in areas where land is in short supply, the availability of rental land provides an opportunity for some households to access land, and can be an important part of the strategy for increasing income, acquiring assets and eradicating poverty.[83]

Land tenure insecurity therefore represents one of the major challenges that people in developing countries like Uganda face. The majority, who are small-scale farmers, especially women, work on land that they do not own, exacerbating their poverty, lack of political power, and equal recognition of basic rights.[84] Insecure land tenure rights in Uganda, for instance, make farmers shun long-term investments on land which could otherwise help them manage resources sustainably.

In this section, discussed is how Uganda's land tenure systems have affected land rights, investment, productivity, and development.

5.1 Customary Land Rights

Article 237 (4) (a) of the Constitution and Section 3 of the Land Act recognize customary tenure as one of the forms of holding land in Uganda. The majority of Ugandans hold land under customary tenure and, this provision, therefore, guarantees the security of land ownership. Further, they can even acquire a certificate of customary ownership of the land they occupy, which they can

79 <*supra note 38*>
80 <https://www.fao.org> Accessed 19 December 2021
81 *supra note 69*
82 *Ibid*
83 *Ibid*
84 World farmers' organisation land tenure challenges & practices <https://www.wfo-oma.org> Accessed 9 December 2021

convert into a freehold title. This certificate has also been accorded value under the Land Act enabling it to be transferred, mortgaged, or pledged, enabling holders to have access to credit.

Around 75 percent of Uganda's population is believed to occupy land under customary tenure, either on an individual or a communal basis.[85] In as much as the Constitution recognizes customary land tenure as one of the modes of land ownership in Uganda, the subsequent enabling legal regime, in particular the Land Act did not capture the aspirations of the Constitution.[86]

According to the land policy 2013, customary tenure continues to be regarded and treated as inferior in practice to other forms of registered property rights, thereby denying it an opportunity for greater and deeper transformation.[87] It is assessed as lesser regarding dispute resolution and mediation compared to the statutory system and weighed as less to other tenures that have titles for proof of ownership in courts of law in the administration of justice.

It must be converted to freehold before it attains the totality of the bundle of rights inherent in all other registered tenures that are held in perpetuity, and is disparaged and sabotaged in preference of other forms of registered tenures, denying it the opportunity to progressively evolve.[88] According to Action 4 Justice, because under customary land tenure land is not registered, there are a number of problems that arise with it.

These include land grabbing, because the customary land owner cannot easily prove their ownership, difficulty in establishing interest over the land, difficulty in establishing which of the multiple interests take precedence over the other, high chances of encroachment among others.[89] Customary tenure limits development because the land is not documented and hence not

---

85 Oates and Ecaat, 1999. Supra Note 21

86 Piloting the protection of rights to customary land ownership in Acholi land. Existing Tenure Options for Protection of Customary Land Owners. A legal opinion submitted to Trócaire and joint Acholi sub-region leaders' forum (JASLF)

87 Steven Lawry; Customary Land Tenure. <https://dai-global-developments.com/articles/customary-land-tenure> Accessed 27 December 2021

88 The Uganda National land Policy, February 2013, page 17

89 Land Rights in Uganda; Land Disputes- Problems with ownership and Rights. Accessed at <https://uganda.action4justice.org/> Accessed 12 March 2022

available for planning. More so, some customs such as those prohibiting sale of land outside the clan do not promote the maximum utility of land inhibiting development.[90] Customary tenure does not encourage record keeping, which makes the resolution of disputes and the approval of any development plans difficult or impossible.

So, despite the constitutional and legislative guarantee, customary land tenure and customary land owners still suffer from inadequate legal protection, a situation that is analogous to that in the colonial and the immediate post-independence era and inhibits development.

5.2 Tenants on Registered Land

Previously, being engaged in a semi-feudal customary relationship with the chiefs, were tenants vulnerable to expulsion by the landowner without any legal protection. It is estimated that currently, this applies to around 19 percent of the population, occupying around 14 percent of the land area.[91] The 1995 Constitution and the Land Act however currently guarantees security of tenure to tenants on registered land, commonly referred to as lawful or bona fide occupants.

The tenants can acquire certificates of occupancy on the land they occupy, and if they so wish, can negotiate with the registered owner to be able to acquire a freehold title.[92] They are to pay the registered owner of the land a ground rent, and failure to do this for two consecutive years may lead the tenant to lose their security if they do not have sufficient reasons for defaulting.

The registered owner cannot ask the tenants for anything except the amount provided for the certificate of occupancy, and the certificate can also be mortgaged, pledged, or transferred. The tenant also has a right to pass on their tenancy in a will.[93] The Land Act of 1998 made clear the tension between

---

90 Brian Makabayi and Moses Musinguzi; To What Extent Have the Existing Land Tenure Systems Affected Urban Land Development?

91 *supra note 63*

92 Section 29 of the Land Act

93 Sections 34 and 35 of the Land Act

the landlord (who is the ultimate owner of the land) and the tenant (who is the current user of the land).

These conflicting rights make it hard for landlords to develop their land even when they are financially able, which weakens the powers of the landlords over their land, and of course, hard for tenants because they are not ultimate owners of the land.[94]

The issue of willing buyer-willing seller coined in the Act further complicates the transfer of land from one person to another. Where the landlord might wish to buy the tenant off the land, the tenant must be willing to sell their rights to use the land and vice-versa. Moreover, tenants have failed to develop land, out of fear that the landlords will one day evict them; likewise, landlords cannot develop the land because they cannot evict the tenants.

This standoff has inhibited land markets in urban areas where purchasers have trouble purchasing secure property holdings. This land use deadlock has also inhibited land development, investment and productivity, delaying the country's transformation into a modernised economy.

5.3 Squatters.

Lawful and bona fide occupants or tenants enjoy security of occupancy and in return, pay annual ground rent to the Landowner. They may acquire a Certificate of Occupancy by applying for it through the Landlord, and with the permission of the landlord, may sublet or subdivide the land they occupy.[95] On the other hand, squatters are illegal occupants and are not protected by any law.

In urban areas, particularly Kampala, informal trading and inheritance of land has created a complex web under which "squatters" claim rights to land. Similar situations exist in leasehold properties, with sublease rights being traded for substantial fees. Whereas the law does not recognize squatters, they have oftentimes received backing from the President in the face of evictions, and more often than not, stood in the way of any possible

94 Sections 35, 36, and 37 of the Land Act
95 Sections 31, 33, 34, 35 and 36

developments on the land. An example is in Masindi where a land conflict involving squatters affected the completion of many government projects including roads.[96]

5.4 Legislation

Uganda's legislation relating to registration, surveying, and land acquisition is outdated and not suited to the current needs of landowners and users. The requirements for obtaining certificates of title, for instance, have made the process of acquiring registered title, registering subsequent transactions and transfers difficult and costly, with the addition of bureaucratic inefficiency.

The 1993 Constitutional Commission reported that many people had given up trying to obtain titles to their land because of corruption in the land office. Underfunding and underinvestment, together with lack of qualified personnel in some areas also hamper efficiency further, particularly due to the poor condition of records and maps and lack of equipment.

From the foregoing, it is clear this may undermine the whole notion of development through privately owned land.

5.5 Dispute Resolution.

The inefficiencies and inequities of the judicial system regarding land are of greater importance as the numbers of disputes multiply every other day in response to the increasing commercialization of land in some areas and the problems in the land registry. The majority of land disputes take forever to be resolved due to inaccessible judicial mechanisms brought about by few judicial officers, the high cost of litigation, the complexity of the process, and physical barriers like distance that keep away litigants.

The situation is worsened by the ever-growing case backlog resulting from countless adjournments which ties pieces of land in courts barring any possible developmental activities.

---

[96] Land wrangles threaten food security, government projects in Bunyoro <https://reliefweb.int/report> Accessed 23 May 2022

6.0 RECOMMENDATIONS.

The link between secure land rights and economic development became more and more recognized in the international development community, so much so that there is the inclusion of land rights as a goal in the post-2015 development agenda.[97] In the premises, these recommendations are made:

6.1 Opportunities for the Resource-Poor

There is a need for land reform, which will provide opportunities for the resource-poor to access land via redistribution, resettlement, or rental and lease markets; and, increase and sustain productivity. The country's national development arguments for the land-reform process are still couched in terms of increasing the ability of the poor to raise their incomes.

Of importance are policy and legal framework, sustainability of land use, land tenure and protection of land rights, land administration and land information, decentralization, and sector efficiency and self-sufficiency.[98] There is therefore need to reform land tenure, including legal and regulatory reforms that might need consolidation, and/or harmonizing the existing laws, and institutional capacity building to reduce on the bureaucracy associated with land transactions.

6.2 The need to Recognize "Secondary Rights" to Land Tenure

Here, recognition does not merely mean that everyone holds a legal title to his or her land or home. The United States Agency for International Development endorses the principle of "secure enough" tenure, in which there is a continuum of rights that can be strengthened through a variety of affordable and sustainable approaches.

These approaches may include the respect of customary or indigenous rights to an area in addition to legal recognition, certificates that secure the rights to use or manage resources, a community-managed titling process, or more formal strategies such as land titling or creating public land registries.

Tiernan Mennen: Know your SDGs: Land matters for sustainable Development. Accessed at <https://chemonics.com/blog>

98 <https://www.fao.org/> Accessed 26th December 2021

6.3 Publicity and Sensitization

Sometimes, locals are unaware of new laws or regulations that strengthen their claims to the land. State and non-state actors can therefore work to ensure that people know their rights. When Kenya passed land reforms, for instance, Landesa informed not only villagers in rural areas, but also government officials and judges. In Burkina Faso, Madagascar, Mozambique, and elsewhere, MCC helped the government reform land tenure laws and inform the public of changes to their land rights.

Sensitizing citizens makes them aware of their rights, aware of the laws and policies that relate to land, creating responsive and accountable institutions. That is what ends up driving economic growth in the end.

6.4 Supporting Projects that Encourage Long-Term Investment

There is evidence to show that when land owners feel secure in their land rights, they might grow crops that require a longer time to bear fruit. This often leads to greater crop diversification and other measures that improve agricultural output over time and lead to greater long-term economic development. In Ethiopia, for instance, donor projects to plant trees following droughts in the 1980s largely failed, because the ownership of the trees was not well defined, so farmers were not interested in maintaining them.

By contrast, for farmers in the Sahel, where farmers have secure access to communal lands, had successfully maintained an estimated 200 million new trees in the last 20 years, leading to richer soil and less wind erosion. In Niger and Burkina Faso, farmers dug in hardened soil to plant manure that would soften the ground, eventually restoring some 500,000 hectares of barren and degraded land.

If they didn't have secure rights, they wouldn't have been motivated to invest all their labor and energy in it. Land tenure is a very complex and political issue but very vital for the future.

7.0 CONCLUSION.

Today, land transfers are one of the most contested issues in Uganda. In the wake of development strategies in the country, the power to control and to use land in Uganda is seen as an impetus to investors for both agricultural and industrial development. A good land tenure system, at least for Uganda, ought to support agricultural development through the function of the land market, which permits those who have rights in land to voluntarily sell their land, and for progressive framers to gain access to land. A good land tenure system ought to protect people's rights in the land and especially those who have no other way to earn a reasonable living or to survive.

Both the 1995 Constitution and the Land Act have gone a long way in providing security of tenure to all land users including customary, bonafide and lawful tenants, resolving the impasse between registered land owners and tenants by occupancy and recognising customary tenure as legal tenure equal to other tenures. They have provided an institutional framework for the control and management of land under a decentralised system.

However, there are still informal developments or lack thereof in Uganda. This is attributed to inefficient land access processes caused by poorly administered land rights, a handful of land use planning and development regulations ill-suited to the local tenure situation, and institutional incapacity. It can also be accredited to ignorance of the law, political interference, institutional and administrative weaknesses among others.

Hence, there is the need for a suitable land tenure, preferably uniform, coupled with a good judicial system, affordable and accessible legal services, and a trustworthy land administration system for effective land tenure, to drive Uganda to development.

LIST OF REFERENCES

Agriculture: A Driver of growth and poverty reduction. The World Bank. at <https://www.worldbank.org> Accessed 26 April 2022

Atunya Valiryano v Okeny Delphino High Court Civil Appeal No. 0051 of 2017

Brian Makabayi and Moses Musinguzi; To What Extent Have the Existing Land Tenure Systems Affected Urban Land Development?

Crown Lands Declaration Ordinance 1922

Economic Growth Depends on Secure Land Tenure. <https://www.land-links.or> Accessed 14 December 2021

Hans-Gerd BECKER; A Fit-for-Purpose Approach to Register Customary Land Rights in Uganda.

How Uganda's insecure land tenure system affects climate adaptation work accessed at <https://ccafs.cgiar.org> Accessed 9 December 2021.

J. Bosworth; Integrating land issues into the broader development agenda: Uganda. An earlier version of the paper presented to a World Bank Conference on Land Reform, Kampala, April - May 2002

John Anthony Okuku; The Land Act (1998) and land tenure reform in Uganda. Africa Development, Vol. XXXI No.1 2006 pp 1-26.

John Mugambwa; A Comparative Analysis of Land Tenure law reform in Uganda and Papua New Guinea. Journal of South Pcific Law (2007) 11 (1).

Land in Economics: Notes, Characteristics, Functions, Importance and Productivity. <https://www.economicsdiscussion.net> Accessed 13 December 2021

Land reform: A source unending conflict in Uganda. Uganda sustainability Bulletin, A Publication of Uganda Coalition for Sustainable Development.

Land Rights in Uganda; Land Disputes- Problems with ownership and Rights. Accessed at <https://uganda.action4justice.org/> Accessed 12 March 2022.

Land Tenure and Economic Activities in Uganda: A Literature Review Rasmus Hundsbæk Pedersen, Rachel Spichiger, Sarah Alobo and Michael Kidoido,

with the collaboration of Bernard Bashaasha and Helle Munk Ravnborg DIIS Working Paper 2012:13

Land wrangles threaten food security, government projects in Bunyoro. Accessed at <https://reliefweb.int/report>

Laura Tuck and Wael Zakout: 7 Reasons for land property rights to be at the top of the world agenda. https://blogs.worldbank.org Accessed 5 December 2021.

Leatherdale, J. & Palmer, D. 1999. Land services appraisal, Land Act Implementation Study, Annex 5.

Margaret Rugadya; Land use and villagisation 1999 land reform: the Ugandan experience.

Ministry of Finance, Planning and Economic Development (MoFPED). 2001. Uganda poverty status report. Kampala, Ministry of Finance, Planning and Economic Development.

Oates, P. & Ecaat, J. 1999. Strategic Environmental Assessment, Land Act Implementation Study, Annex 4.

Piloting the protection of rights to customary land ownership in Acholi land. Existing Tenure Options for Protection of Customary Land Owners. A legal opinion submitted to Trócaire and joint Acholi sub-region leaders' forum (JASLF)

Platteau, J.-P. 2000. Does Africa need land reform? In C. Toulmin and J. Quan, eds. evolving land rights, policy and tenure in Africa. London, FID/IIED/NRI.

Republic of Uganda. 1993. The report of the Uganda Constitutional Commission. Kampala, Republic of Uganda.

Republic of Uganda. 1997. Poverty eradication action plan: a national challenge for Uganda, 1997 - 2000. Kampala, Republic of Uganda.

Seven reasons for land and property rights to be at the top of the global agenda. Accessed at <https://landportal.org/node/81137> Accessed 7 January 2022.

Steven Lawry; Customary Land Tenure. <https://dai-global-developments.com> Accessed 20 December 2021.

The Busuulu and Envujjo Law 1927.

The Constitution of the Republic of Uganda, 1995 (as amended).

The Current Aid Framework: Agriculture & Rural Development Investments; Agriculture and its contribution to poverty reduction. Accessed at <https://www.soas.ac.uk/> Accessed 27 April 2022.

The Land Act Cap 227 (as amended).

The Land Reform Decree 1975.

The Public Lands Act 1969

Tiernan Mennen: Know your SDGs: Land matters for sustainable Development. Accessed at <https://chemonics.com> Accessed 26 April 2022.

Uganda National land Policy, February 2013.

Uganda Office of Statistics. 2001. Population projections. Kampala, Republic of Uganda.

Why #landmatters for economic development; Deborah Horan <https://www.devex.com>. Accessed 13 December 2021

World Bank. 1993. Country study: Uganda agriculture. Kampala, Ministry of Finance, Planning and Economic Development.

World farmers' organisation land tenure challenges & practices, accessed at <https://www.wfo-oma.org> Accessed 9 December 2021

MAKERERE LAW JOURNAL NOVEMBER 2022

Volume 51 Issue 13

ANALYSIS OF THE HIGH COURT DECISION IN THE CASE OF HAM ENTERPRISES LTD & ANOR V. DIAMOND TRUST BANK (K) LTD & ANOR: CONFLICT OF LAWS AND THE RALLI PRINCIPLE OF FOREIGN ILLEGALITY

Kabazzi Maurice Lwanga

Recommended Citation: Kabazzi Maurice Lwanga (2022); "Analysis of the High Court Decision in the Case of Ham Enterprises ltd & Anor v. Diamond Trust Bank (K) ltd & Anor: Conflict of Laws and the Ralli Principle of Foreign Illegality" Volume 51 Issue 13 Makerere Law Journal pp. 30-45.

ANALYSIS OF THE HIGH COURT DECISION IN THE CASE OF HAM ENTERPRISES LTD & ANOR V. DIAMOND TRUST BANK (K) LTD & ANOR: CONFLICT OF LAWS AND THE RALLI PRINCIPLE OF FOREIGN ILLEGALITY

Kabazzi Maurice Lwanga[*]

ABSTRACT

This comment explores the missed opportunity by the High Court decision in the case of Ham Enterprises & Anor V. Diamond Trust Bank (K) Ltd & Anor to raise the issue of conflict of laws. Particularly, focus is placed on the opportunity to determine the proper law governing the loan contract between a Ugandan company and a foreign bank, which contract had a 'foreign element.' The author also discusses the Ralli principle of foreign illegality, with a view of undoing the legacy of rigidly applying national (local) law to transactions with 'a foreign element.' This comment is a response to the High Court decision in Ham Enterprises case to start the discourse on Ugandan courts' application of private international law.

1.0 INTRODUCTION

The doctrine of the proper law is an application of the free will of the parties to the essence of the contractual relationship. It can be interpreted to mean:[1]

---

[*] LLB (Mak) and author of: 'The Defence of Illegality and Unjust enrichment: A case for Flexibility in Breach of Contract Cases' (LLB thesis, Makerere University 2022). *See also*: Kabazzi Maurice Lwanga (2021) 'The Illegality Defense: A Case for Reform in Uganda's Judicial System.' Volume 20, Issue 1, Makerere Law Journal pp 154-177.
I would like to extend my gratitude to Jenipher Tuyiringire and Deborah Kimbowa for their invaluable assistance on this comment.

[1] R.H. Graveson, (1974) 'Conflict of Laws', Private International Law. Sweet & Maxwell. See also The Law Commission Working Paper No. 820 Private International Law Foreign Money Liabilities. London Her Majesty's Stationary office, p 19.

> *"The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as lex loci contractus or lex loci solutionis and has treated the matter as depending on the intention of parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts"*[2].

Foreign law illegalities are derived from the principles in *Foster v Driscoll*[3] and *Ralli Brothers v Compania Naviera Sota y Aznar ("Ralli Brothers").* The first rule of foreign illegality is that the forum ignores foreign law illegality as a general rule. This rule was considered in the case of *Vita Food Products Inc v Unus Shipping Co Ltd.* However, Tan Yock[4] concludes that that the forum court, as a general rule, is chiefly concerned with upholding an international contract where it is perfectly valid by the parties' chosen applicable law.

The second rule of foreign illegality is that court will not enforce contracts, where the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act, which is illegal by the law of such country. The third rule of ex turpi causa doctrine renders contracts unenforceable if illegal under the *lex loci solutionis* (the law of the place of performance).

TAN Yock Lin concedes that difficult questions have been asked about the role of the doctrine of *ex turpi causa non oritur actio* ("ex turpi causa") or the defense of illegality in the conflict of laws. It should be noted that the rule in *Foster v Discroll* is likely limited to contracts that obligate either party to commit a crime.[5]

---

2 Per Lord Wright, Mount Albert Borough Council v. Australian Temperance, etc. Society [1938] AC 224 at pg. 240

3 (1929) 1 KB 470

4 Tan Yock Lin, 'Tainted Contracts in the Conflict of Laws' (2020) 32 SAcLJ 1003, [7]

5 As above

It deals with contracts where the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country.[6]

That notwithstanding, this comment is limited to conflict of laws and the impugned loan agreement, which had a foreign element in the dispute in the Ham Enterprise case.

2.0 THE CASE

The High Court of Uganda applied the local law[7] of Uganda to find the loan contract by DTB (K) Ltd tainted with illegality, and adhered to the "better law" approach to apply the law of the forum.[8] Briefly, the facts are that Diamond Trust Bank (K) Ltd, ("DTB(K)") was a Kenyan financial institution and parent company to its co-lender, Diamond Trust Bank (U) Ltd. ("DTB(U)"). In 2017, Ham Enterprises (the borrower) flew to Kenya and obtained new financing from DTB(K). The securities for this loan were perfected in Uganda, where they were situated. However, the borrower alleged it was illegal for the Kenyan bank to lend money to a Ugandan borrower without being licensed by the Bank of Uganda ("BoU") under the Financial Institutions Act, 2004 ("FIA").[9]

In this case, DTB(K) appointed DTB(U) as agent to debit the borrower's account with the fees and taxes and on each anniversary of the loan, to remit funds to

---

6 With respect to Ham Enterprises case under consideration, the impugned loan transaction cannot be said to have been done with intention and knowledge of possible commission of illegality. Thus, the foreign illegality rule in Foster's case will not be analyzed in this comment with respect to Ham Enterprises case.

7 "The judge applying foreign law is a dilettante, a beginner; he is timid. The judge, applying the lex fori is a learned expert; he is a sovereign, superior judge." Zweigert, Some Reflections on the Sociological Dimensions of Private International Law or What Is Justice in Conflict of Laws? 44 U. COLO. L. Rv. 283, 293 (1973). See also Allstate Ins. Co. v. Hague, 101 S.Ct. 633, 647 & n.14 (1981) (Stevens, J., concurring).

8 The law of the forum lex fori is: If applicable, it provides that the law of the jurisdiction or venue in which a legal action is brought applies.

9 Phillip Karugaba, Rehema Nakirya Ssemyalo, Rachel Musoke and Anita Kenyangi, 'Does a foreign lender to a Ugandan business require a license?' available at <https://www.ensafrica.com> [Accessed October 19 2022]

DTB(K). This was the cause of disagreement.[10] The court ruled that the Financial Institutions Act of Uganda applies to foreign banks, and it was illegal for money held on deposit, whether in Uganda or outside, to be lent without the approval of the BoU. It also ruled that section 117 of the FIA required the local licensing of foreign banks doing business in Uganda. The court took the view that the syndication of the lending between DTB(K) and DTB(U) was aimed at dodging licensing from the relevant authority.

In consequence of its findings, the court declared the lending transactions illegal and void ab initio for violation of the law of the forum (Uganda). The borrower's debt was declared settled by law, and an immediate release of all the mortgaged property and a full refund of all monies allegedly debited from the borrower's account by DTB(U) was also declared. It was held that DTB(K) was in fact conducting financial institution business in Uganda and its failure to obtain a license to conduct such in Uganda rendered the credit transaction illegal, void *ab initio* and consequently unenforceable.[11]

This comment takes issue on the determination of this case from the conflict of laws perspective, arguing that the court ought to have first determined the proper law of the contract and applied foreign illegality principles if any was applicable, instead of domestic illegality.

3.0 APPLICATION OF PRIVATE INTERNATIONAL LAW IN UGANDA

Private International Law applies to the Ugandan courts. The author concurs that foreign law illegalities in conflict of laws are also applicable to Uganda. According to F.M Sekandi, conflicts of laws apply in Uganda, basically as part of

[10] ibid

[11] Anjarwalla & Khanna, 'Unlicensed Foreign Bank Loans Declared Illegal by Ugandan High Court' available at <https://www.lexology.com/library/detail> [Accessed October 19 2022]

the Common Law of England. We have no statute prescribing these rules.[12] F.M Sekandi conceived that courts can only rely on section 3(2) of the Judicature Act, 1967: Act 11/67 (replaced by the Judicature Act section 14). He concluded that

Private International Law is part of the English Municipal System Law and is essentially common law, part of Ugandan law in as far as its rules are consistent with the written law. Conflicts of laws in England are restricted to cases containing a foreign element. As Cheshire states:

> *"It functions only when this (foreign) element is present, and its objects three-fold:*
>
> *First to prescribe the conditions under which the court is competent to entertain such a suit. Secondary, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained. Thirdly, to specify the circumstance in which (a) a foreign judgment can be recognized as decisive of the question in dispute; and (b) the right vested in creditor by a foreign judgment can be enforced by action in England."*

3.1 The missed opportunity on Foreign Illegality in Conflict of Laws

The author criticizes the adherence to the domestic illegality rule in *Makula International* and its applicability to transactions with a foreign element. It is submitted that foreign illegality must be considered from the purview of the proper law of the contract in Private International law.

There are five propositions which establish foreign illegality in contracts from a conflict of laws perspective.

First, it is axiomatic that a contract that is illegal by its proper law cannot be enforced in Uganda. Second, no action lies in Uganda upon a contract which infringes the distinctive public policy of Ugandan Law. Thirdly, a contract falling within the ambit of a Ugandan statute by its creation is forbidden cannot be enforced in Uganda. Fourthly, a contract which is valid by its proper law is

[12] F.M. Ssekandi, 'Conflict of Laws. Uganda Law Focus' 1974 Law Development Center

enforceable in Uganda notwithstanding that is illegal according to the *lexi locis contractus*. Fifthly, that a contract illegal by the *lex loci solutionis* but not by proper law is unenforceable in Uganda.

The parties in this case should not have been faulted for having intended the doing of an act in a foreign country contrary to its laws.[13] It cannot be imputed that the real object, purpose, or intention of the contract was to break laws. In this commentary, we limited our analysis of the *Ham Enterprises* case in line with the Ralli principle of foreign illegality.

4.0 THE PROPER LAW OF CONTRACT UNDER HAM ENTERPRISES' CASE

To successfully apply foreign illegality in conflict of laws, there is need to determine the proper law of contract. The general principle is not in doubt. Parties are entitled to agree to what is to be the proper law of their contract, and if they do not make any such agreement then the law will determine what the proper law is.[14] The proper law is the system of law which the parties expressly or impliedly choose as the law governing their contract or, in the absence of such choice, the 'system of law with which the contract has its closest and most real connection."[15]

Cheshire submitted that with regard to valid creation of a contract, the proper law is the law of the country in which the contract is localized.[16] Its localization

---

13 (Reggazoni v. KC Sethia (1944) Ltd (1958) AC 301, Royal Boskalis Westminster NV v. Mountain ()1999) QB 674

14 Whitworth Street Estates (Manchester) Ltd. James Miller & Partners Ltd. [1970] A.C. 5887 at p.603, per Lord Reid

15 Amin Rasheed Shipping Co v Kuwait Insurance Co [1984] AC 50, 69 ('Amin Rasheed'); Bonython v Commonwealth [1951] AC 201, 219 ('Bonython'). cited by Brooke Adele MARSHALL, 'Reconsidering the Proper Law of the Contract' 2012, 2 Melbourne Journal of International Law [Vol 13] Available at <https://law.unimelb.edu.au > [Accessed 22nd May 2022]

16 The proper law is the law in which the contract is localized. See pg. 203 of Cheshire, 'Private International law' 1948, Oxford Publishers

will be indicated by what may be called the grouping of elements as reflected in its formation and in its terms.[17] The country in which its elements are most densely grouped will represent its natural seat. First, the substantial connection test can be applied to determine the proper law of contract. In the decision by Denning L.J in *Boissevain v. Weil*, it was established that:

> *"The proper law do the contract depends not so much on the place where it is made, nor even on the intention of the parties or on the place where it is to be performed but on the place with which it has the most substantial connection."*[18]

According to the Ham Enterprises case, it is worth noting that the High Court decision was silent on the issue of choice of law. Thus, the author has found it unnecessary to comment on the applicability of choice of law to this matter. It is submitted that if the parties expressly provide their choice of law to govern their contract, the court should not attempt to determine the proper law for them.

5.0 PROPER LAW OF CONTRACT ANALYSIS OF THE CASE

According to Ham Enterprises' case, the loan agreement was connected to Kenya *lex loci contractus (place of contracting*). With regard to recovery of the loan and enforcement of the debt recoveries in Uganda, the appointment of the agent DTB(U) Ltd resident in Uganda, the perfection of securities in the company's assets was also completed in Uganda.

It is generally conceded that a contract is made where the last act necessary to constitute agreement is done.[19] However, since the last act involved in this foreign loan was perfection of securities by the borrower which puts Uganda as *lex locus solutionis*. Thus, the Court in *Ham Enterprises Ltd v DTB Bank (U) Ltd & Anor* could have applied the substantial connection test to decide the issue of the proper law. The author has doubt whether the proper law of contract would be Uganda according to the substantial connection test.

---

17 The proper law depends on localization of contract.

18 Lord Denning repeated this view in The Fehmarn [1958] W.L.R. 159 p 162

19 Cheshire (n 16)

The proper law can be determined by the law of the country with which the contract has the most substantial connection, and no other, determines the question whether an obligation has been validly and effectively created. According to the applicants in Ham Enterprises, the financial institutions business alluded to in this case was commenced in Uganda, evidenced by factors such as the mortgage facility letter being drafted in Uganda by Ugandan lawyers and even witnessed in Uganda.

Furthermore, the applicants were Ugandan companies based in Kampala and issued securities for the loan facilities through mortgages, debentures and other securities registered in Uganda. It is seemingly tempting to say that the loan agreement was most substantially connected to Uganda's legal system. It should be noted that the law of the place of performance is the creditor's residence. In this case, since DTB(K) Ltd, the creditor, was resident in Kenya where the loan was disbursed, it can also be argued that the proper law of the contract was Kenyan law. This proposition finds support from the *Miliangos case*- a leading decision of the House of Lords enforcement of debts.

In the case of *Miliangos v. George Frank (Textiles) Ltd.*, the plaintiff, resident in Switzerland, had successfully claimed payment of a sum due from the English defendants. The case was remitted to the trial judge to determine that amount of interest due on the sum for which judgment was given in Swiss francs. Birstow J decided that the question of the right to interest by way of damages was to be referred to Swiss law as the proper law of the contract, and the parties had agreed that Swiss law gave such a right to the plaintiff in this case.

However, he also held that the rate at which interest should be awarded was a matter of procedure, to be governed by the proper law of the forum i.e. English law. He opined that, "while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the

lex fori to decide how much."[20] By analogy, the court ought to look to the proper law to decide whether the loan contract was legally valid.

5.1 Money's obligation as the proper law.

If the place of performance is not fixed or determinable from the contract, then the place of performance of a money obligation is the creditor's place of business. "The debtor must seek the creditor". This rule will leave the debtor with a free choice of how it will send or transfer the money to the creditor. When the debtor carries the risk of transmission, s/he will have no right to interfere with the mode of transportation or transfer used.[21]

Although the loan transaction was substantially connected to Kenya, the proper law of the contract shall be based on the money obligation. Against this background, the law of the place of performance in this case could be derived from the money obligation attached to the creditor's residence, which is Kenya.

5.2 Agency Contracts

Graveson argues that there is a presumption which exists in favour of the law of the principal's country, which is stronger than a presumption in favour of the law of the place of performance by the agent.[22] Based on this presumption, the author concedes that the agent debt-collecting bank being resident in Uganda did not in any way render the proper law to be Uganda since the principal DTB (K) Bank Ltd was resident in Kenya.

The author further concedes that the proper law, however, is not exclusively decisive on the question of the legality of a contract.[23] Cheshire argues that, in

---

[20] [1977] Q.B. 489, 497. For better authority to the same effect, see The Funabashi [1972] 1 W.L.R. 666, 671; Wildhandel N.V. v. Tucker & Cross Ltd. [1976] 1 Lloyd's Re. 341, 342

[21] Principles of European Contract Law: Parts I and II at pg. 402 available at <https://www.law.kuleuven.be> [Accessed 23 March 2022]

[22] [1894] A.C. 202. *See* N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co. [1927] A.C. 604; Tzortzis v. Monark Line A/B [1968] 1 W.L.R 406

[23] Graveson (n 9) 435.

the particular matter of illegality,[24] though it certainly affects the creation of contact, it is no longer possible to refer exclusively to the proper law.

6.0 THE RALLI PRINCIPLE IN LINE WITH HAM ENTERPRISES CASE

Following the determination of the proper law of the contract, the Ralli principle of foreign illegality can be applied to the facts of the case. This applies to the legal system where the contract is/was/will be performed.

In *Ralli Bros. v. Compania Naviera Sota y Aznar*, an English firm chartered a Spanish ship to carry a cargo of jute from Calcutta to Barcelona, at the rate of £50 a ton, half of which was payable on discharge of the cargo in Spain. By Spanish law, payment of this freight was prohibited as exceeding the maximum legal rate of 875 pesetas a ton. The ship-owners sued in England for the unpaid balance of freight, relying on the absolute nature of the contractual obligation in English law.

In this case, the Court of Appeal made no attempt to classify Spanish prohibition as mandatory or directory; such classification was, indeed unnecessary, since the act was to be performed, if at all, in Spain. Scruton L.J rested his judgment on a term to be implied in the contract itself, saying:

> *"Where a contract requires an act to be done in a foreign country it is, in the absence of very special circumstances, an implied term of the continuing validity of such provision that the act to be done in the foreign country shall not be illegal by the law of that country."*[25]

In Private International law, there is illegality by the law of the place of contracting and illegality by the law of the place of performance. The Ralli principle falls under the latter. Dicey and Restatement both say that if the

[24] Cheshire (n 16) 222.
[25] Zivnostenska Banka National Corporation v. Frankman [1950] A.C. 57

performance of a contract is illegal by the law of the place of performance, there is no obligation to perform.[26]

The former principle with regard to legality of the loan contract in Ham Enterprises case is not considered, since the *locus contractus* was Kenya and the loan was valid and enforceable in that country. This brings us to the discussion of the second principle on illegality based on *locus solutionis*. It will necessitate a brief on the background of the *Ralli brothers* case.

In *Ham Enterprises*, the plaintiffs challenged the credit facility for illegality, as it was being entered into with DTB(K), a bank not licensed by Bank of Uganda. In this case, a loan agreement not illegal or prohibited at the time of its formation in Kenya became unenforceable upon its default in Uganda and the manner of enforcing the security involved a third party (agent), that is DTB (U) which was faulted for performing an illegal loan agreement on behalf of an unlicensed foreign lender.

The rule in *Ralli Brothers* renders contracts unenforceable or illegal under the *lex loci solutionis (law of the place of performance)*. However, there is a presumption that the creditor's residence determines the law of the place of performance prevails. Based on this presumption, the author is pressed to submit that foreign lending would not be illegal according to Kenya's legal system whereby the law proper law of contract is based on the creditor's residence)[27].

7.0 WAY FORWARD

The *Makula International*[28] domestic illegality principle is too narrow and must be limited to contracts governed by domestic law, not those with a foreign

---

26 Restatement, Conflict of Laws (1934) and Dicey, 'Conflict of Laws' 637

27 There is a presumption that the creditor's residence determines the law of the place of performance prevails.

28 Makula International Ltd v His Eminence Cardinal Nsubuga & Anor (Civil Appeal 4 of 1981) [1982] UGSC 2

element. The treatment of the "public policy" defence[29] during this period is no more enlightening. In 1964, for example, in *Intercontinental Hotels Corp. v. Golden,* a government-licensed gambling casino in Puerto Rico advanced $12,000 in credit to a New York customer, with the result that it was promptly lost at the gambling tables.

When he failed to pay, the casino sought to recover the debt in New York, which not only forbids enforcement of gambling contracts, gambling being a criminal offense there, but also allows a loser to recover from the winner in a civil action. With two judges dissenting, the court held that enforcement of a gambling debt, valid where incurred, did not so offend justice or menace the public welfare of New York that its courts must withhold aid.[30]

In *Lemenda v African Middle East,*[31] Phillips J concluded that an English contract which falls to be performed abroad should not be enforced:

i. where it relates to an adventure which is contrary to a head of English public policy founded on general principles of morality and
ii. where the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.

Although Lemenda did not involve a breach of foreign law,[32] we submit that the same concerns apply to positive laws of universal application. We submit that the principles in Lemenda should be applied as the basis of any ex turpi causa

---

29 See generally, Paulsen & Sovern, 'Public Policy' in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

30 David P. Earle III, Conflict of Laws and the Interest Analysis - An Example for Illinois, 4 J. Marshall J. of Prac. & Proc. 1 (1970) available at <https://repository.law> [Accessed 10 November 2022]

31 [1988] QB 448,

32 Ryder Industries Ltd (Formerly Saitek Ltd) v Timely Electronics Co Ltd MISCELLANEOUS PROCEEDINGS NO 13 OF 2015 Hongkong

doctrine tailor-made for foreign illegality.[33] The approach prevents the harsh result of depriving a claimant of a remedy where he is required to found a claim on past contraventions of foreign law based on a policy that is not shared by the *lex fori.* It also has the advantage of certainty in its application in each case.

Can it be concluded that the foreign loan contract was governed by Uganda's domestic law? It has been established that the doctrine of the proper law does not decide the matter involving foreign illegality.[34] There are two doctrines of illegality, namely the rule in *Foster v Discroll* and the rule in *Ralli Brothers v. Compamia Naviera Scotia y Aznar* ("Ralli Brothers"). The rule in the former does not apply because DTB (K) Ltd had no intention of violating Uganda's financial laws and neither did the plaintiffs know that the transaction was possibly illegal in Uganda.

The Trial judge squandered the opportunity to address himself to the Ralli principle. First, that a Ugandan court will not enforce a contract or award damages for its breach, if its object would involve doing an act in a foreign and friendly state, which would violate the law of that state – if applicable.[35]

The DTB (K) knew it was illegal to operate banking business without a license, which is why appointing a debt collecting agent (sister bank in Uganda) was justified. It was done, not in contravention of any law, but to enforce the performance of the contract from the borrower, which is legitimate. Second, that the English courts will not assist the breach of laws of other independent states concerned in a contract.[36] In this case under consideration, the Ugandan court would not have been assisting the breach of any laws of Kenya if it had been considered from the conflict of laws perspective.

---

33 See Mitchell & Bond (2010) Butterworths Journal of International Banking and Financial Law 531, 533, where the Lemenda approach (adopted in Marlwood v Kozeny [2006] EWHC 872 (Comm), §§131-134) was preferred (cf Barros Mattos v MacDaniels [2005] 1 WLR 247, which is distinguishable).

34 Cheshire (n 16)

35 Graveson (n 9) 436

36 This principle was affirmed in Vita Food Products v. Unus Shipping Co *supra*

8.0 CONCLUSION

Although the High Court is *functus officio* on the issues, the matter of conflict of laws never featured in the litigation at lower court. The Court of Appeal decision cannot *suo motu*[37] raise new issues which may not necessarily constitute grounds of appeal or which never constituted issues for determination in the lower courts. In *Fangmin v. Belex Tours & Travel*[38], Odoki at page 30 quoting Katureebe JSC in *Julius Rwabinumi vs Hope Bahimbisibwe*[39] stated:

> *"It is a cardinal principle of our judicial process that in adjudicating a suit, the trial court must base its decision and orders on the pleadings and the issues contested before it. Founding a court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law."*

Aware that this comment is limited in its effect on the case, the author is of the view that foreign illegality and proper law of contract should be applied by litigants and courts of law in resolution of matters in private international law.

---

37 Belex Tours & Travel Ltd v Crane Bank Ltd & Anor (CIVIL APPEAL NO. 071 OF 2009) [2013] UGCA 13 (24 October 2013)

38 SC Civil Appeals No. 06 of 2013 and 01 of 2014

39 SCCA No. 10 of 2009

LIST OF REFERENCES

Brooke Adele Marshall (2012), 'Reconsidering the Proper Law of The Contract' Melbourne Journal of International Law [Vol 13] available at <https://law.unimelb.edu.au/__data/assets/> [accessed on 22nd May 2022]

David P. Earle III, 'Conflict of Laws and the Interest Analysis – An Example for Illinois,' 4 J. Marshall J. of Prac. & Proc. 1 (1970) <https://repository.law.uic.edu/lawreview> [accessed on 10th November 2022]

Dicey & (1991) 'The Conflicts of Laws. Fourth cumulative supplement. mor11th ed. (Vol. 2) Stevens & Sons Ltd., Dicey & Morris, 'The Conflict of Laws', 10th ed., (1980), pp. 812-818

F.A. Mann (Mann (1937) 'Proper Law and Illegality in Private International Law' 18 Brit. Y.B. Int'l L. 97

F.M. Ssekandi (1974) 'Conflict of Laws. Uganda Law Focus' Law Development Center

J. H.C. Morris, 'The Eclipse of the Lex Loci Solutionis' -- A Fallacy Exploded, 6 Vanderbilt Law Review 505 (1953) Available at: <https://scholarship.law.vanderbilt.edu/vlr > [accessed on 10th November 2022]

J.H.C. Morris & P. M. North (1984) 'Cases and Materials on Private International Law. Butterworth.

Kabazzi Maurice Lwanga (2021) "The Illegality Defense: A Case for Reform in Uganda's Judicial System." Volume 20, Issue 1, Makerere Law Journal pp 154-177

R. H. Graveson (1974) 'Conflict of Laws. Private International Law' Seventh edition. Sweet & Maxwell

Tan Yock Lin, Lin, 'Tainted Contracts in the Conflict of Laws' (2020) 32 SAcLJ 1003, [7]

The Defence of Illegality and Unjust enrichment: a case for flexibility in breach of contract cases (LLB thesis, Makerere University 2022).

The Law Commission Working Paper No. 820 Private International Law Foreign Money Liabilities. London Her Majesty's Stationary office

MAKERERE LAW JOURNAL **NOVEMBER 2022**

Volume 51 Issue 14

BOKO HARAM INSURGENCY AND BANDITRY IN NIGERIA: EXAMINING THE CELEBRATION OF MARRIAGE IN INTERNALLY DISPLACED CAMPS

Oreoluwa Omotayo Oduniyi

Recommended Citation: Oreoluwa Omotayo Oduniyi; "Boko Haram Insurgency and Banditry in Nigeria: Examining the Celebration of Marriage in Internally Displaced Camps" Volume 51 Issue 14, Makerere Law Journal, pp. 46-80.

BOKO HARAM INSURGENCY AND BANDITRY IN NIGERIA: EXAMINING THE CELEBRATION OF MARRIAGE IN INTERNALLY DISPLACED CAMPS

Oreoluwa Omotayo Oduniyi*

ABSTRACT

In recent times, hostilities have taken the form of non-international armed conflict with its attendant gory effects, it has become more pronounced in the 21st Century warfare. North Eastern part of Nigeria has been plagued by the twin evil of Boko Haram and Banditry. The region has almost become a war zone within a peaceful sovereign Nation, this has led to the creation of Internally Displaced persons camps in various part of the region. The article explores the subject of marriages within internally displaced camps in light of the era of turmoil in Nigeria by examining the existing legislation and recommending a more effective legal framework to preserve the rights of the internally displaced persons.

1.0 INTRODUCTION

Armed conflict appears to be integral part of human existence. In recent times, forms of armed conflicts have emanated over the years, non-international armed conflicts have been the most popular form of armed conflicts with active participation by non-state actors. One fundamental duty of government is to guarantee peace and protection of the citizens, when this cannot be done, it can be said that the government has failed in her responsibility.

However, armed conflicts have wreaked havoc in most developing countries and indeed the developed countries world over. Insurgency and terror attack

* LL. B (Hons) (Ife, Nigeria), BL (Lagos, Nigeria), LL.M, (Ife, Nigeria), Ph.D. Candidate & Doctoral Scholar, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria. Lecturer, Department of Public Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria.

have occurred more in recent times with its attendance socio-economic and psychological effect on the civilian population. Nigeria is not an exception; the country has been bedevilled with the twin problem of boko haram insurgency and banditry for some years now. Nigeria like most societies especially in the developing countries is experiencing varying degrees of insecurity and domestic uprisings ranging from the Boko Haram insurgency, kidnappings, suicide bombing, ethno-religious conflicts and other social ills.[1]

These conflict disorders have led to the insecurity of lives and properties of both Nigerian Nationals and foreigners within the country. The challenge by National governments and in particular, Nigeria, is how to ensure the protection of lives and properties of the citizens as well as the foreigners, while ensuring that the fundamental human rights of even the violators are respected as enshrined in the Universal Declaration of Human Rights.[2]

Since 2009, the violent activities of the jihadi group popularly known as Boko Haram have caused major upheaval and insecurity in Nigeria and the neighbouring Lake Chad Basin (LCB) countries.[3] Boko Haram attacks have had a negative impact on trading, business activities, entrepreneurship, investment, employment and income levels, relocation or mobility of the population, the rate of meetings between people in social places, attendance of religious functions and psychological trauma of individuals.[4] The impact of the attacks caused social, religious and economic disruption in human lives in communities in the north-east.[5]

The escalation of violence in 2013 culminated with a state of emergency being announced in the north eastern region of Nigeria, but the situation did not

---

1 Sam Olatunji Ajiye, 'Domestic Conflicts and Human Rights in Africa: Implications for Nigerian Foreign Policy', (2015)33 *Journal of Law, Policy and Globalization*

2 *ibid.*

3 Jacob Zenn and Zacharias Pieri, 'How much Takfir is too much Takfir? The Evolution of Boko Haram's Factionalization', (2017) 282, *Journal For Deradicalization* 11

4 Illufoye, S.O. *Domestic Security Threat in the Niger-Delta Region of Nigeria*, (Lagos: Sampeters Publishers 2009)

5 *ibid.*

improve. Boko Haram continued to expand, declaring so-called caliphate in 2014 and initiating in the next year a pledge of allegiance to the Islamic State.[6]

Boko haram, with its more than ten years insurgency against the Nigerian state, remains the biggest modern threat to the country's security.[7] In the course of its ten-year insurgency at undermining the sovereignty of the Nigerian State, Boko Haram has specifically targeted women and girls, with these grave abuses earning it infamy across the globe.[8] Thus, it may appear that the insurgency is targeted against this class of vulnerable persons with varying casualties both reported and unreported. Further to this is the spate of internal displacement in the north eastern part of the Country.

Boko Haram insurgency and Banditry in north eastern part of Nigeria has led to the creation of internally displaced camps for those who had been adversely affected by the armed conflict. This article examines the effects of Banditry and Boko Haram Insurgency in the north eastern Nigeria, with emphasis on the realisation of the right to private family life of internally displaced persons.

2.0 BOKO HARAM INSURGENCY AND BANDITRY IN NIGERIA

Boko Haram insurgency was the greatest threat to security before 2015 and it was the only terrorist act that accounted for the decimation of the greatest number of people that died between 2009 and 2015.[9] However, since 2015 there have been various incidence of herdsmen killing and bandit attacks on local communities, villages and towns in mostly the northern part of Nigeria.[10] The increase in the intensity of operation of Boko Haram insurgency has

6 *ibid.*

7 Olusola Babatunde Adegbite, Oreoluwa Omotayo Oduniyi and Ayobami Oluwaseun Aluko, 'International Human Rights Law and The Victimization of Women by The Boko Haram Sect' (2020) 11(2), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*

8 M. Bloom and H. Matfess, 'Women as Symbols and Swords in Boko Haram's Terror,' (2016), 6 (1), PRISM *A Journal of the Centre for Complex Operations*, 104 – 121.

9 Williams Adewumi Adebayo and Adebola Olumide Adeniyi, 'Utilitarianism and the Challenges of Insecurity in Nigeria from 2015 to 2019' (2019) 86 Journal of Law Policy and Globalization 68

10 *ibid.*

resulted in the aggravated loss of human lives, displacement of people and destruction of properties.[11]

The expectation of the society from every elected government is the security of lives and properties. The government is equally expected to do justice which is the virtue of social institutions. However, this cannot be said of the present-day Nigeria. In Nigeria, every person has a right to life and no one is to be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.[12] Insecurity has adversely affected the realisation of the right to life in Nigeria and has also put a question mark on the quality of life of the average Nigerian. Security is very fundamental to human and societal development.

Security as used in this study refers to the protection of lives and properties from any violence that can lead to death or destruction of property. It is the existence of the conditions within which people in a society run their normal daily activities without any threat to their lives and properties.[13] The acts that threaten the security of Nigeria include but not limited to the Boko Haram terrorism; the Fulani herdsmen/farmers clashes; kidnapping; ritual killing; cultist activities; armed banditry and armed robbery.[14]

Boko Haram Insurgency has its root in the North Eastern States of Nigeria and it is the greatest source of terror and horror to the people of Nigeria and other neighbouring West African countries such as Cameroon, Chad and Niger. It is the greatest security challenge facing Nigeria as a sovereign nation.[15] From 2009 when the operation of the sect assumed a violent dimension, Nigeria has suffered untold hardship by the destruction of lives and properties of people.

---

11 *ibid.*
12 S. 33(1) of the 1999 Constitution of the Federal Republic of Nigeria as altered
13 *supra* note 2, p. 6
14 *ibid.*
15 *ibid.*

Boko haram operation in the three north-eastern states of Borno, Yobe and Adamawa has forced over one million people to become homeless and are now living as refugees in Internally Displaced Camps (IDP) in the region.[16] However, unfortunately in recent times, Boko Haram attacks have gone beyond the three states and has become a threat to the entire northern region of Nigeria.

Predominantly, the Boko Haram Islamist group is a terrorist organization, ideologically created to fight Western education, modern science and Western culture.[17] The conflict between Nigerian security forces and the Boko Haram has deepened the current state of underdevelopment and regional inequalities especially in the area of education between the North and South. The most vulnerable demographic population includes children, women and youths. The mechanism used by the Boko Haram to achieve their lethal operations includes abduction, suicide bombings, sexual violence against womenfolk and recruitment of young men.[18]

Since 2018, insecurity in the North has gone beyond a national narrative with an increasing level of kidnapping of women, foreigners and humanitarian workers by the Boko Haram and the Islamic State in West Africa (ISWA). The kidnapping has often taken place in the North East Yobe, Adamawa, Gombe and Borno states and North Central Kaduna, Bauchi, Niger and Kano as well as around the borderlands such as Chad and Niger borders.[19]

The Boko Haram operations transcends religion or political sentiments as they were against the erstwhile philosophical explanation, acquiesced by some political scholars and analysts, having a religious identity.[20] Others have

16 *ibid.*

17 See N. Dunia, "Abuja Bomb Blast: Senate takes Decision Today," Daily Sun Newspaper, October 6, 2010, p. 6.

18 John Sunday Ojo, 'Governing "Ungoverned Spaces" in the Foliage of Conspiracy: Toward (Re)ordering Terrorism, from Boko Haram Insurgency, Fulani Militancy to Banditry in Northern Nigeria, (2020) *African Security*, Vol. 13, NO. 1, 77–110

19 *ibid.*

20 V. Comolli, *Boko Haram: Nigeria's Islamist insurgency* (Oxford University Press, London, United Kingdom, 2015).

considered its recent dimensions as the compass of terrorism, a universal credence that no one is secure within the global space.[21]

Armed banditry is another threat to the security of lives and properties in Nigeria. It is a species of terrorist act. It is not a clash between two opposing religious groups, ethnic groups or farmers and herdsmen. It is an act perpetrated by some criminally minded people suspected to be a splinter group of Boko Haram. They engage in cattle rustling, kidnapping and armed robbery. The stronghold of armed banditry in Nigeria is Zamfara State, which was the first state in the northern region to implement the Sharia law.

Other States experiencing armed banditry are Katsina, Kebbi and Sokoto States. The Nigerian Minister of Defence, Brigadier-General Mansur Dan-Alli (rtd) alleged that the bandits had links with the Boko Haram. The bandits are usually heavily armed and they move in large numbers attacking both during the day and in the night. Armed banditry is another burden to the weight of insecurity in Nigeria in view of the number of lives lost daily. On 26 March, 2019, Dr. Jang Sunail, a Korean expatriate doctor was abducted by bandits in Tsafe town, Zamfara State.

Between 2011 and 2018, about 1321 people were alleged to have been killed in banditry operation alone in Zamfara State with 1881 people injured, 185 cars and motorcycles lost. In the same period, ten thousand herds of cattle were lost to rustling; 2,688 hectares of farmlands and 10,000 houses destroyed. The Governor of the State Abdulaziz Yari in 2018 expressed his helplessness by calling on the Federal Government to declare a State of Emergency in the State.[22]

The National Assembly urged the Federal Government to mount diplomatic pressure on Niger Republic and Chad to prevent criminals from using their territories to launch attacks on Nigeria. The upper chamber also urged

---

21 O. Adagba, S. C. Ugwu, and O. I. Eme, 'Activities of Boko Haram and insecurity question in Nigeria,' *Arabian Journal of business and management review* (2012)1(9) 77–99.

22 Special Report: No Security Strategy Despite Mass Killings in Zamfara'. <https://saharareporters.com > [accessed 11 March, 2022]

Zamfara State to upgrade recruit and to generously fund state and local vigilant teams with the aim of improving security in the affected states.[23]

Derailment of values, societal and religious values, insincerity within ourselves; from the community, the individual, and government are some of the root causes of Banditry in Nigeria.[24] It is a phenomenon that has undergone a process of transformation over time from acts of minor crimes to full blown outright criminality which is characterised by armed robbery on highways, brutality, cattle rustling, village raiding, and kidnapping for ransom and hostage taking with damning implication on citizens.[25]

While others have argued that banditry is remotely caused by proliferation of arms, poverty, unemployment, drug abuse, unregulated and illegal gold mining and the vast forests that have served as a safe haven for criminals.[26] Thus, banditry is a complex, multi-layered and hydra headed phenomenon that requires a multi-dimensional approach to resolve.[27]

However, the activities of bandits in recent weeks have been alarming with loss of lives and properties. Bandits now attack trains with bombs and other weapons openly without any restraints.[28] The recent attack by bandits was carried out on the 28th of March, 2022 when the Abuja bound train was attacked on the Abuja-Kaduna train line, which led to the killing and kidnapping some of the passengers and blowing up a portion of the train.[29] It has been reported that 9 of the passengers were killed and about 25 injured.[30]

---

23 Senate urges Zamfara to equip vigilance team to tackle killings', punchng.com. <https://saharareporters.com > [accessed 11 March, 2022]

24 Dr. Mukhtar, 'The Root Causes of Banditry in Nigeria' May 24, 2021 <https://dailytrust.com/.> [accessed 4 April, 2022.]

25 Maryam Hamza, Ph.D., 'Remote Causes of Banditry' July 30, 2021 <https://dailytrust.com. > [accessed 4 April, 2022.]

26 *ibid.*

27 *ibid.*

28 'Suspected bandits attack passenger train in northern Nigeria' Al Jazeera, 29 March 2022, < https://www.aljazeera.com > [accessed 4 April, 2022]

29 Abuja-Kaduna train attack: Passengers killed after Nigeria gang hits rail link, BBC News March 31,2022 <https://www.bbc.com/news/world-africa-60914481 > [accessed 4 April, 2022]

30 Abuja-Kaduna Train Bombing: 9 Killed, Dozens Missing; Survivors Recount Ordeal, March 30, 2022 <https://dailytrust.com > [accessed 4 April, 2022]

3.0 BOKO HARAM INSURGENCY AND BANDITRY IN NIGERIA AND THE CHALLENGE OF INTERNAL DISPLACEMENT

Millions of people have been forced to leave their homes to seek safety unfamiliar to them in the process losing their assets and being exposed to enormous hardship. In the midst of these hardships, these displaced persons experience challenges with regards to their rights and their welfare condition. More than half of the world's internally displaced persons can be found in Africa.[31] There various reasons or factors responsible for internal displacement in various countries all over the world. Thus, some of the reasons for internal displacement in Nigeria includes but not limited to political violence, Boko Haram attacks and counter insurgency operations, Government policies, inter-communal violence, environmental degradation and lack of benefits from oil revenue, and natural disasters.[32]

The scourge of Boko Haram insurgency and Banditry in the North Eastern Nigeria has come with its attendant socio-economic challenges. A major problem attached to this is the internal displacement of people of the region. More than two million people have fled their homes because of the Boko Haram insurgency in the northeast. Millions more have been displaced by other causes, including natural disasters and development projects.[33] The rise in the problem has led to calls for concrete rights-based solutions to protect and assist internally displaced persons. This is why the absence of a national legal framework for dealing with the crisis is receiving increased attention.[34]

---

31 Betts, A.; Chimni, B.S.; Cohen, R.; Collinson, S.; Crisp, J.; Gil-Bazo, M.T. & Stigter, E, 'The State of the World's Refugees,' (2006) New York, United States: Oxford University.

32 There is an increase in the rate of diseases, declining agricultural productivity, increasing number of heat waves, unreliable weather patterns. Flooding, declining rainfall, decreasing food production, destruction of livelihood by rising water in coastal areas where people depend on fishing and farming have resulted in displacements. See Theresa Akpoghome, 'Internally Displaced Persons in Nigeria and the Kampala Convention' (2015) <https://www.researchgate.net.> [accessed 7 April, 2022.]
See also, Ujah, O. C., 'Internal Displacement in Nigeria,' <http://www.unisdr.org/hfa.> [accessed 7 April, 2022.]

33 Romola Adeola, 'Nigeria's constitution holds the key to protecting internally displaced people' The Conversation, June 28, 2016 <https://theconversation.com.> [accessed 4 April, 2022]

34 *ibid.*

UNOCHA[35] reported that Boko Haram attacks on the four major states in Northern Nigeria have led internally displaced persons to take shelter in relatively safe urban centres.[36] This is causing overcrowding in already inadequate living conditions and places resources and basic services under huge strain. In an area already economically deprived, more than 80percent of internally displaced persons experience lack of access to livelihoods and drained resources leading to risky livelihood.[37]

Since 2011, the North Eastern part of Nigeria has been affected by Boko Haram insurgency and Banditry. Military Forces have been engaged in fierce battle with the insurgents, particularly in North-Eastern State of Yobe, Adamawa and Borno.[38] There has been increased rate of killings, kidnapping and abduction of civilians, as well as destruction of social and economic infrastructure in the region. An inter-agency assessment mission fielded in Nigeria in May 2014 showed that between 2013 and 2014, in six states affected by the crisis (Adamawa, Borno, Bauchi, Gombe, Taraba and Yobe) the number of Internally Displaced Persons (IDPs) had reached some 647,000. Over 90 per cent of the IDPs now reside in host families within communities; others have taken shelter in public buildings such as schools.[39]

According to figures in the report released by the Internal Displacement Monitoring Centre (IDMC), an offshoot of the Norwegian Refugee Council (NRC), an independent, non-governmental humanitarian organization as at April 2015, estimated that about 1,538,982 people that fled their homes in Nigeria were still living in internal displacement camps scattered across Nigeria. In its 'Global Overview 2014 report', the Internal Displaced

---

35 UNOCHA is the United Nations Organisation for Humanitarian Affairs, April 4, 2022 < https://www.unocha.org/about-ocha.> [accessed 4 April, 2022.]

36 A.O. Hamzat, 'Challenges of the Internally Displaced Persons and the Role of the Society.' The Nigerian Voice (2013) < https://www.thenigerianvoice.com/> [accessed 4 April, 2022]

37 *ibid.*

38 Molly Wooldridge, J.D and John Wamwara, 'Nigeria, Assistance to IDPs' IHL in Action Respect for Law on the Battlefield (2020) <https://ihl-in-action.icrc.org/case-study/nigeria-assistance-idps.> [accessed 4 April, 2022]

39 *ibid.*

Monitoring Centre (IDMC) posited that Nigeria has Africa's highest number of persons displaced by conflict, ranking behind Syria and Colombia.[40]

The aforesaid figure comprises people displaced as a result of fierce attacks by Boko Haram militants in north-eastern Nigeria, the government-led counterinsurgency operations against the group, sporadic inter-communal clashes and natural hazard-induced disasters" and also includes the additional 47, 276 Internally Displaced Persons in Plateau, Nasarawa, Abuja (FCT), Kano and Kaduna which was collated by Nigeria's National Emergency Management Agency (NEMA) in February 2015.[41]

4.0 LEGAL FRAMEWORK FOR INTERNAL DISPLACEMENT IN NIGERIA

According to H.E. Prof. Dr. Kennedy Gastorn,[42] Internally Displaced People (IDPs) are amongst the most vulnerable groups of persons as there is no universal, legally binding instrument that specifically addresses their plight. This is irrespective of the UN Guiding Principles on Internal Displacement of 1998, which remains as the only universally accepted international framework for the protection of IDPs.[43] This is complemented by other regional instruments in Africa.[44]

The Kampala Convention is a landmark achievement of the African Union being the first ever regional instrument enacted for the protection of internally

---

40 Babatunde I.O. & Omidoyin T.J., 'Domestic Terrorism and the Application of International Humanitarian Law in Protecting Internally Displaced Persons in Nigeria,' (2017) 20 Nigerian Law Journal 123

41 *ibid.*

42 Secretary-General of Asian-African Legal Consultative Organization (AALCO), speaking on the topic 'Internally Displaced People (IDPs) And International Humanitarian Law: The Viability of Establishment of Safety Zones' at the Fifth Commonwealth Red Cross and Red Crescent Conference on International Humanitarian Law, on the Theme "Celebrating the Geneva Conventions and Building Respect for IHL: A Commonwealth Perspective", at Kigali Convention Centre, Kimihurura, Kigali, Rwanda, 10-14 June, 2019.

43 *ibid.*

44 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009 (Kampala Convention).

displaced persons in Africa. The Convention has five cardinal objectives,[45] which outlines the goals of the Convention and obligation of state parties. Furthermore, the Convention specified some general obligations relating to State parties and they include: obligations of State parties relating to protection from internal displacement;[46] obligation relating to protection and assistance;[47] international organizations and humanitarian agencies;[48] protection and assistance to internally displaced persons in situation of armed conflict;[49] obligation relating to African Union;[50] obligation of States parties relating to sustainable return;[51] issues concerning payments and compensation;[52] registration and personal documentation;[53] monitoring and compliance;[54] etc.

Article 13 of the Convention states that registration and documentation is particularly important as it is crucial to achieving a durable solution to IDPs. Article 9 of the Convention relating to the obligation of States parties with regard to protection and assistance during internal displacement is quite instructive.

Article 9 (2) (6) provides that:

---

45 a. to promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions;
b. to establish a legal framework for preventing internal displacement, and protecting and assisting internally displaced person in Africa;
c. to establish a legal framework for solidarity, cooperation, promotion of durable solutions
and mutual support between the States Parties in order to combat displacement and address its consequences;
d. to provide for the obligations and responsibilities of States Parties, with respect to the preventing of internal displacement and protection of, and assistance to internally displaced persons;
e. to provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons.

46 Articles 3, 4, and 5 Kampala Convention, 2009.

47 *ibid.,* Article 5

48 *ibid.,* Article 6

49 *ibid.,* Article 7

50 *ibid.,* Article 8.

51 *ibid.,* Article 11

52 *ibid.,* Article 12

53 *ibid.*, Article 13

54 *ibid.,* Article 13

> *…Internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services and where appropriate extend such assistance to local and host communities.*

The extent of compliance with the above provision in Nigeria is questionable; issues have arisen lately to raise doubts in the minds of millions of Nigerians as to the commitment of the government towards ensuring that IDPS are properly catered for.

As discussed earlier, Boko Haram attacks have become the main problem facing Nigerians in recent times.[55] These groups have executed several bombings, killed about 20,000 people, displaced millions of innocent citizens in Nigeria and caused the destruction of private and public property, worth billions of Naira, in a bid to make people in the north-east accept their fundamentalist Islamic Nigerian view of Western education.[56]

As earlier discussed, internal displacement has been a scourge in North Eastern part of Nigeria due to the Boko Haram Insurgence and Banditry that has ravaged the region. It is important to note that the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) is a major achievement of the African Union. It is evident that Africa has been adversely affected by war, insurgency and insurrection, Nigeria inclusive. In Africa, 12 million people were displaced by armed conflict and violence and there were hundreds of thousands of people displaced by natural disasters.[57]

---

55 Securipedia, 'Economic effects of terrorism' (2013) < http://eu/mediawiki/index.. > accessed 7 April, 2022

56 *ibid.*

57 Eme T Owoaje, Obioma C Uchendu, Tumininu O Ajayi, Eniola O Cadmus, 'A Review of the Health Problems of the Internally Displaced Persons in Africa' (2016)2 Nigerian Postgraduate Medical Journal 23 <https://www.npmj.org.> [accessed 7 April, 2022]

Global estimates indicate that the number of people displaced annually by conflict and violence has increased since 2003. On the average, 5.2 million have been displaced annually in the past 13 years due to insurgency, political instability and terrorist activities of groups such as ISIS and Boko Haram, particularly in the Middle East and Sub-Saharan Africa.[58]

Thus, it is necessary to examine and evaluate the existing legal framework for the protection of internally displaced persons in Nigeria. It is important to note that Nigeria ratified the Kampala Convention on the 17th of April, 2012 to be the 12th African Country to do so.[59] However, little can be said about the implementation of the Convention in Nigeria. Realizing the dream of protecting the IDPs using the Kampala Convention may be a tall dream in Nigeria for some obvious reasons.

Scholars have argued that for an effective protection of internally displaced persons in Nigeria, there is need for a constitutional provision to guarantee such protection.[60] Nigeria operates a federal constitution with established process of amendment. It is believed that the ratification of the Kampala Convention is not adequate, it has been advocated that the protection of internally displaced persons should have constitutional backing. It noteworthy that some Countries have adopted this option as a means of protecting internally displaced persons.[61]

It is noteworthy that Chapter II of the 1999 Constitution of the Federal Republic of Nigeria,[62] provides for the Fundamental Objectives and Directive Principles of State Policy. The directive principles outline strategic policy

---

58 *ibid.*

59 Stock-Taking Meeting on The Domestication of Kampala <https://data2.unhcr.org.> [accessed 7 April, 2022]

60 It is important to note that the Kampala Convention requires a state party to enact a domestic legislation that mirrors the legal and institutional frameworks for the protection of internally displaced persons as contained in its third objective.

61 The Ethiopian constitution recognises the right of pastoralists not to be displaced. It further requires that displaced persons must be protected. The Colombian Constitutional Court in 2004 declared the situation of internal displacement in the country an "unconstitutional state of affairs". This is despite the Colombian constitution not having such explicit provision.

62 Section 13 and 14 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

direction for the state in the realisation of a democratic, just and egalitarian society. It further set out policy priorities in relation to economic, political, social and environmental concerns. In preserving social order, section 17 of the 1999 constitution (as amended) mandates the state to direct its policy towards all citizens.

In addition, it specifically recognises the need to protect children, young people and the elderly. However, a downside to entrenching protection for internally displaced persons in the directive principles is that its provisions are non-justiciable. As such, they cannot be legally asserted in a court of law. To circumvent this, an alternative proposition is to insert a specific right for protection of internally displaced persons under chapter IV of the constitution.

However, it can be argued that it is not necessary to have a Constitutional provision for the protection of internally displaced persons in Nigeria. This presupposes the need for a separate legislation to protect and assist internally displaced persons without recourse to any constitutional provision. While this argument is plausible, it is also believed that such enabling law may not be properly monitored and implemented. Also, there may be need for a government institution to be established to specifically ensure the implementation of the law.

While, this is noble, it can also just suffer the same setback as other existing legislation and relevant bodies established for implementation. Nepotism, corruption, bureaucracy and other militating factors have been a clog in the wheel of progress and implementation of some existing legislations in Nigeria. It is pertinent to note that Nigeria adopted the National Policy on Internally Displaced Persons (IDPs) in Nigeria in 2012 as a manifestation of particular concern for the IDPs which is geared to responding to their human right needs.

However, it appears the policy has only remained a policy and not a statute. By a Presidential fiat, the statutory mandates of National Commission for

Refugees established in 1989 were extended in 2002 to cover migrants and in 2009 to embrace IDPs protection and assistance.[63] With these extensions, the hitherto National Commission for Refugees became National Commission for Refugees, Migrants and Internally Displaced Person (NCFRMI). Yet the needed amendment to the original Act to reflect these changes in scope it yet to be made.

Without this amendment the activities of the Commission in the area of internally displaced persons remain outside of law. Some Scholars have opined that a change in the name of this Commission to reflect the newly ceded mandates remains a mere window dressing in the absence of appropriate legislative amendment, and thus it is preposterously akin to 'new wine in an old bottle'.[64] Hence there is no particular enabling statute regulating internal displacement in Nigeria.

The absence of appropriate laws and policies governing IDPs protection and assistance in Nigeria has placed unnecessary burden on the National Emergency Management Agency which is the only body with capacity to respond swiftly to emergency situations given its mandate.[65] Though this agency has a unit dedicated for IDP related issues, the obvious challenge too is that, since it virtually intervenes in almost all known emergency situations in Nigeria, it is most likely that its dependence on the meagre funds that accrue to it from the national revenue would hamper its service delivery.[66]

---

63 Jude O. Ezeanokwasa, Uwadineke C. Kalu & Francis Ejike Okaphor, 'A Critique of the Legal Framework for Arresting the Threat of Internal Displacement of Persons to Nigeria's National Security' (2018) 9 *Nnamdi Azikiwe University Journal of International & Jurisprudence* 10

64 S Ekpa and NHM. Dahlan, 'Legal Issues and Prospects in the Protection and Assistance of Internally Displaced Persons (IDPs) in Nigeria' (2016) Journal of Law, Policy and Globalization (49) 110

65 By virtue of section 8(1) of the National Emergency Management Act Cap N34 Laws of the Federation of Nigeria 2004 (hereinafter called "NEMA Act"), there is State Emergency Management Committee (SEMC) in each of the 36 States in Nigeria to complement the activities of the agency at the States and Local Governments levels. See also Emmanuelar Imasuen, "Insurgency and Humanitarian Crises in Northern Nigeria: The Case of Boko Haram" African Journal of Political Science and International Relations, Vol. 9(7), July (2015):284-296, <http://www.academicjournals.org.> [accessed 8 April, 2022.]

66 For example, the source of funding to this agency is limited by virtue of section 13 of the NEMA Act having regard to the long list of its functions under section 6 thereof.

Owing to absence of clearly delineated area of responsibilities for each of the relevant institutions such as National Emergency Management Agency and National Commission for Refugees, Migrants and Internally Displaced Persons sharing concerns on IDPs issues, the requisite synergy is also lacking regarding humanitarian intervention in Nigeria resulting in wasteful duplication of responsibilities as well as in the provisions of material needs for victims.[67]

5.0 NATIONAL POLICY ON INTERNAL DISPLACEMENT AND THE RIGHTS OF INTERNALLY DISPLACED PERSONS IN NIGERIA

The National Policy on Internally Displaced Persons (IDPs) in Nigeria 2012 was drafted and adopted by the Presidency.[68] It appears to be the light in the tunnel towards modelling a workable framework for the protection of internally displaced persons in Nigeria. With such hopes and aspiration, the policy was well received by all. The aim of the policy makers is to ensure that the rights of internally displaced persons are not infringed upon and they get all necessary protection and assistance they deserve. The policy also seeks to ensure that there is form of discrimination against internally displaced persons.

In ensuring that the rights of the IDPs are protected, the policy in its third chapter outlines certain rights for the IDPs, which are classified into general and specific rights. The general rights belong to all displaced persons and they include the right to protection from displacement,[69] right of every displaced person to protection and assistance during and after displacement,[70] and right of IDPs to voluntary return, local integration and relocation.[71]

While the specific rights are rights guaranteed for particular categories of persons needing special attention. The rights include the rights of internally

67 *supra* note 65, p. 291
68 Chapter 5(2) of the National Policy on Internally Displaced Persons (IDPs) in Nigeria.
69 *ibid.*, Ch 3.1.2
70 *ibid.,* Ch. 3.1.3
71 *ibid.*, Ch. 3.1.8

displaced children,[72] the rights of internally displaced women,[73] the rights of internally displaced persons with disabilities,[74] and rights of internally displaced elderly persons.[75] Though the rights are for all displaced persons, they, nonetheless, do not guarantee for displaced non-citizens rights that they cannot enjoy if they were not displaced, such as the right to vote or be voted for in public elections. It should be noted that the policy also has obligations for the IDPs. They must be law abiding and personally responsible for any crime committed under international and municipal law.[76] They are also to respect the culture and norms of host communities[77] and abide by rules and regulations in collective settlements.[78]

The policy in its fourth chapter places varying degrees of responsibilities on major stakeholders in the IDPs issue; government, humanitarian agencies, host communities and armed groups. Government at all levels is known as the primary bearer of the responsibility of preventing internal displacement and when it occurs, it has the responsibility of protecting and assisting IDPs in Nigeria.[79] This responsibility consists of three dimensions: first, being responsive, that is, aiming to prevent imminent or stop on-going violations that lead to displacement;[80] second, being remedial, that is, aiming to provide redress (e.g., access to justice, reparation or rehabilitation) for past violations.[81]

The third is environment-building, that is, aiming at creating the necessary legal and institutional framework, capacity and awareness that is necessary to promote respect for human rights of internally displaced persons and prevent future violations.[82] Humanitarian agencies operating in Nigeria and

72 *ibid.*, Ch. 3.1.4
73 *ibid.,* Ch. 3.1.5
74 *ibid.*, Ch.3.1.6
75 *ibid.*, Ch. 3.1.7
76 *ibid.*
77 *ibid.,* Ch. 3.2(d)
78 *ibid.*, Ch. 3.2(e)
79 *ibid.*, Ch. 4.1
80 *ibid.*, Ch. 4.1
81 *ibid.*
82 *ibid.*

working with the IDPs have the obligation to comply with law, both international and municipal law, and policy guidelines on IDPs.[83]

It is important to note that the policy also recognizes the rights of the host community which government and humanitarian agencies must respect pursuant to the principles of impartiality and non-discrimination. These rights include socio-economic rights, right to security of life and property, right to adequate and appropriate compensation, right to food security, right to safe environment, and right to quality health.[84] At the same time the host communities bear responsibilities which include providing adequate security and safety for internally displaced persons settled or resident in their communities,[85] and allowing IDPs the freedom to express their cultural, religious and political beliefs without undue discrimination, molestation or inhibition.[86]

The coming on board of the National Policy on IDPs came with high hopes and expectations, it is supposed to be germane ingredient for national security by responding efficiently to the short-, medium- and long-term needs of the IDPs. Undoubtedly, the making of the policy being the first of its kind in Nigeria, is indeed a bold step in this direction. Another thing that goes for it is that it has a very broad concept of internal displacement by defining the scope of the policy to cover arbitrary displacement and other forms of displacement.

Arbitrary displacement refers to displacement resulting from machinations such as policies of discrimination, armed conflicts, violations of human rights, harmful practices and collective punishment.[87] In other words, it understands internal displacement to embrace all displacements cause by human actions and natural disasters. This notwithstanding, the policy is marred by a number of problems. Some of the challenges include but not limited to lack of

83 *ibid.*, Ch. 4.2.1
84 *ibid.*, Ch. 4.3.1
85 *ibid.*, Ch. 4.3.2(a)
86 *ibid.*, Ch. 4.3.2(g)
87 *ibid.*, Ch. 1.2

coordination in implementation, lack of funding, lack of adequate statistical data, and IDPs return, resettlement and reintegration.

Another major defect of the policy is that it has no legal status and is therefore incapable of enforcement by any of the affected actors that is the government or the delegated actors.[88] It has been advocated that an agency be specially created for the purpose of ensuring the implementation of the policy. This will be complementary to the making of a law rather than just a policy for the protection of IDPs.

6.0 RIGHT TO PRIVATE FAMILY AND CELEBRATION OF MARRIAGE IN NIGERIA

The Constitution of Nigeria provides for the right to private family life.[89] Though not expressly stated, this class of right gives a citizen of Nigeria the right to marry and have a family once the statutory requirements have been satisfied. However, the National Policy on Internal Displacement did not provide for this right to be enjoyed by internally displaced persons. It is imperative to examine the celebration of marriage and the forms of marriage in Nigeria.

6.1 Forms of Marriage in Nigeria

Broadly speaking, marriage is both a legal and social union of two consenting adults.[90] An important element is the consent of the two parties involved which gives the union a semblance of a contract. Another element that gives marriage the semblance of a contract is the fact that the two forms of marriages have their separate laws that govern the union from the beginning to the point of separation, if any, or the sharing of properties should either of

---

88 Eni Alobo and Synda Obaji, 'Internal Displacement in Nigeria and the Case for Human Rights Protection of Displaced Persons' (2016) 51 *Journal of Law Policy and Globalization* 26

89 S.37 of the 1999 constitution of the Federal Republic of Nigeria as amended.

90 Tochuckwu Anayo-Enechukwu 'Types of Marriage in Nigeria' (2020) The Nigerian Lawyers <https://thenigerialawyer.com/types-of-marriage-in-nigeria/.> [accessed 15 January, 2022.]

the party become deceased. The regulations of these two forms of marriages further validates the school of thought that views marriage as a contract.

The contractual nature of marriage as it has been discussed presupposes that it is regulated by laws, customs and beliefs and attitude that that prescribe the rights and duties of the parties and accords the rights of their offspring.[91] The regulation that governs a marriage is determined by the type of marriage celebration. In Nigeria, the forms of marriage include: Traditional/Customary Marriage; Church/Islamic Marriage; and Statutory Marriage/Marriage Under the Act.[92]

We shall discuss Statutory Marriage and Traditional Marriage, which are the two major forms in Nigeria. That is not to say that Church/Islamic Marriage is not recognised, the nature of it however has been indirectly fused with Statutory marriage and Customary marriage respectively. The origin of Statutory Marriage can be traced back to colonisation. The Marriage Act which is the primary source of law for Statutory Marriages is modelled after the English law.[93]

Most Nigerians view Statutory Marriage as the ultimate legal seal to their union. This is why you find most couples that have gone through Traditional/Customary Marriage or Religious Marriage still go ahead to contract Statutory Marriage. However, the law recognises some Churches as Statutory places of worship where couples that contract marriages in such churches are issued both Church Marriage Certificate and Statutory Marriage Certificate.[94]

6.1.1 Statutory Marriage

91 *ibid.*
92 Emmanuel Ekpeyong, 'An Appraisal of Types of Marriages in Nigeria And Procedure For Contracting Statutory Marriage In Nigeria' (2017) Mondaq <https://www.mondaq.com> [accessed 15 January, 2022.]
93 *ibid.*
94 *ibid.*

The primary statute that provides for the celebration of marriage in Nigeria is the Marriage Act (Matrimonial Causes Act) and it is worthy to note that the Act recognises only monogamy, which refers to the union between one man and one woman.[95] This is what makes it distinct from customary marriage and Islamic marriage which allows for more than one wife.[96] In Nigeria, statutory marriage is quite strict and can only be dissolved at the High Court or by death.[97] A valid statutory marriage can be celebrated in different ways as provided by the Marriage Act. These ways include:

i. By the Registrar in the Marriage Registry (Section 27 of MA);
ii. By a Minister of a religious denomination in a licensed place of worship (Section 18 of MA);
iii. By special license under the hand of the Minister of Internal Affairs (Section 13 of MA);
iv. By celebration abroad in a Nigerian Diplomatic Mission (Section 50 of MA);[98]

a) By the Registrar in the Marriage Registry (Section 27 of MA)

This method of marriage begins with a signed Form A notice by either party to the Registrar of Marriages where the marriage is intended to be celebrated.[99] After the notice has been filed and the Registrar pastes same on his office door or the Registry's notice board, the Registrar will then issue a Form C Certificate after 21 days and less than 3 months from the day the notice was filed.[100] The couple must have also paid the prescribed fee and sworn to an affidavit stating that:

---

95 Benedette Bassey, 'Nigeria: Overview of Statutory Marriage in Nigeria' (2020) Mondaq <https://www.mondaq.com.> [accessed 16 January, 2022.]
96 Omotoyosi Salihu, 'How to Become Legally Married in Nigeria: What to Know About Statutory Marriage' (2018) medium.com <https://medium.com.> [accessed 17 January, 2022.]
97 *ibid.*
98 *ibid.*
99 *supra* note 91
100 Olaoluwatomi Kolawole, 'An Overview of the Celebration of Statutory Marriage in Nigeria' dJetLawyer <https://djetlawyer.com.> [accessed 17 January, 2022.]

i. Either couple is resident within the district where the marriage is intended to be celebrated at least fifteen days preceding the grant of the Form C;
ii. They intending couple have paid the prescribed fee;
iii. The Notice of the marriage has been posted on the Registry's Notice Board for 21 days and it has been entered in the Marriage Notice Book without any objection to the couple's union by anyone;
iv. They are both above the age of 21;
v. There is no impediment of kindred or affinity or any other kind of lawful hinderance to the marriage;
vi. They are not married under any customary law to any other person other than themselves.[101]

The affidavit must be sworn before a Registrar or an administrative officer of the Registry or before a recognised Minister of religion. A date for the marriage celebration is chosen afterwards and it must fall within 3 months from the date the Notice of Marriage was filed by the couple at the Registry.[102]

b) By a Minister of a Religious Denomination in a Licensed Place of Worship

The Marriage Act provides that the marriage can be celebrated in any licensed place of worship by any recognised minister of the church, denomination or body which such place belongs.[103] If we are to go by this provision, a lot of Nigerians are not legally married because all they have done is just to acquire the Church's blessing.[104] The two keywords that validates marriage in a place of worship are 'licensed place of worship' and 'recognised minister of that church'.

101 *supra* note 96
102 *ibid.*
103 Elton Chizindu, 'Where and How a Valid Celebration of Marriage is Celebrated in Nigeria' (2017) LegalPuzzles <https://legalpuzzles.wordpress.com> [accessed 18 January, 2022.]
104 Omotoyosi Salihu (n101)3.

Without these two elements, a marriage is invalid even though it was celebrated in a place of worship. Such minister may be sentenced to 5 years imprisonment for joining a couple who have not obtained a Registrar's Certificate empowering them to celebrate their marriage.[105]

The other prerequisite provided by the Marriage Act that must be fulfilled to have a valid marriage are that it must be done in the presence of at least two witnesses, apart from the officiating minister. The marriage must also be celebrated with open doors between the hours of 8am and 6pm.[106] It is important to note that the couple must also have delivered the Registrar's Certificate to the minister.

c) Marriage by Special License

This gives an exception to the venue of where the marriage will be celebrated. Under a special license, a marriage can be celebrated in a place other than a licensed place of worship or the office of the office of the registrar of marriages.[107] The license is granted by the Minister of Interior if he is satisfied through an affidavit sworn to by the couple, that there is no legal impediment against the proposed marriage and all necessary consents have been obtained.[108]

However, such marriage must be conducted by a licensed minister of religion or registrar of marriages.[109] Special license are usually granted when the couple cannot wait for the prescribed period of twenty-one days after lodging a notice with the registrar. It can also be granted where a public figure wants to celebrate marriage without publicity.[110]

d) Celebration Abroad in Nigerian Diplomatic Mission

105 *ibid.*
106 s*upra* note 100, p. 2.
107 *ibid.*
108 s*upra* note 103, p. 2.
109 *supra* note 106, p.3.
110 *supra* note 104.

The Marriage Act provides that a celebration of marriage is valid if one of the parties is a Nigerian and is contracted outside Nigeria before a marriage officer in his office.[111] Every Nigerian diplomatic or consular officer or the rank of a secretary or above is for the purpose of the Marriage Act a marriage officer and any venue used for the celebration of the marriage will be deemed to be the marriage officer's office.[112]

Circumstances that invalidate a statutory marriage is contained in Section 33 of the Marriage Act.[113]

6.1.2 Customary Marriage

Customary/Traditional Marriage in Nigeria is celebrated in accordance with the customs of the Bride and the Groom's families. Some of the common elements include paying of Bride price, Dowry, and many more.[114] Customary laws are recognised under the Nigerian law. Therefore, a marriage celebrated under customary laws is regulated by native laws and customs and is deemed legal.[115]

Customary and Islamic marriage permits the marriage of more than one wife which is why both have been fused together as the same type of marriage. The inherent right of the man to marry more than one wife is an important element of customary marriage. The only difference with Islamic law is that there is a limit of four wives in Islam while the man has the right to marry an infinite number of wives under customary law.[116] The laws guiding customary marriage in Nigeria vary from culture to culture and since there is no official

111 The Marriage Act, CAP M6, Laws of the Federation of Nigeria, 2004, S.49
112 *supra* note 103, p. 2.
113 *supra* note 99, p. 2.
114 LawPadi Admin, 'Types of Marriages in Nigeria' LawPadi <https://lawpadi.com.> [accessed 18 January, 2022.]
115 Francis Ladipo, 'What is Customary Law of Marriage in Nigeria' (2017) Legit.ng <https://www.legit.ng/1127334-> [accessed 18 January, 2022]
116 Linus Nwauzi, 'The Rules of Marriage Under Customary Law' (River State University, River State 2019)

registry tracking all customary marriages, the courts cannot verify whether such marriage exists unless there are witnesses to the ceremony.[117]

The contractual nature of marriage under customary law is not as pronounced as that of statutory marriage. This is because women are perceived as not having equal rights in most customary law, which is why some customs allow for marriage to an underaged girl.[118] The element that gives a man the right to contract marriage with more than one wife removes exclusivity from the marriage. While the rules that govern marriage under customary law is largely unwritten, there are few generic elements that must be present before such marriage can be said to be valid. These elements include:

i. Parental consent and the consent of parties to the marriage;
ii. Bride price, gift or any other symbol;
iii. Prohibited degrees of consanguinity and affinity;
iv. Capacity to marry under customary law.[119]

Other elements are culture specific. Not to take anything away from customary marriage, it is also valid and recognised by the Nigerian legal system. It can also be said to be a form of contract between the couple only that it is governed by unwritten terms that most often than not puts one party at an advantage over the other.

7.0 CELEBRATION OF MARRIAGE IN INTERNALLY DISPLACED CAMPS

The celebration of marriage in every jurisdiction has a deeper meaning other than the joyful celebration of the union of the couple and their family. The celebration of marriage also puts a legal seal to the union, be it marriage under the Act or customary laws. For this to be valid, it must be done

117 *supra* note 115, p.3

118 Food and Agriculture Organization of the United Nations, 'Customary Norms, Religious Beliefs and Social Practices That Influence Gender-Differentiated Land Rights' Gender and Land Rights Database <https://www.fao.org> [accessed 18 January, 2022.]

119 Hi Writers, 'The Legal Effect of Customary Marriage in Nigeria' HiWrites.com <https://hiwriters.com.ng.> [accessed 18 January, 2022.]

according to the prescribed provisions of the Marriage Act or the customs of the couple.

For a marriage under the Act to be valid, it must be celebrated in either the marriage registry or a licensed place of worship.[120] It must be presided over by the registrar of marriages or a licensed minister of a licenced place of worship.[121] All these requirements are what culminates to make a validly celebrated statutory marriage.

Under customary laws, the requirements vary from culture to culture, and they must all be fulfilled to make a validly celebrated marriage under customary laws. Some of the elements that make a marriage under customary law valid include the consent of the parties and their families. Fulfilment of traditional rites such as payment of Dowry, and Bride price. Nigerian laws recognise marriages under customary laws as long as there are witnesses to the ceremony.[122] Most of the marriages under customary laws are celebrated in the home-town of the bride.

Every adult has the right to marry as provided for in the 1999 Constitution (as amended)[123] encapsulated in the right to private family life. This class of rights involves the right of privacy of citizens and particularly right to their homes (family life). It important to note that marriage is the foundation for every family and without it, there may not exist a functional society. It is important that the Kampala Convention prohibits any form of discrimination from enjoying any right or freedom because of internally displacement[124]. The

120 *supra* note 109.

121 Resolution Law Firm, 'An Overview of Marriage Laws in Nigeria' resolutionlawng <https://www.resolutionlawng.com> [accessed 19 March, 2022.]

122 Francis Ladipo, 'What is Customary Law of Marriage in Nigeria' (2017) Legit.ng <https://www.legit.ng> [accessed 19 March, 2022]

123 S.37 of the 1999 Constitution of the Federal Republic of Nigeria as (amended) provides for the right to private family life which provides for the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications and ensure that such rights are not only guaranteed and protected.

124 Article IX 1(a) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)

right to private family life should not be an exception, an internally displaced person should not be deprived of the right to marry.

As discussed earlier, Boko Haram insurgency and Banditry has caused a devastating effect in the north eastern region of Nigeria, thus leading to the creation of IDP camps.[125] Over 3.2 million people have been displaced during the conflict with 2.9 million internally displaced persons in the north-eastern part of Nigeria.[126] IDP camps are not a place conducive for the celebration of marriage and do not have all the necessary facilities as required by law. Until recently, when a certain couple, Gbede Senenge and his wife Joy, celebrated their marriage at an IDP camp in Benue state.[127]

Other couples have since followed suit and there have been various reports of celebration of marriage in IDP Camps. Furthermore, high bride price imposed by some cultures has also driven some men to pick their brides from IDP camp with a Bride price requirement of as low as ₦10,000.[128] As for the legality of celebrating a marriage in an IDP camp, the requisite conditions must have been met because an IDP camp is not listed as one of the legal places to celebrate marriages.

Statutory marriages are required to be celebrated first with the issuance of Form A marriage notice by the couple and the registrar also issues Registrar's certificate contained in Form C.[129] Other requirements include that the marriage must be celebrated in a licensed place of worship officiated by a licensed minister of that denomination or it can be celebrated in the office of the registrar. Alternatively, the ministry of interior can issue a special license for it to be celebrated at the couple's place of choice after all pre-requisites must have been fulfilled.[130]

---

125 The UN Refugee Agency, 'Nigeria Emergency' The UN Refugee Agency Africa <https://www.unhcr.org> [accessed 19 January, 2022.]

126 *ibid.*

127 Nigerian couple hold their wedding reception inside an IDP camp in Benue state, won the heart of people (photos), < https://madailygist.ng. > [accessed 13 April, 2022]

128 Oge Okonkwo, 'Eligible Grooms Rush to IDP Camps for Brides Over Cheaper Dowry' *pulse.ng* (September 22, 2015)

129 *supra* note 113, p.3.

130 *ibid.*

A valid marriage can only be celebrated when all these conditions have been fulfilled by the intending couple. The law allows couple to further celebrate their marriage wherever they choose after they must have satisfied the legal requirements, which includes a licensed place of worship. Also, an important celebration is done and is generally known as the 'Reception' where all guests are entertained and families of the couple are introduced to guests. In other words, where Sections 21 to 29[131] have been fulfilled, a couple can go ahead to further celebrate their marriage in any place of their choice.

When it comes to customary law, same rule also applies. If all traditional rites are fulfilled, the couple and their families may decide to celebrate the marriage in any agreed place. However, what if the wife and her family have been displaced and reside in the IDP camp? Will that suffice as a venue recognised by the custom of the wife? Under customary law in Nigeria, marriages are arranged between the families and the prospective suitor is required to pay the bride price to the bride's family.[132] After this is done, every other requirement is practically agreed between both parties. Therefore, in a case where the bride's family are located in an IDP camp, should they insist that the marriage be celebrated in the camp, the groom and his family will have no choice but to accept. In most cultures, it is tradition that the bride's family dictates the venue of the wedding except otherwise agreed by both parties. Therefore, this does not in any way affect the legality of the marriage, as long as there are witnesses to the marriage who can attest to the fact that a marriage celebration was held.

8.0 CONCLUSION

Thus, it is imperative that the right to private family life as provided by the Constitution is to be enjoyed by all Nigerians, including those who are internally displaced. Though the National Policy on Internal Displacement has

131 The Marriage Act, CAP M6, Laws of the Federation of Nigeria, 2004, S.21-29

132 Research Directorate, Immigration and Refugee Board, Canada, 'Nigeria: Whether Registration of Customary Marriages Is Required And, If So, When It Began' (2000) refworld.org <https://www.refworld.org/docid/3df4be791c.html> [accessed 19 January, 2022.]

not captured this particular class of right, it is advocated that internally displaced persons should be allowed to enjoy the right to private family life vis-à-vis celebration of marriage.

Thus, the basic requirements if a valid marriage either statutory or customary may be waived or jettisoned for those who are in IDP camps. It may also be advocated that this waiver should be documented through an amendment of the existing policy of internal displacement. It is important to note that the right to private family life is a constitutional right and should not be derogated from. Furthermore, the constitution also provides for the right from discrimination of any Nigerian citizen[133] based on ethnicity, sex, religion, place of origin, political opinion and status. Thus, not allowing the celebration of marriage in IDP camps amounts to discrimination based on status.

Arguments can be made about the fact that no right in itself is absolute,[134] however, the right to private family life should not be categorised as that which can be derogated from. Though, internal displacement cannot be said to be normal and was not envisaged by the law makers in drafting the constitution, it is imperative that future amendment could capture such situation. As discussed above, some couples have successfully celebrated their marriage in IDP camps thus, not allowing same would amount to an infringement on the right of IDPs.

However, the practice of men going to get brides from IDP camps because of cheap bride price should be discouraged, the right is specifically meant for couples who both reside in IPD camps. Cultural relativity and differences are the root cause of some particular culture that require the payment of high bride price alongside other exorbitant requirements. All hope cannot be said to be lost in this regard, as there have been agitations for the amendment of the Policy on internal displacement to fill the existing gaps discovered therein. This paper advocates for the enactment of a separate legislation for the

133 S. 42 of the 1999 Constitution of the Federal Republic of Nigeria as (amended)

134 *ibid*, S.45 provides for circumstances where the fundamental human rights of a citizen can be derogated from which is in the interest of defence, public safety, public order, public morality or public health; or the purpose of protecting the rights and freedom or other persons.

protection of IDPs and a supervisory agency created to ensure compliance and implementation of the statute. It is also suggested that a licensed place of Worship is established in internally displaced camps to ensure compliance with the requisite statutory requirements.

LIST OF REFERENCES

A.O. Hamzat, 'Challenges of the Internally Displaced Persons and the Role of the Society.' *The Nigerian Voice* (2013) < https://www.thenigerianvoice.com/> [accessed 4 April, 2022]

Abuja-Kaduna train attack: Passengers killed after Nigeria gang hits rail link, BBC News March 31,2022 <https://www.bbc.com/news/world-africa-60914481 > [accessed 4 April, 2022]

Abuja-Kaduna Train Bombing: 9 Killed, Dozens Missing; Survivors Recount Ordeal, March 30, 2022 <https://dailytrust.com > [accessed 4 April, 2022]

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009 (Kampala Convention).

Babatunde I.O. & Omidoyin T.J., 'Domestic Terrorism and the Application of International Humanitarian Law in Protecting Internally Displaced Persons in Nigeria,' (2017) 20 *Nigerian Law Journal*

Benedette Bassey, 'Nigeria: Overview of Statutory Marriage in Nigeria' (2020) Mondaq <https://www.mondaq.com/nigeria/family-law/985124/overview-of-statutory-marriage-in-nigeria.> [accessed 16 January, 2022.]

Betts, A.; Chimni, B.S.; Cohen, R.; Collinson, S.; Crisp, J.; Gil-Bazo, M.T. & Stigter, E, 'The State of the World's Refugees,' (2006) New York, United States: Oxford University

Betts, A.; Chimni, B.S.; Cohen, R.; Collinson, S.; Crisp, J.; Gil-Bazo, M.T. & Stigter, E, 'The State of the World's Refugees,' (2006) New York, United States: Oxford University

Constitution of the Federal Republic of Nigeria 1999

Dr. Mukhtar, 'The Root Causes of Banditry in Nigeria' May 24, 2021 <https://dailytrust.com.> [accessed 4 April, 2022.]

Elton Chizindu, 'Where and How a Valid Celebration of Marriage is Celebrated in Nigeria' (2017) LegalPuzzles <https://legalpuzzles.wordpress.com> [accessed 18 January, 2022.]

Eme T Owoaje, Obioma C Uchendu, Tumininu O Ajayi, Eniola O Cadmus, 'A Review of the Health Problems of the Internally Displaced Persons in Africa' (2016)2 Nigerian Postgraduate Medical Journal 23 <https://www.npmj.org.> [accessed 7 April, 2022]

Emmanuel Ekpeyong, 'An Appraisal of Types of Marriages in Nigeria And Procedure For Contracting Statutory Marriage In Nigeria' (2017) Mondaq <https://www.mondaq.com> [accessed 15 January, 2022.]

Emmanuelar Imasuen, “Insurgency and Humanitarian Crises in Northern Nigeria: The Case of Boko Haram” African Journal of Political Science and International Relations, Vol. 9(7), July (2015):284-296 <http://www.academicjournals.org/.> [accessed 8 April, 2022.]

Eni Alobo and Synda Obaji, 'Internal Displacement in Nigeria and the Case for Human Rights Protection of Displaced Persons' (2016) 51 *Journal of Law Policy and Globalization* 26

Food and Agriculture Organization of the United Nations, ‘Customary Norms, Religious Beliefs and Social Practices That Influence Gender-Differentiated Land Rights’ Gender and Land Rights Database <https://www.fao.org> [accessed 18 January, 2022.]

Francis Ladipo, ‘What is Customary Law of Marriage in Nigeria’ (2017) Legit.ng <https://www.legit.ng/1127334-what-customary-law-marriage-nigeria.html> [accessed 18 January, 2022]

Hi Writers, ‘The Legal Effect of Customary Marriage in Nigeria’ HiWrites.com <https://hiwriters.com.ng.> [accessed 18 January, 2022.]

Illufoye, S.O. *Domestic Security Threat in the Niger-Delta Region of Nigeria*, (Lagos: Sampeters Publishers 2009)

Jacob Zenn and Zacharias Pieri, ‘How much Takfir is too much Takfir? The Evolution of Boko Haram’s Factionalization’, (2017) 282, *Journal For Deradicalization* 11

John Sunday Ojo, 'Governing “Ungoverned Spaces” in the Foliage of Conspiracy: Toward (Re)ordering Terrorism, from Boko Haram Insurgency, Fulani Militancy to Banditry in Northern Nigeria, (2020) *African Security*, Vol. 13.

Jude O. Ezeanokwasa, Uwadineke C. Kalu & Francis Ejike Okaphor, 'A Critique of the Legal Framework for Arresting the Threat of Internal

Displacement of Persons to Nigeria's National Security' (2018) 9 *Nnamdi Azikiwe University Journal of International & Jurisprudence*

LawPadi Admin, 'Types of Marriages in Nigeria' LawPadi <https://lawpadi.com.> [accessed 18 January, 2022.]

Linus Nwauzi, 'The Rules of Marriage Under Customary Law' (River State University, River State 2019)

M. Bloom and H. Matfess, 'Women as Symbols and Swords in Boko Haram's Terror,' (2016), 6 (1), PRISM *A Journal of the Centre for Complex Operations*.

Maryam Hamza, Ph.D., 'Remote Causes of Banditry' July 30, 2021 <https://dailytrust.com/remote-causes-of-banditry. > [accessed 4 April, 2022.]

Molly Wooldridge, J.D and John Wamwara, 'Nigeria, Assistance to IDPs' IHL in Action Respect for Law on the Battlefield (2020) <https://ihl-in-action.icrc.org/case-study/nigeria-assistance-idps.> [accessed 4 April, 2022]

N. Dunia, "Abuja Bomb Blast: Senate takes Decision Today," Daily Sun Newspaper, October 6, 2010.

National Policy on Internally Displaced Persons (IDPs) in Nigeria.

Nigerian couple hold their wedding reception inside an IDP camp in Benue state, won the heart of people (photos), < https://madailygist.ng/. > [accessed 13 April, 2022]

O. Adagba, S. C. Ugwu, and O. I. Eme, 'Activities of Boko Haram and insecurity question in Nigeria,' *Arabian Journal of business and management review* (2012)1(9) 77–99.

Oge Okonkwo, 'Eligible Grooms Rush to IDP Camps for Brides Over Cheaper Dowry' *pulse.ng* (September 22, 2015)

Olaoluwatomi Kolawole, 'An Overview of the Celebration of Statutory Marriage in Nigeria' dJetLawyer <https://djetlawyer.com/.> [accessed 17 January, 2022.]

Olusola Babatunde Adegbite, Oreoluwa Omotayo Oduniyi and Ayobami Oluwaseun Aluko, 'International Human Rights Law and The Victimization of Women by The Boko Haram Sect' (2020) 11(2), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*

Omotoyosi Salihu, 'How to Become Legally Married in Nigeria: What to Know About Statutory Marriage' (2018) medium.com <https://medium.com.> [accessed 17 January, 2022.]

Research Directorate, Immigration and Refugee Board, Canada, 'Nigeria: Whether Registration of Customary Marriages Is Required And, If So, When It Began' (2000) refworld.org <https://www.refworld.org> [accessed 19 January, 2022.]

Resolution Law Firm, 'An Overview of Marriage Laws in Nigeria' resolutionlawng <https://www.resolutionlawng.com> [accessed 19 March, 2022.]

Romola Adeola, 'Nigeria's constitution holds the key to protecting internally displaced people' The Conversation, June 28, 2016 <https://theconversation.com.> [accessed 4 April, 2022

S Ekpa and NHM. Dahlan, 'Legal Issues and Prospects in the Protection and Assistance of Internally Displaced Persons (IDPs) in Nigeria' (2016) Journal of Law, Policy and Globalization (49)

Sam Olatunji Ajiye, 'Domestic Conflicts and Human Rights in Africa: Implications for Nigerian Foreign Policy', (2015)33 *Journal of Law, Policy and Globalization*

Securipedia, 'Economic effects of terrorism' (2013) < http://eu/mediawiki/index.php. > accessed 7 April, 2022

Senate urges Zamfara to equip vigilance team to tackle killings', punchng.com. <https://saharareporters.com > [accessed 11 March, 2022]

Special Report: No Security Strategy Despite Mass Killings in Zamfara'. <https://saharareporters.com > [accessed 11 March, 2022]

Stock-Taking Meeting on The Domestication of Kampala <https://data2.unhcr.org.> [accessed 7 April, 2022]

'Suspected bandits attack passenger train in northern Nigeria' Al Jazeera, 29 March 2022, < https://www.aljazeera.com# > [accessed 4 April, 2022]

The Marriage Act, CAP M6, Laws of the Federation of Nigeria

The UN Refugee Agency, 'Nigeria Emergency' The UN Refugee Agency Africa <https://www.unhcr.org/> [accessed 19 January, 2022.]

Tochuckwu Anayo-Enechukwu 'Types of Marriage in Nigeria' (2020) The Nigerian Lawyers <https://thenigerialawyer.com/types-of-marriage-in-nigeria/.> [accessed 15 January, 2022.]

Ujah, O. C., 'Internal Displacement in Nigeria,' <http://www.unisdr.org/hfa.> [accessed 7 April, 2022.]

V. Comolli, *Boko Haram: Nigeria's Islamist insurgency* (Oxford University Press, London, United Kingdom, 2015).

Williams Adewumi Adebayo and Adebola Olumide Adeniyi, 'Utilitarianism and the Challenges of Insecurity in Nigeria from 2015 to 2019' (2019) 86 Journal of Law Policy and Globalization 68

MAKERERE LAW JOURNAL DECEMBER 2022

Volume 51 Issue 15

REGISTRATION OF BUSINESS NAMES LAW IN NIGERIA: A COMPARATIVE STUDY OF THE COMPANIES AND ALLIED MATTERS ACTS 1990 AND 2020 REGIME.

David A. Oluwagbami

Recommended Citation: David A. Oluwagbami (2022), "Registration of Business Names Law in Nigeria: A Comparative Study of the Companies and Allied Matters Acts 1990 and 2020 Regime." Volume 51 Issue 15 Makerere Law Journal pp. 81-111

REGISTRATION OF BUSINESS NAMES LAW IN NIGERIA: A COMPARATIVE STUDY OF THE COMPANIES AND ALLIED MATTERS ACTS 1990 AND 2020 REGIME.

David A. Oluwagbami*

ABSTRACT

Registration of business names facilitates the identification, registration and minimally regulating the informal sector business operators. This article, using doctrinal and legal comparative method, discusses and compares the 1990 and 2020 Nigerian Business Law legal regimes, drawing similarities and differences between the provisions of the 1990 and 2020 Companies and Allied Matters Acts. There has been improvement in the legal and administrative framework for business name registration as a special purpose vehicle for exploring business opportunities in Nigeria. It is however recommended that the newly improved administrative structure is adequately funded and efficiently managed to foster sustainable economic development for the entrepreneurs concerned in particular, and the nation as a whole.

1.0 INTRODUCTION

There are several special purpose vehicles for carrying on businesses in Nigeria. In the private sector, these include private companies limited by shares, public companies limited by shares, partnerships, co-operative societies and trading under the name and style of registered business names, among others. Of these, the registered business names model is relatively attractive to small and medium-scale entrepreneurs in Nigeria. The Nigerian Law Reform Commission noted this in 1991, over (30) thirty years ago:

* David Akinola Oluwagbami, LL.B (Hons) (Ife), LL.M (Ife), BL, AMNIM, AIPMN, 08137694775, davidoluwagbami@gmail.com is a Senior Research Fellow at the Nigerian Institute of Advanced Legal Studies, Formerly the Company Secretary/Legal Adviser, University Press Plc. Ibadan, Oluwagbami presently shares his research interest and time between Investment and Energy Law as well as Legislative Drafting.

> *"The use of business names is a very popular means of carrying on business in this country. It is the mean between individual business and companies. Compared with purely individual business, it avoids the publicity of personal name where this is not desired and because it may require to be registered under the Registration of Business Names Act 1961, it provides some means of separate identification especially where two or more persons are involved. Its advantage over a company is its informality."*[1]

The main objective of this paper is to comparatively examine the provisions of the Companies and Allied Matters Act 1990 (repealed) and the Companies and Allied Matters Act 2020 (newly enacted) on registration of business names in Nigeria. This study compares the old and new Acts in order to determine how the new Act, when compared to the old, can improve the effectiveness of the regime of business registration as a tool for encouraging entrepreneurship and economic development.

The scope of this paper is relatively narrow. While this study is comparative, it does not go beyond comparing selected provisions of the present and the repealed Nigerian legislation on registration of business names. It does not inquire into recent policy decision of the Federal Government of Nigeria to register, free of charge, business names for young entrepreneurs under the present Federal Government Poverty Alleviation Programmes.[2] While the author is aware of how the legal transplant affects business laws in Nigeria, but will refrain from comparing Nigeria's business names registration law to

---

1 Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law', Lagos, January 1991, P.261, paragraph 1

2 This is the 'Formalisation Support (Registration of 250, 000 New Businesses with the Corporate Affairs Commission)' under the Federal Government MSME Survival Fund. The summary of the Scheme is outlined below:
(1) The programme: Formalisation Support Scheme aimed at registering 250, 000 new businesses at the CAC nationwide commencing 20th October 2020, administered by the steering Committee of the MSME Survival Fund and the guaranteed off-take scheme headed by the Hon. Minister of State, Federal Ministry of Industry, Trade and Investment, FMITI, Ambassador Mariam Yalwaji Katagun.
(2) The scheme is one of the compliments of the Economic Sustainability Plan signed into law by President Mohammadu Buhari on 1st July 2020 to cushion the effects of the COVID 19 pandemic on MSMEs and self-employed individual across the country.
(3) Target beneficiaries 250, 000 micro enterprises, spread as follows: Lagos 9, 084; Kano, 8,406; Abia, 7,906; other states, 6,606 each.
See generally The Nation (Newspaper) October 23, 2020, p.8

those of the United Kingdom, other common law jurisdictions, or indeed any jurisdiction.

2.0 CONCEPTUAL CLARIFICATION

The term "Registration of Business Names" had come to be closely linked to an aspect of the Law of Business Association[3] in Nigeria. This law has a post-independence history of sixty years.[4] The first Registration of Business Names Act was enacted in 1961. The first concern is defining the topic matter of this paper's scope. It is required to shine light on the crucial aspects of the subject in order to do it justice.

2.1 Business

The new *International Webster Pocket Business Dictionary* defines business as an enterprise established to provide a product or service in the hope of earning a profit. Such an enterprise may be a sole proprietorship, a partnership, or a corporation.[5] Although this explanatory definition is helpful, *Chambers Dictionary* sheds more light on the idea of Business:

> *"Business-1. The buying and selling of goods and services. 2. A shop, firm or commercial company, etc. 3. A regular occupation, trade or profession. 4. The things that are one's proper or rightful concern: mind your own business. 5. Serious work or activity: let's get down to business. 6. An affair or matter: a nasty business. 7. Colloq a difficult or complicated problem. 8. Commercial practice or policy: Prompt invoicing is good business. 9. Commercial dealings, activity, custom or contact: I have some business with his company."*[6]

Thus, the word business as a noun connotes several ideas. These include *doing business* (in the sense of trade, commerce, industry, manufacturing, dealings, transactions, bargaining, trading, buying, selling and

---

3 The areas covered by the Law of Business Association include Company Law, Partnership Law, Mergers and Acquisition Law (which was essentially a Company Law topic now enlarged to stand alone as a field of Corporate Law and Finance subjects). Business Name Registration Law belongs to these areas of law.

4 The 1961 Act was repealed and re-enacted as part C of the *Companies and Allied Matters Act, 1990*. In 2020, the 1990 Act was wholly repealed. The new law, the *Companies and Allied Matters Act*, 2020 retained the Part C of the 1990 CAMA, but now as Part E, with minor amendment of the 1990 Act.

5 The New International Webster's Pocket Business Dictionary, Trident Reference Publishing, USA, 2006, P.26

6 The Chambers 2-in-1 Dictionary and Thesaurus, Chambers Harrap Publishers Ltd, 2008, P.122.

merchandising). It also connotes *setting up a new business*. In that sense business includes company, firm, industry, corporation, establishment, organisation etc. Business in this second sense tends to reflect a more complex special purpose vehicle for carrying out business than the simplicity of business name registration which the first sense tends to connote. There is yet a third sense. This is business as a *"line of business"*. In this sense, business means a job, an occupation, employment, trade, professional line, calling, career, vocation, duty, task, responsibility and metier."[7]

The foregoing is essentially an English Language perspective of what business means; business is perceived as *an organised productive adventure.* The Business Dictionary, which was quoted earlier, reflects that the English meaning is also close to the viewpoint of the business community. The question now is: Does this match the legal definition of a business? The answer is in the affirmative. This can be deduced from the definition provided by the *Black's Law Dictionary*:

> *"Business. 1. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain. 2. Commercial enterprises <business and academia often have congruent claims>. 3. Commercial transactions <the company has never done business in Louisiana>. See Doing Business 4. By extension, transactions or matters of a non-commercial nature <the courts; criminal business occasionally overshadows its civil business>. 5. Parliamentary law. The matters that come before a deliberative assembly for its consideration and action, or for its information with a view to possible action in the future. • In senses 2, 3, and 4, the word is used in a collective meaning."*[8]

The CAMA 1990 in section 588, which provides for interpretation of words used in Part C of the Act, also offers a statutory definition of a number of words used.[9] It provides that, "Business includes any trade, industry and profession and any occupation carried on for profit." This is a useful statutory

---

7 Martin H. Manser (ed) 'The Chambers Thesaurus' (Allied Chambers (Indian) Limited, New Delhi, Indian (with licence from Chambers Harrap Publishers Ltd, USA the 2004), p.134

8 Bryan A. Garner (Editior-in-Chief) Blacks' Law Dictionary. (Ninth Edition, West Publishing Co, A Thomas Reuters Business St. Paul. MN 55123, USA) p. 226

9 CAMA, 1990, section 588 defined "Assistant Registrar," "business", "business minister", "minor", "registrar", "show cards".

definition. The legislative framework for the registration of business names implies that business is widely defined to include a wide range of the most lawful economic endeavours.

2.2 Registration of Business Names

The idea of registration of business names is practically easy to digest among lawyers specialising or practising in the field of business or corporate law. This is made even easier by the Act by providing definitions for both business name and registration of business names, as well as dividing the Part F of CAMA, 2020 into sub parts.

Business name is defined statutorily as "the name or style under which any business is carried on whether in partnership or otherwise."[10] Registration of Business Name is the legal processes of registering every individual firm or corporation that has a place of business in Nigeria and carrying on businesses under a business in a manner provided under the Companies and allied Matters Act.[11]

3.0 LEGAL AND INSTITUTIONAL FRAMEWORK

3.1. The Convergence of Business Names Registration and Companies Act in Nigeria

Prior to 1990, Nigeria operated a separate legal regime for the registration of business names and companies. The Registration of Business Names Act of 1961 governed the registration of businesses and individuals using trade names, as well as matters related thereto.[12] The Act is a relatively short enactment with only twenty sections. In summary, the Act provides for the registration of business names; manners of registration, registration of changes in names and certificate of registration.[13]

It also provided for the office of the Registrar of Business Names, removal of names from register, publication of true name, offences, penalties and

10 Companies and allied Matters Act, 1990, section 588(1)
11 ibid, section 573 and now section 814-818 of the CAMA Act 2020.
12 Registration of Business Names Act, 1961, Act No. 17 of 1961, Long Title
13 Registration of Business Names Act 1961, section 3-14

regulations.[14] These regimes remained effective until the reform of company and related laws initiated in the late 1980s by the then Attorney General of the Federation, Prince Bola Ajibola,[15] and actively implemented by the Nigerian Law Reform Commission under the leadership of Sir Danley Alexander.[16]

Company Law was also separate. The Companies Act of 1968[17] was the principal legislation for the regulation of matters relating to the incorporation, operation and winding up of companies, among other matters. Though a comprehensive enactment, it never contained matters relating to registration of business names.[18] The Nigerian Law Reform Commission in 1990 had the philosophy of maintaining the strict separation between the two, but the Government of the day over-ruled the Commission.

---

14 ibid section 15-18

15 Prince Bola Ajibola, SAN, FCI. Arb FNIALS, KBE, CFR was the Honourable Attorney-General and Minister of Justice, Federal Republic of Nigeria 12 September 1985-4 December 1991. He was also the President of Nigerian Bar Association 1984-1985. He was a Judge of the International Court of Justice, The Hagne, 5 December 1991 to February 1994.

16 Hon. Sir Danley A. R. Alexander, GCON, CFR, KT, CBE, was the Chairman of the Nigerian Law Reform Commission as at the time of the commission undertook the rigorous process of reforming the Nigerian Companies Act 1968. The other members of the commission then were Dr. S.N.C. Obi, Hon. Dr. Olakunle Orojo, CON, OFR, Alhaji Usman D. Bungudu and Alhaji Aminu I. Kastina, who seemed as the secretary to the Commission. The process took place between 1987 and 1990.

17 Companies Act (then Decree), No. 51 of 1968

18 The principles of Company Law in force in Nigeria are deprived principally from English Law. The first Company Legislation in Nigeria was the *Companies Ordinance 1912*. This Ordinance, coming shortly after the *English Companies (Consolidation) Act 1908*, understandably, adopted many of the provisions of the latter. Various amendments were made to this Ordinance and the existing statutes were consolidated into the *Companies Ordinance 1922* (see Cap. 38 of the laws of Nigeria 1948 Edition and Cap. 37 of the Laws of Nigeria 1958 Edition). This ordinance was also amended by various subsequent Ordinances, e.g. *Companies (Amendment) Ordinances* 1929, 1941 and 1954. All these amendments were based on *the English Companies Acts*.
The next important attempt at company legislation was in 1968 when the *Companies Decree (later Act)* was promulgated. This Act was again based on the existing *U.K. Companies Act 1948*. Since it incorporated some of the provisions of the U.K. Act, it is an improvement on the previous law. For example, it makes mandatory provisions in respect of the accounts of companies. However, as has been pointed out, 'one of the major criticisms of the Act is that it is little more than the putting together of some of the sections of the repealed Companies Act, Cap. 37 and some sections of the English Companies Act, 1948 instead of taking the bold step of codifying both the statutory and case law on companies. The preparation of such a Code would have provided the opportunity for reviewing and modifying some of the more inconvenient common law rules" (Orojo, J.O., Nigerian Company *Law and Practice*, Vol. 1 p.11) ibid P.1 paragraph 1-2. See also Nigerian law Reform Commission, 'Report on the Reform of Nigerian Company Law', Nigerian Law Reform Commission, Lagos, 1991, P.1

In her Working Paper, the Nigerian Law Reform Commission had recommended an amending Business Name Decree. The Commission felt that a new Decree would be preferable due to the extensive nature of the proposed amendments in the Amendments to the Registration of Business Names Act, 1961. This, according to the Commission, would obviate the need for a consolidating statute which will inevitably be necessary if the Act were merely amended. In the circumstances, it proposed a new Business Names Decree incorporating these changes. It therefore recommended that:

> *"A new Business Names Decree should be promulgated incorporating the changes suggested above, namely –*
> *(i) Establishment of State registry offices.*
> *(ii) Better means of identifying individual applicants.*
> *(iii) Administration of the Decree by the Corporate Affairs Commission.*
> *(iv) Appointment of the Registrar of Companies as the Registrar of Business Names and the appointment of Assistant Registrars and other officers."*[19]

The aforementioned statement was included in the Nigerian Law Reform Commission's Report on the Reform of the Nigerian Company Law, which it submitted to Prince Bola Ajibola,[20] the then-Attorney General of the Federation, and which was eventually published in 1991. This quotation substantially represents the philosophy of the Commission on Registration of Business Names as at that time. This philosophy was also reflected in the Registration of Business Names Scheme adopted under the Companies and Allied Matters Act 1990, the product of that law reform project.

The Act was unique in many respects. Part of that uniqueness was the incorporation of the Registration of Business Names Act 1961 (with necessary modifications) into the Companies and Allied Matters Act, 1990. The Nigerian Law Reform Commission considered CAMA 1990 to be one of the best-researched Companies Acts developed in the common law jurisdiction as of

---

19 Nigerian Law Reform Commission, *Report on the Reform of Nigeria Company*, fn 1 1991, pp263, paragraphs 14-15. Indeed, the Commission included a Draft Registration of Business Names Decree in the Volume 2 of her Report submitted to the Attorney General for consideration.

20 Prince Bola Ajibola, SAN, FNIALS, KBE, CFR, later Judge International Court of Justice (ICJ), activated the law reform functions of the Federal Ministry of Justice during his tenure as the Federal Attorney General. One of products of those reform activities was the CAMA, 1990

that time when it looked back on its uniqueness in 2007, sixteen years after it was adopted. in the commission's own words:

> *"When CAMA was promulgated in 1990, it was (and still is) generally acclaimed to be one of the well-researched code ever produced in recent times as it is a drastic improvement on the repealed Companies Act 1968, and it also contains novel provisions which suit and reflect the economic and business climate prevailing at the time it was promulgated."*[21]

3.1.2 Business Names under CAMA 1990

As earlier noted, the Nigerian Registration of Business Name Law was first incorporated into her company legislation under the Companies and Allied Matters Act, 1990[22]. This section of the essay analyses those trailblazing initiatives with the goal of highlighting the crucial clauses pertaining to the registration of business names.

In summary, the Part B of CAMA 1990 has 21 sections. Broadly, these sections cover issues relating to administrations;[23] registration of business names, and procedure for registration;[24] issuance of certificate of registration and registration of changes;[25] removal of name from register;[26] searches, copies of entries in the register and publication of true name;[27] offences and penalties.[28] Other provisions relate to power to make regulations;[29] validity of previous registration under the Registration of Business Act No. 17 of 1961;

---

21 Nigerian Law Reform Commission, Workshop papers on the Review of the Company and Allied Matters Act, 1990, 2007, p.2

22 Companies and Allied Matters Act, 1990, Cap C20, LFN 2010, Part B, section 569-589 hereafter called CAMA 1990

23 CAMA 1990, section 569-572, ibid.

24 CAMA 1990, ibid, section 573-575

25 CAMA 1990, ibid, section 576-577

26 CAMA 1990, ibid, section 576

27 CAMA 1990, ibid, section 577-582

28 CAMA 1990, ibid, section 583-584

29 Indeed, the Registration of Business Names Act No.17 of 1961 provides a good precedent to the drafter of the Part B of the Companies and Allied Matters Act, 1990.

Annual Returns, Interpretation of words used in Part B of CAMA 1990[30] as well as a repeal provision.[31]

Although Part B of CAMA, and indeed, the whole of CAMA 1990 had been repealed,[32] the provisions of Part B of CAMA are still very much relevant to this discussion. This is because of their historical and comparative value. Similarly, the Nigerian courts had assisted to resolve disputes between the Corporate Affairs Commissions and a number of aggrieved users of the Act, especially on the extent of powers of CAC. We found some of these cases useful. Therefore, an examination of the jurisprudence of the Registration of Business Names Law under CAMA 2020 will be grossly defective without an idea of the 1990 provisions.

3.2 Legal Framework

The legal framework for the registration of business names in Nigeria is broadly provided for under the following:

i. The Constitution of the Federal Republic of Nigeria, 1999, as amended
ii. The Companies and Allied Matters Act 2020
iii. The Regulations made pursuant to the CAMA, 2020

3.2.1 The Constitution of the Federal Republic of Nigeria, 1999

The Federal Government of Nigeria is given authority to make laws, exercise executive and adjudicative functions related to business name registration under the community reading of section 4 and item 62(f) of the Exclusive Legislative List, Second Schedule Part III of the Constitution of the Federal Republic of Nigeria, 1999, as amended. Section 4(1) and 4 (2) provide that:

> *" (1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.*

---

30 Part B of CAMA has its own Statutory Interpretation Clause. This is understandable in view of the fact that Part is essentially a "Statute within a Statute".

31 The Drafter also provides a separate repeal provision for Part B in relation to the Statute that was in operation before the coming into operation of CAMA 1990. The rationale for this is equally reasonable. Such repealing provisions are necessary within to clear doubts as to whether the Act is repealed or not. A closer examination of CAMA also revealed that this repealing provision is repealed at the end of the Act, section ---- CAMA, 1990.

32 See CAMA 2020

> *(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part 1 of the Second Schedule to this Constitution."*[33]

Item 64(f), Second Schedule, Legislative Powers, Part I of the Exclusive List provides that the National Assembly shall have power to make law for: "62 Trade and Commerce, and in particular- (f) registration of business names." The above provisions clearly take business name registration away from the realm of the legislative powers of the State Houses of Assembly. The Company Law Reform workshops that took place in the late 1980s and gave birth to the CAMA 1990 discussed the possibility of shifting business name registration from the Exclusive Legislative List to the Residual List. This was rejected.

The Nigerian Law Reform Commission, in her Report on the Reform of Nigerian Company Law published in 1991, documented this argument and the resolutions then. The Commission reported that:

> *"The registration of business names is a subject in the Exclusive Legislative List in the Constitution of the Federal Republic of Nigeria 1979. It has been urged by some people that the subject be removed from the list and left as a residuary subject for the States, or alternatively, that it should be included in the Concurrent List. We do not consider that this is desirable as it is likely to create unnecessary confusion and reduce the value of a business name and the possibility of protecting it."*[34]

3.2.2 Regulations by the Corporate Affairs Commission

The Corporate Affairs Commission is a statutory corporation created initially by the Companies and Allied Matters Act, 1990. The Companies and Allied Matters 2020 Act scrapped the 1990 Act and replaced it, but the good news is that the 2020 Act recreated the Commission. It has been observed that the most important characteristic of a corporation is that it has separate legal

---

33 The Constitution of the Federal Republic of Nigeria, 1999 as amended section 4(1) - (3)

34 Nigerian Law Reform Commission, *Report on the Reform of Nigerian Company Law*, Annexes 1, Registration Emphasis more of Business Law, Nigerian Law Reform Commission, Lagos, 1991, Pp. 261-263, at P. 261, paragraph 5, italics mine, for emphasis.

existence from the existence of its members for the time being.[35] The Corporate Affairs Commission is empowered to make Regulations relating to Registration of Business.[36] Similar powers to make regulations are provided under section 587 of the CAMA, 2020. Under the 1990 CAMA, the CAC issued several regulations on various aspects of her regulatory functions. One of such regulation was packaged as Notes for Customer Guidance.[37]

3.3 Institutional Framework

Theoretically, institutions are important for the implementation of government policies, especially when such policies are translated into laws. Thus, the establishment or the re-establishment of the Corporate Affairs Commission can be justified. The Regulations and regulatory institutions are generally important for public good. This is supported by the theory of regulation. By this theory regulatory commissions which are established by law performs several regulatory duties.

These include licensing, developing rules as well as ensuring compliance and enforcement.[38] It is in this light that the powers and duties of the Corporate Affairs Commission become clear in relation to the registration of business names.

3.3.1 Corporate Affairs Commission

CAMA 2020 re-established the Corporate Affairs Commission. The Commission may sue and be sued in its corporate name, may own, possess, and dispose of any property, moveable or immovable, for the purpose of carrying out its duties. The Commission is a body corporate with perpetual succession and a common seal. The headquarters of the Commission shall be

---

35 Ian McLeod, Principles of Legislative and Regulatory Drafting, Harts Publishing Ltd, Oxford, United Kingdom, 2009, chapter 8 on statutory corporations, pp.133-138 at p.134

36 CAMA 1990, CAMA 2020, section 16

37 Corporate Affairs Commission, Notes for customer Guidance: Legal Requirements for services of the Commission, undated CAC, Abuja, Nigeria. This was issued in the early 2000. It was of tremendous benefits to those involved in operating the Companies and Allied Matters Act 1990 then.

38 On theory of regulation see generally; Robert C. Fellmeth, 'A Theory of Regulation: A platform for State Regulatory Reform', available at <http://www.cpil.org/download/> Accessed 28 December 2019

in the Federal Capital Territory, Abuja, and there shall be established an office of the Commission in each State of the Federation. There is established for the Commission a Governing Board (in this Act referred to as "the Board"), which shall be responsible for performing the functions of the Commission.[39]

3.3.2 The Registrar General and The Commission's Staff

The Corporate Affairs is governed by a Board, policy-wise. However, the Commission names a Registrar-General who is licensed to practice law in Nigeria, has done so for at least 10 years, and who has additionally had experience in the practice or administration of company law for at least 8 years.[40] The Registrar-General is the Chief Executive Officer of the Commission and is subject to the Board's directives. He or she will hold office under the terms and conditions outlined in his or her letter of appointment as well as any other terms and conditions that the Board may decide upon with the President's consent.

For the purpose of managing and distributing funds from the Fund created in accordance with section 13, he serves as the accounting officer. The Commission also has such other staff as it may deem necessary for the efficient performance of the functions of the Commission under this Act.[41] The office of the Registrar General is more or less the alter ego of the Commissions and a very important institution for the Registration of Business Names under the CAMA 2020.

3.3.3 Registrars of Business Names and State Offices[42]

Long before the enactment of the CAMA 2020, there was a call for the decentralisation of the registration officers for the registration of business names in Nigeria. This was in the late 1980s before the enactment of the CAMA, 1990. The creation of state Business Name Registries has its genesis in the reform debates that led to the promulgation of Part B of 1990 CAMA. The Law Reform Commission reported this graphically:

---

39 CAMA 2020, section 1-2
40 CAMA 2020, section 9(1) -(3)
41 CAMA, 2020 section 9-10
42 CAMA 2020, section 9 (1) -(3)

> *"A strong plea was made for further decentralization of registration. It was suggested that there should be a registry in each State. Thus, if the registration of business names comes under the Corporate Affairs Commission as we recommend, then the Commission should set up and supervise the State registries. In addition, there is the point that most of these businesses are local in nature. In order to solve the problem of confusion of names, it has been suggested that each name registered should bear as an essential part of the name the identification letters of the State, either before or after the name as in the case of motor vehicle registration. Thus "Garuba & Co." may be registered in Lagos as "Garuba & Co (LA)", or in Enugu as "Garuba & Co." (AN)" or in Yola as "Garuba & Co. (GG)". In such circumstances, it will not be necessary to search for a name beyond a State. We believe that this arrangement is feasible, simple and desirable and we recommend it."*[43]

Thirty years after, the legislature had yielded. So part of the institutional framework for the registration of business names under CAMA is now the state offices of the Registrar of Business Names. Section 851 (1) -(3) of the 2020 provides clearly for this. This is a great improvement over the positions under the 1961 and the 1990 Acts.

3.3.4 Administrative Proceedings Committee (of the CAC)

One interesting innovative institutional provision of the CAMA 2020 is the Administrative Proceedings Committee. This is established under section 851 of the Act. The Committee comprises the Registrar-General of the Corporate Affairs Commission, as the Chairman; five representatives from the operational departments of the Commission, not below the level of a director and a representative of the Federal Ministry of Industry, Trade and Investment not below the grade of director and other co-opted members.

The secretary is elected from among its members and must be a legal practitioner of not less than ten years post call experience[44]. The Committee is essentially a dispute resolution mechanism, outside the Federal High Court. In this respect, section 851(4) provides that:

> *"The Administrative Committee shall –*
>
> *(a) Provide the opportunity of being heard for persons alleged to have contravened the provisions of this Act or its regulations;*

---

43 Nigerian Law Reform Commission, 'Report on Company Law', 1991, at p 62.

44 CAMA 2020, section 851 (1) -(3)

(b) Resolve disputes or grievances arising from the operations of this Act or its regulations; and

(c) Impose administrative penalties for contravention of the provisions of this Act or its regulations in the settlement of matters before it."[45]

The Committees also have potent administrative powers. Thus, under section 851(10), the sanctions that may be imposed by the Administrative Committee include: (a) Imposition of administrative penalties; (b) Suspension or revocation of registration; (c) Recommendation for criminal prosecution if matters brought before it reveals any criminal act or conduct.[46]

Nevertheless, decisions of the Administrative Committee are subject to confirmation by the Board (of the Commission). Parties dissatisfied with decisions of the Committee may appeal to the Federal High Court. These provisions can be found under section 851 (11) -(12). While it may be argued that the establishment of the Committee may lead to abuse, invariably there are good news however.

The powers of the Committee, though judicially and quasi-judicially potent, the checks inherent in the preserved appellate power of the Federal High Court is good for checking probable abuse of power by the Committee.

4.0 BUSINESS NAME REGISTRATION UNDER CAMA 2020

The incorporation of corporations, limited liability partnerships, limited partnerships, the registration of business names, and the incorporation of trustees for specific communities, bodies, and associations are all provided for by this Act.[47] The long title provides that it is:

"An Act to repeal the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004 and enacts the Companies and Allied Matters Act, 2020 to provide for the incorporation of companies, limited liability partnerships, limited partnerships, registration of business names together with incorporation of trustees of certain communities, bodies, associations; and for related matters."[48]

---

45 CAMA 2020, section 851(4). There are also provisions for Order of Proceedings under section 851 (5) -(9) (13)

46 CAMA 2020, section 851(10) (a)-(c).

47 CAMA 2020, Explanatory Memorandum

48 CAMA, 2020 Long Title.

What is the scope of the business name registration provisions in the Act? There are eleven sections of the CAMA, 2020 that are devoted to Business Names. These are under Part E of the Act, sections 811-821. The sections are further structured into four parts; business names registry, registration of business names, removal of business names from register and miscellaneous.[49]

4.1 Business Registration under CAMA 2020

The legal regime of business registration under CAMA 2020 is relatively more comprehensive than what was obtainable under the 1990 Act.[50] First, there are more provisions. In all, there are eleven sections (section 811-822) structured into three chapters.[51] Each of the chapters has a number of related provisions grouped together to cover all the necessary fields in this area of the law.[52]

5.0 SIMILARITIES AND DIFFERENCES BETWEEN THE 1990 & 2020 CAMA

As noted earlier, there are several points of similarities and differences between the provisions of the CAMA 1990 and that of 2020 on matters relating to the registration of business names. This segment of the paper focuses on that comparison. To sum up, the scope and structure of the two Acts, the regulatory framework, the registration of business names and the associated procedures, the repeal and savings provisions, the electronics documentation, the offences and penalties, the prohibited names, the Business Names Law, and the Nigerian federal system were the themes chosen for the comparative study.

5.1 Scope and Structure of the Two Acts

In terms of scope, the two legislations are not substantially different. However, the 2020 legislation is slightly different in structure from that of the 1990. The following subject matter is common to the two Acts: Registration of

49 See generally CAMA 2020, Part E, chapters 1-4
50 CAMA 2020, Part E, chapter 1, section 811-813
51 CAMA 2020, Part E, ibid chapter 2, section 814-818
52 Ibid, chapter 3, section 819. Indeed, there is the fourth chapter, section 820-822.

Business Names[53]; Procedure for Registration[54]; Entry of Business Name in the register[55]; Certificate of Registration[56]; and Registration of changes.[57]

Arguably, these are the core provisions required in a Business name registration enactment. These are basically historical extraction from the Registration of Business Names Act, 1961 by the legislature.[58] The other similar provisions to the two Acts are removal from register, searches, and prohibited names, publication of true name, offences and penalty.

Structurally, however, the 2020 Act appears to have come up with a structural innovation. First, the provisions for Business Registration are now under Part E of the CAMA 2020, as against Part B under the 1990 Act.[59] Similarly, the 2020 Act's provisions on Business Name Registration are divided into chapters. This is a new innovation. The four chapters are:

i. Chapter 1: Establishment of Business Name Registry etc.[60]
ii. Chapter 2: Registration of Business names.[61]
iii. Chapter 3: Removal of Business Name from Register.[62]
iv. Chapter 4: Miscellaneous & Supplemental.[63]

The other major difference in scope has to do with the regulatory and administrative framework. This is examined in the next segment of this paper.

5.2 Regulatory Framework under the Two Acts

The regulatory framework for the Registration of Business Names under the two Acts remains substantially the same with minor variations in nomenclatures of the Registrars and offices for the registration of Business Names.[64] Under the two Acts, the Corporate Affairs Commission established

53 CAMA 1990, section 573; CAMA 2020, section 814
54 CAMA 1990, section 574; CAMA 2020, section 815
55 CAMA 1990, section 575; CAMA 2020, section 816
56 CAMA 1990, section 576; CAMA 2020, section 817
57 CAMA 1990, section 577; CAMA 2020, section 818
58 Registration of Business Names Act 1961, section 7-12 provides for matters relevant to the registration similar to those itemized above.
59 Compare CAMA 1990 Part B and CAMA 2020, Part E
60 CAMA 2020, section 811-813
61 CAMA 2020, section 814-818
62 CAMA 2020, section 819
63 CAMA 2020, section 820-821
64 CAMA 1990, section 569; CAMA 2020, section 9

under the Act has the overall administrative power over matters relating to Registration of Business Names. Similarly, the Registrar General of the Corporate Affairs Commission is the Registrar of Business Names under the two Acts.[65]

It is however important to note that the 2020 Act differs in some respects. It now strengthens the provisions for state offices, Registrar of Business Names at state level. More importantly, CAMA 2020 now establishes an Administrative Proceedings Committee (a quasi-judicial dispute resolving mechanisms within the Corporate Affairs Commission regulatory system).

5.3 Registration of Business Name

The essence of the provisions relating to registration of business name under both the CAMA 1990 and 2020 is to provide a registration scheme. Thus, provisions relating to registration can be found under sections 573-577 of the CAMA 1990. Likewise, sections 814-818 of CAMA 2020 provide for matters relating to registration. Both Acts therefore cover the basic registration elements such as registration of the name,[66] procedure for registration,[67] entry of the names in the register,[68] certificate of registration[69] and registration of changes.[70]

Under the CAMA 2020 section 814 is the main provision for registration of business names. This is similar to section 573 of the 1990 Act. The core provisions under 573 (1) -(3) of 1990 are almost identical with section 814 (1) -(3) of the 2020 Act except for the substitution of the word corporation for company under the 2020 Act in section 814 (1)(c). It provides:

> *"814 (1)(c) Every individual, firm or Corporation having a place of business in Nigeria and carrying on business under a business name shall be registered in the manner provided in this Part."*

What then are the dissimilarities? First the legislative introduced the concept of dividing the relevant provisions on Business Name Registration under

65 CAMA 1990, section 571; CAMA 2020, section 812
66 CAMA 1990, section 573; CAMA 2020, section 814
67 CAMA 1990, section 574; CAMA 2020, section 815
68 CAMA 1990, section 575; CAMA 2020, section 816
69 CAMA 1990, section 576; CAMA 2020, section 817
70 CAMA 1990, section 577; CAMA 2020, section 818

CAMA 2020 into chapters. Thus, there are four chapters[71] under Part E of the 2020 Act. This was not the case under the 1990 Act. Secondly, the provision relating to the appointment of Assistant Registrars of Business Names under S. 571(2) of the 1990 Act had been redrafted. It now reads, under S. 812 (2):

> *"Suitable staff of the Commission may be appointed from time to time to be head of office and other officers of the Business Name Registry in each state of the Federation as may be necessary for the administration of this part of this Act."*

Thirdly, section 573(a)-(b) of the 1990 and section 814 (1) -(3) of 2020 are similar. There is however a major departure in the number of subsections. While the 1990 section 573 has 2 subsections, the 2020 section 814 has 4 subsections. The first 2 subsections are identical with that of 573 (1) -(2) while the remaining 2 i.e. 814 (3) -(4) are new provisions providing for the *powers of inspectors* over a registered partnership business name.

This provision becomes necessary for two reasons. One, CAMA 2020 now provides for a new regime of limited partnerships.[72] Second, the new CAMA Act also strengthens the power of inspection[73] vested in the relevant organ of the Corporate Affairs Commission. Section 814 vests an inspector with a number of discretionary powers. These include power to examine on oath and other remedial regulatory matters.

The above observations are but a part of the central problem. The core challenge with the provision relating to registration under the Act is section 814 which provides for compulsory registration of all businesses commenced in Nigeria within 28 days of their commencement. Why do we have to enact a regime of compulsory registration when the socio-economic indices available are not supportive of such an over-formalised system?

5.4 Procedure for Registration

The procedures for registration of business name under the two Acts are almost identical. These are contained under section 574 of the 1990 and

---

71 The chapters are: Chapter 1: section 811-813 Chapter 2, section 814-818, Chapter 3: section 819, Chapter 4: section 820-821

72 CAMA 2020

73 CAMA 2020, section 814

section 815 of the 2020 CAMA. Each of the two provisions has six subsections each. The retention of the procedure under the 1990 Act in the 2020 Act is good for consistency. Nevertheless, electronics registration is now part of the new scheme.

5.5 Electronic Documents

One encouraging difference between the 1990 and the 2020 CAMA in respect of filing is the introduction of electronic filing under s.860 (1) -(3) of the new Act. These provisions put a permanent end to the controversies that raged in our procedural law (Evidence inclusive) before the enactment of the Evidence Act, 2011 and CAMA 2020. It would be recalled that section 84(1) -(5) Evidence Act, 2011, now provide for what the side note to the section describes as "Admissibility of Statement in Documents Produced by Computers." Section 84(1) provides that:

> *"In any proceedings a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question."*[74]

The provision of CAMA 2020 on electronics documentation is a good development. This provision will add value to ease of doing the business of registration of business names in Nigeria. The positive effects of this on commercial law practice and business transactions by the registered businesses are equally likely to be enormously positive. This will lead to sustainable development of the jurisprudence of Nigerian business registration law and entrepreneurship.

5.6 Repeal and Savings Provisions

The 1990 Act has three separate repeal provisions, one each for Part A, B, and C of the Act as appropriate. For Business Name, section 589 was the repealing section. It provided that, "The registration of Business Names Act 1961 is

---

[74] Evidence Act 2011, section 8 (1). Interestingly section 64 (2) build on the provision of section 84(1).

hereby repealed."[75] However, under the 2020 Act, there is only one repealing and savings provisions, though comprehensive in its drafting. This forms part of the final and transitional provisions at the end of the Act.

5.7 Offences and Penalties

It is in the nature of licensing, registration or regulatory laws to provide penal provisions relevant to the activities forming the subject matter of the law. The objective of this is to ensure obedience and to make enforcement relatively easy. As rightly observed by Vicrabb:

> *"Laws are commands in the main. A command demands obedience. Obedience to the law is secured by sanctions. Sanctions are the penalties attached to disobedience to the law's commands. An enactment would thus contain a penal provision to ensure its observance or compliance. Penal provisions must be clearly expressed; they are strictly construed by the courts, in the favour of an individual."*[76]

Following the above rationale, both CAMA 1990 and 2020 make penal provisions for the violations of relevant legal commands relating to the registration of Business Names under the two Acts. Whatever approach is taken, it is important that the three elements of penal provisions must be present in any penal provision. These are *prohibition*, *contravention* and the *sanction* or *penalty*.[77]

However, and this is crucial, the *Interpretation Act* established the guidelines to be followed when reading a penal provision. Section 17 (1) of the *Interpretation Act,* 1961 while providing for penalties unequivocally states as follows:

> *"(1) Where a punishment in respect of an offence is provided by an enactment, the enactment shall be construed as providing that an offender shall be liable in pursuance of the enactment to a punishment not exceeding the punishment so provided."*[78]

---

75 Companies and Allied Matters Act, 1990, section 589. On Part A dealing with companies, section 568 was the Repeal section. section 568(1) provides that subject to the provisions of section 568, the companies Act 1968 and the Companies Special Provisions Act 1964 shall, on the commencement of this Act be repealed. Similarly, Part D dealing with incorporated Trustees was repealed by section 611. That section provides that "The Land Perpetual Succession Act Cap 98 is hereby repealed.

76 Vicrabb Legislative Drafting p.171, quoting with approval ibid, p.171

77 Vicrabb ibid, p.171

78 Interpretation Act, Cap I 23, section 17

Going by its predecessor, the CAMA 1990, the CAMA 2020 is arguably an Act that is intended to last for a few decades before a substantial reform, repeal, and re-enactment. This invariably implies that many of its provisions, including those on Registration of Business Names are to be driven by Regulations made pursuant to the principal Act. Where this is the case it must be noted that in the absence of a general power such as is commonly found in the more modern interpretation statutes, specific provision must be made empowering delegated legislation to include penal sanctions.[79]

This is self-explanatory. The Regulations to be made under the CAMA, 2020 must derive penal power from the Principal Act. If otherwise, such powers to punish will be ultra vires, and consequently void.

5.8 Prohibited Names

The law relating to registration had always provided for the regulation of the classes of names that may or may not be used. Under section 579 of the CAMA 1990, the law provided for Prohibited and restricted names. Where any business name under which the business of a person is carried on or to be carried on:

i. contains the word "National" "Government", "Municipal", "State", "Federal", or any other word which imports or suggests that the business enjoys the patronage of the Federal, State or Local Government;
ii. contains the word "co-operative" or its equivalent in any other language or any abbreviation thereof;
iii. contains the words "Chamber of Commerce", "Building Society", "Guarantee", "Trustee", "Investment", "Bank", "Insurance" or any word or similar connotation;
iv. is identical with or similar to a name by which any firm, company or individual is registered under this Part of this Act or any company is registered under the Act;

[79] Thornton, Legislative Drafting, 4th Edition p.147

v. is similar to any trade mark registered in Nigeria; and the Registrar is of opinion that registration would likely mislead the public then the Registrar shall, unless the consent of the Commission has been first obtained by the person refuse to register the business name or, as the case may be, cancel the registration thereof.[80]

Section 579 (2) elaborates further. There are other bases such as underage, fraud or previous registration under section 579 (3)-(4).[81] It would be recalled that Part A of CAMA 1990 has similar provisions for prohibited names under section 30 (1) -(2). The regimes of different provisions for the prohibition of certain names for companies and communities have changed. Under the CAMA 2020, there is now a single provision for prohibited and restricted names. The provision applies to companies, partnerships, non-profit making organisations as well as business names.

Thus under section 862(1):

> *"No company, limited liability partnership, limited partnership, business name or incorporated trustee shall be registered under this Act by a name or trade mark which –*
> *(a) is identical with that by which a company or limited liability partnership in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires."*

This is a welcome development.

5.9 Business Name Law and Federalism

Arguments had been made in favor of removing business names off the Exclusive Legislative List. This debate has been going on for more than 30 years, even before the CAMA of 1990 was passed. In 1988, the Nigerian Law Reform Commission, a representative of government circles, held the opinion that keeping it on the Exclusive Legislative List was preferable.

The Commission argued then that:

> *"The registration of business names is a subject in the Exclusive Legislative List in the Constitution of the Federal Republic of Nigeria*

80 CAMA 1990, section 579 (1)
81 CAMA 1990, section 579 (2) – (4)

> *1979. It has been urged by some people that the subject be removed from the list and left as a residuary subject for the States, or alternatively, that it should be included in the Concurrent List. We do not consider that this is desirable as it is likely to create unnecessary confusion and reduce the value of a business name and the possibility of protecting it."*[82]

As with the CAMA 1990, the CAMA 2020 is a federal law, same as before. However, we believe that state authority over business registration should be given to them. Small-scale informal companies are the main subject of Registration of Business Names. This is the approach. There is nothing in it that is so extraordinary that states shouldn't be able to handle it.

6.0 JUDICIAL CONTRIBUTIONS TO REGISTRATION OF BUSINESS NAMES REGIME

It is important at this stage to examine, in brief, the contributions of the Nigerian judiciary to the development of Business Names Registration Law in Nigeria. The courts, in many cases, had pronounced on several aspects of the provisions of the Companies and Allied Matters Act, 1990, on Business Names Registration. There are also cases on the registration of limited liability companies that have bearings on registration of business names. Few of these relevant cases will form the basis of my discussion in this segment of this paper.

Under the CAMA 1990, the rules relating to names are the same for business names and limited liability companies. Sections 30-32 of CAMA deal with prohibited and restricted names change of a name and reservation of names of companies. These provisions are similar to section 579-580 of the same CAMA, 1990 that provide for prohibited and restricted names and searches in relation to business names.

6.1 General Attitude of the Court

Generally, the courts had shown uncommon willingness to keep its doors open to any litigant on the provisions of the Companies and Allied Matters Act, 1990. Specifically, the cases had revealed that the courts are always

---

82 *Nigerian Law Reform Commission, Report on the Reform of Nigerian Company Law*, NLR, Lagos, 1991, p.261

ready to interpret the provisions of the Act objectively, using the CAMA, legal submission of counsel and adhering to the interpretative functions of the courts. While it is true that it is the Federal High Court that has the jurisdiction to adjudicate on matters relating to the provisions of the CAMA, 1990, the case that went on appeal testified to the fairness of the justice dispensed by the trial courts. We therefore review few of these cases here under.

6.2 The Scope of the Power of the Corporate Affairs Commission on Registrable Names

The Corporate Affairs Commission is conferred with the responsibility of registering companies (and businesses) operating in Nigeria by statute; CAMA 1990. Under that Act it can prohibit and restrict certain names sought to be registered. The case of *Mustapha v. C.A.C.*[83] illustrates this point clearly. This was an appeal against the judgment of the Federal High Court, Abuja, which dismissed the claims of the appellant against the respondent.

The Court of Appeal, in a unanimous decision, dismissed the appeal. The question in this case was whether the trial court was correct in ruling that the appellant's proposed company names were the same as or confusingly similar to those of companies that were already in existence and were thus properly rejected by the respondent acting in accordance with section 30 of the Companies and Allied Matters Act, 1990.

It was held, inter alia, that Companies and Allied Matters Act does not place any duty on the Corporate Affairs Commission to undertake an etymology of the words used in formulating the names to be registered in ascertaining whether they are identical as to mislead or deceive people as to the identity of the names already registered. All that is required of the Commission by law is a comparative analysis of the names from the ways they look or sound in the mouth and ears of ordinary citizens on the streets of Nigerian towns and cities

83 *Mustapha v C.A.C.* [2009] 8 NWLR (part 1142) 35

and in particular those doing business in markets in the commercial cities who may be potential business customers of these companies.

That by virtue of section 30(1)(a)(b)(c) of the CAMA, 1990, the CAC is under a mandatory duty to refuse to register any company in Nigeria with a name identical or so resembling another company already registered**.** The CAC's discretionary ability to approve names to be registered is being preserved in this case. I consider this to be justifiable good judgment. S.579 CAMA 2020, which addresses names for business names that are forbidden or restricted, is the exact same as Section 30 of CAMA 1990.

6.3 Duty of CAC to Act Within the Law

A public entity or authority with statutory powers must follow the law and take care not to overstep or abuse its authority, the courts have repeatedly emphasized. It must stay within the bounds of the power granted to it. It must behave honestly and sensibly.[84] This principle of law also came up in one of the relevant cases to my discussion, the case of *Amasike v. Registrar-Gen., C.A.C.*[85]

This was an appeal against the ruling of the Federal High Court, which struck out the appellant's suit for being incompetent. The Court of Appeal, in a unanimous decision, dismissed the appeal. The questions in this case were whether the trial court had done the right thing in raising and considering suo motu legal and factual issues in dismissing the case without giving the appellant a chance to be heard, and whether the trial court had done the right thing in concluding that the respondents were justified in their determination that the names proposed by the appellant are ineligible for registration under the terms of the Companies and Allied Matters Act, 1990.

It was held, inter alia, that the Corporate Affairs Commission has the discretion to refuse registration of a company. By section 30(l)(c) and (2)(a) of

---

84 *Psychiatric Hospital Management Board v Ejitagha* (2000) 11 NWLR (Pt. 677) 154_referred to.] (P.500, paras. F-H*)*

85 *Amasike v Registrar-Gen., C.A.C.* [2006] 27 NWLR (part 968) 462

the Companies and Allied Matters Act, 1990 no company shall be registered under the Act by name which in the opinion of Corporate Affairs Commission is capable of misleading as to the nature or extent of its activities or is undesirable, offensive, or otherwise contrary to public policy. According to the ruling on the presumption of discretion in the use of statutory powers, discretionary powers are implied and, when appropriate, utilized for beneficial purposes unless a legislation expressly or by necessary implication forbids it or the obligation demanded prevents it.[86]

6.4 Discretionary Power of the CAC to Register Names

It should be recalled that no company may be registered under the Companies and Allied Matters Act, 1990, by a name that, in the opinion of the Corporate Affairs Commission, is undesirable, offensive, or otherwise contrary to public policy or is capable of deceiving as to the nature or extent of its activities. A company's name cannot include the words "Federal," "National," "Regional," "State," "Government," or any other word that, in the Commission's opinion, implies or is intended to imply that it enjoys the patronage of the Government of the Federation or the Government of a State in Nigeria, as the case may be, or any Ministry or Department of Government, without the Commission's consent.

The Court of Appeal sheds more light on this in the case of *Corporate Affairs Comm. v. Ayedun.*[87] This was an appeal against the ruling of the Federal High Court, Abuja, which granted an order of mandamus at the respondent's instance against the appellant, directing the appellant to apply to court for directions on the issue of refusal to register the name Credit Registry Limited which the respondent had presented for incorporation. The Court of Appeal, in a unanimous decision, allowed the appeal.

In this case, the question of whether section 36(2) of the CAMA, 1990 imposes an obligation on the appellant to seek court directions regarding the

86 The Court also held that Courts are enjoined to apply the literal interpretation of words where such words are used in a statute without any ambiguity. Therefore, in interpreting a law or laws the court should do so as they ought to be.

87 *Corporate Affairs Comm. v Ayedun* [2005] 18 NWLR (part 957) 391

appellant's refusal to register the name Credit Registry Limited, as well as the question of whether the trial court's order of mandamus requiring the appellant to seek court directions under section 36(2) of the CAMA, was legally justifiable, were the issues to be resolved.

It was held that under section 30 of the Companies and Allied Matters Act dealing with names of companies to be registered there is no provision requiring the CAC to apply to court for directions. It gives the Commission the discretion in the registration or rejecting to register a name based upon certain criteria. It is only when those criteria are not adhered to or the discretion improperly exercised that a court can interfere.[88]

The foregoing cases illustrate the position of the law on the express and discretionary powers of the Corporate Affairs Commission to accept or refuse to register a proposed company name or that of business names. Though the above cases were mainly on proposed names for private limited liability company, it is obvious from the provisions of the CAMA 1990 and the pronouncements of the courts that the same principles apply when it comes to the issue of acceptable or unacceptable names for registration of companies or business names, Sections 29-32 of the 1990 Act deals with name of company.

The provisions cover the name stated in the memorandum; prohibited and restricted names; change of name of company and reservation of names.[89] These provisions are obviously in Part A of the CAMA 1990, which deals with

---

88 On Construction of clear and unambiguous words of a statute, it is a fundamental and cardinal principle of interpretation of statutes that where in its ordinary meaning a provision is clear and unambiguous, effect should be given to it without resorting to external aid. The proper approach to the interpretation of clear words of a statute is to follow them in their simple, grammatical and ordinary meaning rather than look further because that is what prima facie gives them their most reliable meaning. This is also generally true in the construction of statutory provisions if they are clear and unambiguous even when it is necessary to give them a liberal or broad interpretation. In the instant case, the provisions of section 36 of the Companies and Allied Matters Act, 1990 are clear. Therefore, the trial court was wrong to have imported into section 30, the requirement in section 36 of the Act.

89 CAMA, 1990, section 29-32

companies. Section 579, Part B, CAMA, 1990 provides for identical regime of prohibited and restricted names for business names.

7.0 FINDINGS, RECOMMENDATIONS AND CONCLUSION

The foregoing discussions have focused on a number of issues relating to the Registration of Business Names under the Companies and Allied Matters Acts, 1990 and 2020. The discussions revealed a rich historical context, a succinct conceptual definition of the key terms, a discussion of the relevant legal and institutional framework on the operation of the Acts, a fairly straightforward comparative study of the provisions relating to the registration of business names under the two Acts, as well as the discussion of a number of illustrative decided cases on the subject.

7.1 Findings

I found that the CAMA, 1990 and 2020 have several common provisions on the registration of business names. This, is good for policy stability and smooth transitions from one legal regime to another. It will enhance sustainability of the system of business name registration in Nigeria, and arguably leads to further growth and development of small and medium scale enterprises which form the main focus of the business name registration system.

I also found that the two Acts derived the origin of their provisions from the Registration of Business Names Act, 1961. Secondly, that the change from the Registrar of Business Names under Ministry of Trade to the Self-regulatory administrative corporation, the Corporate Affairs Commission, in the 1990 Act also continued under the 2020 Act. Further, that the framework under the 2020 Act had been consolidated and improved upon. Thirdly, that the Registration of Business name remains constitutionally and legally a federal matter.

Structurally, the two Acts remain the same, with slight but useful drafting modifications. Regulatory frameworks remain basically similar except with the improved restructuring of, and re-designating relevant officers of the Corporate Affairs Commission as the State Registrars of Business Names.

There is however the establishment of the Administrative Committee of the Commission, whose quasi-judicial functions also extend to matters relating to disputes emanating from the administration of the provisions on Registration of Business Names under the 2020 Act.

The provisions relating to removal of business names from the Register as well as provisions relating to offences and penalties are substantially similar. The repeal and savings provisions remain technically the same but structurally adjusted in terms of placement in the new Act. This is basically a legislative drafting design issue. Furthermore, the courts have made meaningful contributions to the development of the jurisprudence in this area of the law.

The few cases examined exhibited the willing consistency in the pronouncements of the courts in relevant disputable areas of the administration of the law under the 1990 Act. These cases are arguably, good pointers to future reasoning of the courts under the 2020 Act. Nevertheless, there are a number of differences between the 1990 and 2020 CAMA provisions. Few of them were identified and discussed: scope and structure, regulatory framework, the scheme of registration, procedure for registration and the introduction of electronics registration are the key areas of comparison.

The key differences noted are: modified structure; more elaborate registration procedure; the statutory establishment of the state offices for business names registration; and the statutory introduction of electronics documentation under the CAMA 2020. The paper also found that the new Act had further consolidated the control and regulation of matters relating to Registration of Business Names in the Federal Legislature and the Federal Executives. States have no say in this, constitutionally.

The 2020 Act provided for continuity of the 1961 and 1990 regime of business name registration. This is good for stability in this area of our law. Nevertheless, there are areas for improvements. These form the basis for the policy recommendations, which follows.

7.2 Policy Recommendations

I make the following recommendations:

There is a need to re-examine the centralised regime of Business Name Registration in Nigeria, a federal system. The Business Name Registration model is essentially designed for informal and semi-formal, relatively localised businesses. The constitution made a feeble attempt at decentralising business name registration to local government by providing for the control and regulation of shops and kiosks under the Fourth Schedule Paragraph K (iii) of the Constitution of the Federal Republic of Nigeria 1999, as amended. It failed to go further. The issue is central to the future of Registration of Business name regime in Nigeria.

Section 814(1) of CAMA, 2020 is drafted in a mandatory forum "shall be registered". This is not reflective of the socio-legal position of the law. We have a regime of voluntary registration in practice. This section should be redrafted with the word "may" as the operative key word. This will make registration voluntary, legally.

The introduction of State Registrars of Business Names is a welcome development. But this must be supported with well-equipped accessible offices across the commercial cities and towns in the states, rather than the state capital alone.

7.3 Conclusion

The legislature must be commended for sustaining the policy framework of the Registration of Business Names already well-established under the 1961 and 1990 legal framework. This consistency will go a long way in sustainability of the system as more business inclined citizens gradually adopt the registration of their businesses. This will contribute to economic growth and development through more formalised approach to business, and consequently positive tax contributions.

LIST OF REFERENCES

Amasike v Registrar-Gen., C.A.C. [2006] 27 NWLR

Bryan A. Garner (Editior-in-Chief) Blacks' Law Dictionary. (Ninth Edition, West Publishing Co, A Thomas Reuters Business St. Paul. MN 55123, USA)

Companies and Allied Matters Act, 1990.

Corporate Affairs Comm. v Ayedun [2005] 18 NWLR (part 957) 391

Ian McLeod, Principles of Legislative and Regulatory Drafting, Harts Publishing Ltd, Oxford, United Kingdom, 2009, chapter 8 on statutory corporations, pp.133-138

Interpretation Act, Cap I 23

Martin H. Manser (ed) 'The Chambers Thesaurus' (Allied Chambers (Indian) Limited, New Delhi, Indian (with licence from Chambers Harrap Publishers Ltd, USA (2004)

Mustapha v C.A.C. [2009] 8 NWLR

Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law' of 1991

Nigerian Law Reform Commission, Workshop papers on the Review of the Company and Allied Matters Act, 1990, 2007

On theory of regulation see generally; Robert C. Fellmeth, 'A Theory of Regulation: A platform for State Regulatory Reform', available at <http://www.cpil.org/download/> Accessed 28 December 2019

Psychiatric Hospital Management Board v Ejitagha (2000) 11 NWLR

Registration of Business Names Act No. 17 of 1961

The Constitution of the Federal Republic of Nigeria 1999

The New International Webster's Pocket Business Dictionary, Trident Reference Publishing, USA, 2006.

MAKERERE LAW JOURNAL DECEMBER 2022

Volume 51 Issue 16

AN OVERVIEW OF THE DEVELOPMENT AND REALIZATION OF TRANSITIONAL JUSTICE GOALS IN UGANDA

Courage Ssewanyana

Recommended Citation: Courage Ssewanyana (2022), "An Overview of the Development and Realization of Transitional Justice Goals in Uganda" Volume 51 Issue 16 Makerere Law Journal pp. 112-131

AN OVERVIEW OF THE DEVELOPMENT AND REALIZATION OF TRANSITIONAL JUSTICE GOALS IN UGANDA

Courage Ssewanyana*

ABSTRACT

Most societies in the aftermath of serious human rights violations try to come to terms with these violations through various means or mechanisms. One of the modern means is pursuing Transitional justice mechanisms. Loosely defined transitional justice means the mechanisms through which a society comes to terms with its violent past. Uganda as country has seen a lot of human rights violation before and after 1962 when she became an independent country. The country has tried various ways to reconcile with its pasts and transitional justice has become one of the ways to do so. This paper traces the history of transitional justice in Uganda highlighting what has worked and failed in the quest for social cohesion.

1.0 INTRODUCTION

"Uganda will not recover as a state if it does not confront the demons that have tortured it for decades"

—Prof. Makau Mutua[1]

In the aftermath of a mass atrocity, human rights violations and insurgencies, the priority of a society becomes restoration of peace, livelihoods and search

---

* The author is a student of Law at Makerere University and Trainee at Refugee Law Project, School of Law Makerere University.

1 Makerere University, Faculty of Law, 'Stakeholders' Dialogue, Beyond Juba: Building Consensus on a Sustainable Peace process for Uganda' December 1-3,2006

for justice and accountability. Mass atrocities and turbulence have been part of Uganda since its independence in 1962. There is no meaningful transition to speak about since the end of colonial rule in 1962; instead, what we have is that each regime that transitions pilled victims of its atrocities in what has become a pattern of transitional injustices.

Transitional Justice (TJ) refers to ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations.[2] TJ is also understood as the full range of processes through which a community or country attempts to come to terms with past gross human rights abuses and armed conflict. These procedures involve both legal and extralegal elements, such as accountability, truth-telling commissions, criminal prosecutions, and restitution.[3]

Truth commissions are official, time limited fact-finding bodies generally charged with examining the roots, facts, patterns and consequence of armed conflict or dictatorship and presenting a report and recommendations to avoid recurrence.[4] They are intended to promote acknowledgment and speaking the truth. As a result, it is considered to support the goals of encouraging justice, advancing social and psychological healing, creating reconciliation, and preventing further crimes.[5]

Reparations, on the other hand, serve to acknowledge the legal obligation of a state or group to repair the effects of violations that were directly committed by them or that they were bystanders to the effect of failing to prevent the conflict.

---

2 International Centre for Transitional Justice, "What is Transitional Justice?" available at <www.ictj.org> [Accessed on 31 August 2022]

3 Stephen Oola, "Uganda's Transitional Justice Policy: Better late than never", New vision, July 5, 2019, available at <https://www.newvision.co.ug/news/1502988/> [Accessed on 28 August 2022]

4 Priscilla Hayner, "Unspeakable Truths: Confronting State Terror and Atrocity" (New York: Routledge, 2000).

5 Beyond Juba, Building Consensus on Sustainable Peace in Uganda "Why being Able to Return Home should be part of transitional justice: Urban IDPs in Kampala and their quest for a Durable solution" Working Paper No.2 March 2010 available at <https://www.peaceinsight.org/> [Accessed on 28 August 2022]

They are meant to recognise and address the harms suffered and acknowledge wrongdoing.[6] Reparations can be material or symbolic, and they are frequently the most obvious signs that a state recognises the rights and dignity of victims and is committed to not committing the same wrongs again.[7]

As a result, transitional justice works to advance procedures for determining the origins of violence, holding those responsible for abuses accountable, compensating victims, and encouraging institutional and structural changes meant to address any structural injustices that may have contributed to the conflict.[8] One can infer from the foregoing that Uganda actually requires and/or needs these processes. Many untold human rights violations happened in the colonial era in Uganda.

After attaining independence in 1962, Uganda got embroiled in civil strife for over two decades under Milton Obote (1964-1971), Idi Amin (1971-1979), and Milton Obote (1980-1985) with 300,000 estimated deaths and various human rights violations documented.[9] Each dictatorship that came into power pilled its victims of human rights crimes on the lists of the prior regimes. Under Yoweri K. Museveni's administration, Uganda had a number of military conflicts from 1986 to 2006. Of these, the Lord's Resistance Army (LRA) insurgency in Northern Uganda, which lasted for two decades, is prominent.

The LRA insurgency is infamous for the untold violations levelled against the civilian population in Northern Uganda by both the LRA and the government soldiers. Formal transitional justice discussions began at the Juba Peace talks between the government of the Republic of Uganda and the LRA. There, the

---

6 ICTJ, "Reparations and Transitional Justice" , available at <https//www.ictj.org/our-work/transitional-justice-issues/reparations> [Accessed on 28 August 2022]

7 Laura A and Naomi R, "Social Reconstruction as a Local Process" p161, The International Journal of Transitional Justice Volume 2, Issue 2, July 2008

8 Beyond Juba, *ibid* at n (5)

9 Refugee Law Project (RLP) (2014b) "Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit". Kampala: Refugee Law project, School of Law, Makerere University

Agenda Item No.3 on Accountability and Reconciliation was signed, aimed at preventing impunity and promoting redress in accordance with the Constitution and international obligations.

The road to transitional justice in Uganda has been bumpy because of various challenges complicated by the nature of the conflicts in Uganda. This article traces the development of transitional justice in Uganda, focusing on its several pillars and evaluating what has been done thus far in light of what has worked and what has not, as well as the reasons behind each. It is segmented into different sections starting with a brief history and nature of conflicts in Uganda, transitional justice mechanisms employed before the promulgation of the 1995 Constitution, focus on the LRA conflict with emphasis on the juba peace talks and the processes thereafter. Logical conclusion is therefore drawn citing lack of political will as the greatest obstacle to the realization of TJ in the Uganda.

2.0 THE NATURE OF CONFLICTS IN UGANDA

The sheer complexity of Uganda's conflicts has led to a large number of victims seeking retribution to this day. The Refugee Law Project in 2014 documented 125 major conflicts in Uganda, ranging from colonial era to the latest war in northern Uganda out of a National Reconciliation and Transitional Justice (NRTJ) Audit conducted across 20 districts.[10] The history of Uganda and the lives of its people were forever changed by these conflicts. The scale of these conflicts is different from the religious disputes between Catholics and Protestants in Buganda in 1892, or the political conflicts in 1964 and 1966, when many Baganda were slaughtered in an attack on the Kabaka's palace in Lubiri. During Obote's rule, violations influenced by tribalism were also reported against the Buganda and other tribes.[11]

---

10 *ibid*

11 Phares Mutibwa, Uganda since Independence: A Story of Unfulfilled Hopes, Africa Word Press, 1992

When Idi Amin overthrew Obote in a coup in 1971, a new wave of human rights abuses began in earnest. Undocumented numbers went missing and thousands were brutally killed, including prominent members of the society like Chief Justice Ben Kiwanuka, Archbishop Janani Luwum. The regime also targeted and killed the Langi and Acholi soldiers in the Army. The rich and the merchant Indians were targeted and expelled from Uganda with their property confiscated unconstitutionally.[12] After eight years of many human rights crimes, the dictatorship was ousted in 1979 with the assistance of Tanzanian soldiers and Ugandan exiles.

Many human rights violations were also recorded thereafter with the return of Obote in 1980. In retaliation for being targeted by Amin's army, the Langi also attacked Amin's ancestral home of West Nile. Following the contentious 1980 elections, Yoweri K. Museveni led a second lengthy uprising, which lasted until Tito Okello's dictatorship was overthrown in the Luwero triangle, which resulted in the deaths of many people.[13] Upon assuming power in 1986, the NRM government faced off with over 23 rebel insurgents most notable of which are the UNBF, Allied Democratic Forces (ADF), Lord's Resistance Army (LRA) among others.

All these rebel groups left serious human rights violations in the areas of their operations and the government soldiers are also implicated on various violations. To this end we can see that the conflicts in Uganda are complicated in nature. It can be exceedingly challenging to distinguish between offenders and victims in most conflicts since victims of earlier violations frequently go on to commit subsequent violations, and vice versa.[14] As was stated at the outset, Uganda's recent regime upheavals have left nothing but "transitional injustices" to discuss.

---

12 *ibid*

13 *ibid*

14 This can be seen from the Langi and Acholi who were targeted by Amin who later revenged on the people of West Nile after his overthrow thereby becoming perpetrators of violence. See also Dominic Ongwen who was convicted for war crimes at ICC, he was a victim as a child abducted but later became a commander in the LRA becoming a perpetrator of various violations.

Understanding the disputes gives us the chance to evaluate the efforts made to bring about justice and healing.

3.0 TRANSITIONAL JUSTICE IN UGANDA BEFORE THE 1995 CONSTITUTION: ASSESSMENT OF THE TRUTH COMMISSIONS SET UP IN UGANDA BEFORE 1995

Formal TJ debates started in the early 1990s in the lead towards the formation of the Truth and Reconciliation Commission of South Africa. However, the TJ processes like truth seeking or telling were already in place. The human rights violations and the unexplained disappearance of Ugandan Citizens prompted the government of Idi Amin to setup a committee to investigate the disappearance of these people. Through Legal Notice No.2 of 1974, the Commission of Inquiry into the Disappearances of People of Uganda was setup with a mandate, inter alia, to inquire into whether these people died or were living and the circumstances under which they met their death.[15]

This commission recorded 308 cases of disappearances between 1971 and 1974 with 529 witnesses appearing before it. Although the hearing procedures were open to the public, the commission's findings were never published, and Idi Amin received a confidential report instead. Because they were allegedly the ones responsible for the disappearances, the Commission recommended that the police and armed forces be reformed and schooled in human rights norms.[16] Although it is regarded as the first attempt to bring TJ to Uganda, not much was accomplished.

The commissioners themselves were targets of retaliation to the extent that the main judge was forced into exile. The administration also limited hearings on the disappearance of people of Asian descent, which deprived the panel of the crucial

15 United States Institute of Peace, "Commission of Inquiry into the Disappearance of People in Uganda since 25 January,1971:Charter" available at <www.usip.org> [Accessed on 2 September 2022]

16 USIP available at <https://www.usip.org/> [Accessed on 2 September 2022]

independence. As a result, the regime never acted on the Commission's recommendations, which created a negative precedent for TJ and Truth Commissions in Uganda.

In 1986 when the NRA/M took power, President Museveni established the Commission of Inquiry into the Violations of Human Rights to investigate all aspects of human rights abuses from the past governments from October 1962 to January 25, 1986, with emphasis on arbitrary arrests, detentions and killings.[17] The Commission, led by Supreme Court Justice Oder, published its report in 1994 after eight years of investigations. It struggled with inadequate financing and did not completely cover the nation, particularly the north where there was a raging rebellion.

Many human rights violations were documented, and victims were able to learn the truth about the offenders or the people who had hurt their loved ones. However, save for the recommendation of setting up a Human Rights Commission which was incorporated into the 1995 Constitution,[18] all the recommendations of the report were not implemented.[19] The majority of victims found this discouraging because they went before the panel expecting to receive justice and recompense if they testified there.[20] Even though it was published, the report was only circulated around the elite circles, not widely enough to advance the conversation on transitional justice. The commission had limited resources, including capacity, time, money, and political will.[21]

These two Truth Commissions (TC) can be credited for setting up the pace for future TJ mechanisms in the country albeit they were not able to achieve the ultimate goals of TJ and bring justice to the victims of the past violations. There are lessons to be learned from these two commissions for future entrenchment

17 The Commission of Inquiry Act, Legal Notice No.5(May,16,1986) Cap .56
18 Article 51 of the 1995 Constitution of Uganda
19 Joanna R. Quinn, "Constraints: The Un-Doing of the Ugandan Truth Commission", Human Rights Quarterly 26(2004), The John Hopkins University Press
20 *ibid*
21 *ibid*

of TJ. It is essential for TC to be independent from the government in order to reduce interferences as seen with the TC of 1974. This can be achieved by adequately funding the commission and unbiased selection of commissioners from all walks of life.

Future commissions should be victim-centered and mindful of the gender dynamics of conflicts. In order to improve inclusivity, the Commission's creation and mandate should be codified in law.

4.0 POST 1995 CONSTITUTION TRANSITIONAL JUSTICE MECHANISMS

By the time the 1995 Constitution was ratified, a protracted conflict between the LRA and the government of Uganda was raging in the nation's north. Unimaginable horrors were witnessed and experienced by the local civilian population. A battle that was launched with the intention of overthrowing the NRM government and restoring the Ten Commandments instead had a terrible impact on the populace.

The people were robbed of their lives, body parts, livelihoods and peace.[22] In an effort to protect the populace, the government forcibly relocated them into "protected villages" (internally displaced camps), where they lost their culture and their way of life.[23] Children were in the process abducted and served as child soldiers in the LRA. With very many massacre sites perpetrated by both LRA and the government, the victims of this war are trying to come to terms with this turbulent past. During this era, Ugandans began to argue the use of TJ, as will be addressed later. The Amnesty Act of 2000, the ICC, the Juba Peace Agreement, and the locally driven transitional justice systems are discussed in the following section.

---

22 Chris Dolan, Social Torture: The Case of Northern Uganda, 1986-2006. New York: Berghahn Books, 2009.

23 Chris Dolan, "Collapsing Masculinities and Weak States: The case of Northern Uganda" in Masculinities Matter! Men, Gender and Development, ed. Francis Cleaver (Zed Books, London) at p 64.

5.0 THE AMNESTY ACT 2000 AND TRANSITIONAL JUSTICE IN UGANDA.

The Amnesty Act was passed in response to the various rebel groups operating against the government of Uganda, targeting those who had taken arms since 1986 when the new government came in place.[24] It was an implementation of the Disarmament, Demobilization and Reintegration process. According to the Amnesty Act, "Amnesty" means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment.[25]

The Act was widely criticized by international law activists, as it was looked at as breeding the culture of impunity with the argument that the amnesty was blanket. Around 13,000 LRA soldiers benefitted from this process and were able to be reintegrated into the society.[26] Reconciliation is the goal of transitional justice, as was previously mentioned, and this statute paved the road for it. Many of the returnees were welcomed back into the society after performance of the traditional justice mechanisms like *Mato Oput* (drinking of the bitter root) and *Nyono tong Gweno* (stepping on the egg). Thus, the Amnesty Law greatly contributed to the TJ processes in Uganda.

The Rome Statute of the International Criminal Court (Rome Statute), which forbade amnesty for those who commit war crimes and crimes against humanity, sparked most of the controversy surrounding the law. This saw the denial of Amnesty to Thomas Kwoyelo, a former LRA Commander currently being tried at the International Crimes Division of the High Court of Uganda. Justice Bart Katurebe in *Uganda v Thomas Kwoyelo*, reasoned that Amnesty Act only covers crimes that are committed in furtherance of or cause of war or armed rebellion and does not include attacks on civilians.[27]

---

24 Amnesty Act 2000 Cap 294, Laws of Uganda.

25 Section 1(a) of the Amnesty Act 2000

26 IRN, Uganda: Amnesty or prosecution for war criminals?, available at: <https://www.reforld.org> [Accessed on 3 September 2022]

27 Uganda v Thomas Kwoyelo, Constitutional Appeal NO.1 of 2012 available at <https://www.right2info.org > [Accessed on 3 September 2022]

It should be emphasized that Ceasor Acellam, a prominent LRA leader, received amnesty, causing a discussion on selective justice. Surprisingly, the justices concluded that it is irrelevant whether a person with a comparable situation was granted amnesty, asserting that the DPP has the discretion to decide.[28]

In conclusion, the Amnesty Act, despite being divisive, made a significant contribution to the integration, accountability, and reconciliation of roughly 13,000 combatants, which is a commendable accomplishment in the area of transitional justice. The majority of returnees were able to participate in local truth-telling, recognition, and integration activities, which are important TJ tenets. In 2022, the Act is still in use to reintegrate ADF personnel who are presently serving in the Congo.

6.0 THE JUBA PEACE TALKS (2006-2008) AND TRANSITIONAL JUSTICE IN UGANDA

After violent clashes and fruitless peace negotiations, the LRA and the government of Uganda gathered once more in Juba, South Sudan, in 2006 to try to end the conflict. The parties were able to sign three agenda items: an agreement on accountability and reconciliation, a comprehensive solution to the conflict, and the cessation of hostilities (AAR). Agenda Item No.3, AAR was very instrumental in the development of TJ in Uganda.[29]

As stated in the preamble, the parties committed themselves to preventing impunity and advancing redress in line with the Constitution and international commitments and were aware of the major crimes, human rights violations, and negative socioeconomic and political effects of the conflict. They also recognized

28 *Ibid*

29 Agreement on Accountability and Reconciliation between Government of Uganda and the Lord's Resistance Army, available at <https://peacemaker.un.org> [Accessed on 3 September 2022]

the need to adopt appropriate justice mechanisms, including customary processes of accountability.[30]

This agreement detailed the various pillars of TJ to be harnessed in Uganda, including accountability, legal and institutional reforms, informal justice processes, formal justice processes, memorialization, reconciliation and reparations.[31] The agreement called for gender-sensitive implementation, understanding the conflict's complexity. Even though the negotiations failed, the Ugandan government decided to carry out the agreed-upon agenda items, which helped TJ gain support in the north and throughout Uganda. The Government, in fulfilment of the above, set up a transitional justice working Group under the Justice Law and Order sector in 2008 to come up with a TJ policy which was passed in June 2019 after many years of consultation as will be discussed later.[32]

7.0 ASSESSMENT OF THE IMPLEMENTATION OF TRANSITIONAL PILLARS IN UGANDA

We will now look at the implementation of the different pillars of TJ and the clauses in the AAR. It should however be noted that most of the TJ processes are being initiated and taken up by the civil society organizations with limited government involvement.

7.1 Reparations

Reparations can be material or symbolic and are often the most visible manifestations of States recognition of victims' dignity and rights, and of its commitment not to repeat past wrongs.[33] Clause 9 of the AAR stated that reparations may include rehabilitation, restitution, compensation, guarantees of

30 *Ibid*

31 See the different clauses of the agreement

32 Stephen Oola, "Uganda's Transitional Justice Policy: Better late than never", New vision, July 5,2019 available at <https://www.newvision.co.ug [Accessed on 28 August 2022]

33 Laura A and Naomi R, "Social Reconstruction as a Local Process" p161, The International Journal of Transitional Justice Volume 2, Issue 2, July 2008

non-recurrence and other symbolic measures like apologies, memorials and commemorations. These processes were partially performed in the region enhancing TJ.

The government, in partnership with international bodies, was able to rehabilitate various infrastructures that were destroyed during the war including roads, hospitals, schools and others. Various programs to restore livelihood in the regions were rolled out, including Northern Uganda Social Action Fund (NUSAF), Peace Recovery and Development plan (PRDP) which has seen rehabilitation and restoration of livelihoods. However, some victims expected more than infrastructures and do not consider these steps taken as reparations, they wanted household items because to them justice can only be achieved when there is economic justice.[34]

Through the Acholi War Debt claimant's organization, some of the victims who lost their livestock during the war were able to receive compensation from the government.[35] The government also compensated some victims of the Luwero Triangle. Many people view the compensation as a positive step toward transitional justice, but the process was plagued by corruption, and many condemned the government for turning to a private company to carry out such initiatives.[36]

The reparations clause identified memorials and commemorations, and under Clause 8.3 victims were granted the right to acquire pertinent information about their experiences as well as to remember and honour earlier events that had an impact on them. The process of commemoration has been largely led by CSOs and has proved to be a very instrumental aspect of TJ in Uganda.

---

34 Refugee Law Project, School of Law, Makerere University;" Thrown Along the Way: Community perspectives on Conflict Drivers in the Implementation of the Peace Recovery and Development Plan(PRDP) for Northern Uganda" page 11, November 2012

35 Arnest Tumwesige, " Acholi War Compensation: claimant numbers reduce", New Vision, April 27,2016 available at <https://www.newvision.co.ug> [Accessed on 3 September 2022]

36 *ibid*

In Uganda, numerous massacre locations have been identified. Every year, victims meet to offer yearly prayers that are healing in nature and promote reconciliation. To support memorials and commemorations around the country, the the Refugee Law Project of Makerere established the National Memory and Peace Documentation Centre museum in Kitgum.[37]

7.2 Formal Justice Processes

Criminal prosecution is one of the strong pillars of TJ aimed at deterring impunity. Clause 6 of the AAR recognized the necessity for formal judicial processes as well as changes to the national legal system to promote integrated justice and accountability. The criminal prosecution has been a two-pronged approach with the involvement of the ICC and the ICD based in Uganda. Five commanders of the LRA were indicted by the ICC and arrest warrants issued for them.

The Ocampo five included Joseph Kony, who is currently at large, Vincent Otti (dead), Okot Odiambo (death), Raska Lukwiya (deceased), and Dominic Ongwen, who was convicted of war crimes and crimes against humanity in 2021 at the International Criminal Court.[38] The indictment came after the state of Uganda opted for self-referrals in a bid to pile pressure on the LRA and became the first country to refer cases to the ICC.

Dominic Ongwen, a child soldier turned commander, faced 70 counts of war crimes and crimes against humanity at The Hague.[39] His trial therefore fits within the narrative of TJ through criminal prosecutions. Many victims were engaged as witnesses and back home victims and survivors are able to follow proceedings in organized community streaming. They feel that that justice is

---

37 For more on NMPC visit < www.refugeelawproject.org>

38 BBC, "Court moves against Uganda rebels", October 7, 2005 available at <https://news.bbc.uk/2/hi/africa/4317852.stm> [Accessed on 3 September 2022]

39 International Criminal Court, Ongwen Case: Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 available at <https://www.icc-cpi.int/uganda/ognwen> [Accessed on 3 September 2022]

being seen to be done. However, some victims and survivors feel the prosecution is useless and opt for Ongwen return to face traditional justice and reconciliation.[40]

Others believe the ICC will not provide the justice they deserve, given Ongwen's luxurious existence in The Hague while they are impoverished here.[41] This argument is consistent with Brian Kagoro's assessment that, "what will criminal prosecutions of serious human right abusers benefit those who are impoverished?"[42] In fulfillment of the AAR, the government of Uganda established the International Crimes Division of the High Court as parallel court to the ICC to try war crimes and crimes against humanity internally.

Since its inception, the court has only tried two major cases of Thomas Kwoyelo junior commander of the LRA and Jamil Mukulu the former commander of the ADF.[43] The trials are seen as viable because the victims and survivors of these violations are able to physically attend and own the process. A case in point is the trial of Kwoyelo, which is being done in Gulu city which was the epicenter of the LRA violations. These trials are instrumental to the realization of TJ in Uganda as they seek to provide justice and deter impunity, which is the greatest assurance of non-recurrence.

One could argue that these trials are selected and, to some extent, unbiased. Many TJ practitioners have pointed out that human rights violations and crimes were committed not only by rebels but also by government soldiers, and there is evidence to support up such charges, some of which have been admitted by the

40 Amani Institute Uganda, Perceptions of Trial Justice in the Case of the Prosecutor vs Dominic Ongwen, A Survey Report by Amani Institute Uganda. February 2021.

41 *ibid*

42 Brain Kagoro, "The paradox of alien Knowledge, narrative and praxis: transitional justice and the politics of agenda setting in Africa." Where Law Meets Reality: Forging African Transitional Justice. Cape Town: Pambzuka, 2012.1-49 print

43 Grace Matsiko, "12 years on, Uganda's International crimes Division has Little to show" March 09, 2020, JUSTICEINFO.NET, available at <https://www.justiceinfo.net> [Accessed on 3 September 2022]

government.[44] No government soldier, however, has been brought before these courts to answer for their crimes, not even in court martial. This creates a gap in the execution of TJ, which becomes selective and dilutes the necessary healing in society by creating a culture of impunity.

Col Abiriga, a former MP, was recognized by a community in Kitgum as the commander of an attack on their hamlet; he never apologized, and efforts to bring him to justice were ineffective; the community later applauded when he was assassinated in 2018. As a result, the legal system should be made impartial in order for all victims of violations to receive justice.

7.3 The National Transitional Justice Policy 2019

In order to assist Uganda's execution of the Juba Peace Agreement, a Transitional Justice working group was formed in 2008 to develop a TJ policy and law.[45] The working group, after wide consultations drafted a TJ policy which was presented before cabinet and was finally adopted in 2019 after the victims and survivors had lost hope.[46] Uganda is the first state in Africa to adopt a TJ Policy after a similar policy was adopted by the African Union.[47]

The NTJP is comprehensive in nature and generally victim centered, upon its adoption many TJ practitioners hailed it as a light at the end of the tunnel for victims and survivors of the various human rights violation. The adoption showed the commitment of the government to redress the wrongs of the past and maintain a peaceful Uganda. A look at the policy offers a great insight into the perceived TJ processes in Uganda with the inclusion of women and children as participants in TJ.

---

44 Chris Dolan, Social Torture: The Case of Northern Uganda, 1986-2006. New York: Berghahn Books, 2009

45 Transitional Justice Working Group works under The Justice Law and Order Sector

46 Ministry of Internal Affairs, " The National Transitional Justice Policy ,June 2019", available at <https://drive,google.com> [Accessed on 29 August 2022]

47 African Union , "Launch of the Transitional Justice policy", available at <https://au.int/en/pressreleases/> [Accessed on 28 August 2022]

The policy also effectively defines reparations which had often been misunderstood by many as only limited to monetary handouts to include government development programs. However, for the policy to bear the much-needed impact, it must be tabled as a bill before parliament and passed as Law which has not been done ever since its adoption. The NTJP adoption, I believe will guide the realization of TJ in Uganda and cure the anomalies that existed before.

7.4 Informal Justice Mechanisms

Traditional processes in Uganda have been integral to TJ and, thus far, the most effective mechanism in attaining reconciliation and accountability, both of which are critical pillars of TJ. The Juba Agreement on Accountability and Reconciliation recognized the role of traditional mechanisms on reconciliation. It identified; *mato oput, gomo tong, kayo ocok, riyo tal* as those practices to be embraced.[48] Uganda is home to numerous tribes with diverse cultures, the majority of which have dispute settlement procedures.

These traditional dispute resolution mechanisms helped in the reintegration of many combatants into the society and encouraged reconciliation. It worked perfectly in northern Uganda, where around 13,000 combatants were reconciled with their clans, enemies, abductors among others. It was also these rituals that cleansed them of the "*cen*" associated with spirits of those killed by the combatants.

Ceremonies like *Nyono Tong Gweno* welcomed members who had been in the bush back into the society, *gomo tong* in Alur helped in cessation of hostilities between parties, *mato oput* and *culu kwor (compensation)* worked in Northern Uganda to end the bad blood between the family or clan of the perpetrator and

[48] Clause 3.1 of the Agreement on Accountability and Reconciliation between the Government of Uganda and LRA

those of the victims.[49] It is imperative to note that before these mechanisms are practiced, the perpetrator is often tasked to do truth telling and acknowledge the crimes committed by him or her and hence achieving truth telling and accountability in the process.[50]

These traditional processes were initially designed for small-scale crimes such as homicide, where the perpetrators and victims knew each other, but not for gross human rights violations such as those committed by the LRA, where there are many actors, or complex crimes such as sexual abuse in a conflict setting.[51] This has been the bedrock of arguments against traditional mechanisms citing it as irrelevant in the TJ process by many actors.

The arguments were also adopted in the case of *Kanyamunyu Mathew v Uganda*, where the learned judge Stephen Mubiru refused to halt the trial for the parties to pursue Mato Oput.[52] It has also been labelled as falling short of the international legal standards in deterring impunity.[53] All the above assertions are true but they cannot relegate traditional mechanisms to the point of irrelevancy. The mechanisms have worked in those were the perpetrators and victims are known and the advocates for traditional mechanisms also advocate for the formal justice system to address the complex crimes like massacres, sexual abuse among others. On the universality of the mechanisms, each community is encouraged to practice their own to avoid imposition of culture on others.

8.0 CONCLUSION

---

49 Lyandro Komakech, "Traditional Justice as a form of adjudication in Uganda." Where Law Meets Reality: Forging African Transitional Justice. Cape Town: Pambzuka, 2012. Page 73 print

50 *ibid*

51 Brian Kagoro Supra

52 Courage Ssewanyana (2021) "The Interface between the Traditional and Criminal Justice Systems: A Review of the High Court's Decision in Kanyamunyu Mathew Muyogoma v Uganda" Volume 21 Issue 4, Makerere Law Journal pp 298-318

53 *Ibid*

With the adoption of the NTJP, a lot of opportunities to effectively pursue TJ lie in Uganda. It should be noted that there are a lot of pending issues in Uganda, which have not been addressed for decades. These sensitive topics, if left untreated, risk returning Uganda to its violent pasts; thus, we should seize the opportunity and begin engaging in national debate to build Uganda's future and right the wrongs of the past. Using the lessons learned from previous truth commissions, a more independent and inclusive panel can be constituted to investigate human rights violations even under Museveni's administration.

Most of the TJ debates and policies are dominated with ideas from the West; it is time TJ in Uganda becomes locally owned with ideas originating from here. As previously said, criminal or civil prosecution is an important pillar of TJ; yet, problems have been identified in the pursuit of the same. The trial of Thomas Kwoyelo has lasted over a decade, with the ICD experiencing budget issues and a continual turnover of justices on the bench. As the proverb says, "delayed justice is denied justice," and this has had an impact on the achievement of justice.

To address these shortfalls, ICD's finances and operations should be enhanced. The concept of selective justice is also restricting full implementation of TJ in Uganda, as UPDF soldiers who committed atrocities are still at large and little acknowledgements have been made. Finally, the TJ process in Uganda is on the right road; all that is required is strong political will on the part of the government, which should collaborate with Civil Society Actors to accomplish complete realization of TJ in Uganda.

LIST OF REFERENCES

Amani Institute Uganda, Perceptions of Trial Justice in the Case of the Prosecutor vs Dominic Ongwen, A Survey Report by Amani Institute Uganda. February 2021

Brain Kagoro, "The paradox of alien Knowledge, narrative and praxis: transitional justice and the politics of agenda setting in Africa." *Where Law Meets Reality: Forging African Transitional Justice.* Cape Town: Pambzuka, 2012.1-49 print

Chris Dolan, "*Collapsing Masculinities and Weak States: The case of Northern Uganda"* in Masculinities Matter! Men, Gender and Development, ed. Francis Cleaver (Zed Books, London)

Chris Dolan, Social Torture: The Case of Northern Uganda, 1986-2006. New York: Berghahn Books, 2009

Courage Ssewanyana (2021) "The Interface between the Traditional and Criminal Justice Systems: A Review of the High Court's Decision in Kanyamunyu Mathew Muyogoma v Uganda" Volume 21 Issue 4, Makerere Law Journal pp 298-318

International Criminal Court, Ongwen Case: Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 available at <https://www.icc-cpi.int/uganda/ognwen> [Accessed on 3 September 2022]

Joanna R. Quinn, "Constraints: The Un-Doing of the Ugandan Truth Commission", Human Rights Quarterly 26(2004), The John Hopkins University Press

Laura A and Naomi R, "Social Reconstruction as a Local Process" p161, The International Journal of Transitional Justice Volume 2, Issue 2, July 2008

Lyandro Komakech, "Traditional Justice as a form of adjudication in Uganda." *Where Law Meets Reality: Forging African Transitional Justice.* Cape Town: Pambzuka, 2012.

Phares Mutibwa, Uganda since Independence: A Story of Unfulfilled Hopes, Africa Word Press, 1992

Priscilla Hayner, "Unspeakable Truths: Confronting State Terror and Atrocity" (New York: Routledge, 2000)

Refugee Law Project (RLP) (2014b) "Compendium of Conflicts in Uganda. Findings of the National Reconciliation and Transitional Justice Audit". Kampala: Refugee Law project, School of Law, Makerere University

Refugee Law Project, School of Law, Makerere University;" Thrown Along the Way: Community perspectives on Conflict Drivers in the Implementation of the Peace Recovery and Development Plan(PRDP) for Northern Uganda", November 2012

Uganda v Thomas Kwoyelo, Constitutional Appeal NO.1 of 2012 available at <https://www.right2info.org/> [Accessed on 3 September 2022]

MAKERERE LAW JOURNAL FEBRUARY 2023

Volume 52 Issue 1

EFFECTIVE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY: ADDRESSING THE CHALLENGES CONFRONTING THE INTERNATIONAL CRIMINAL COURT

Dandy Chidiebere Nwaogu

Recommended Citation: Dandy Chidiebere Nwaogu (2023), "Effective Maintenance of International Peace and Security: Addressing the Challenges Confronting the International Criminal Court" Volume 52 Issue 1 Makerere Law Journal pp. 132-158

EFFECTIVE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY: ADDRESSING THE CHALLENGES CONFRONTING THE INTERNATIONAL CRIMINAL COURT

Dandy Chidiebere Nwaogu*

ABSTRACT

This article examines the establishment, jurisdiction, and objectives of the International Criminal Court (ICC), which was created to hold national leaders and individuals accountable for war crimes, crimes against humanity, and genocide. The ICC has faced challenges that have led to concerns about its legitimacy and ability to fulfil its mandate of ending impunity for the most serious crimes of concern to the international community. The purpose of this article is to identify the current challenges facing the ICC and to provide recommendations for addressing these issues. Ultimately, this article argues that the ICC can overcome its challenges and achieve its objectives through a combination of internal reforms and increased support from the international community.

1.0. INTRODUCTION

With the signing of the Rome Statute by 120 countries, the International Criminal Court was established in July 1998.[1] The Rome Statute stresses the need to establish the ICC to end impunity for individuals committing the 'most

* Senior Lecturer, Department of jurisprudence and International Law, Faculty of Law, University of Benin, Benin City, Edo State, Nigeria. 08035657681; dandy.nwaogu@unibe.edu

1 The Statute of the International Criminal Court, (Hereinafter the ICC) 17 July 1998, U.N. Doc. A/CONF. 183/9 (Hereinafter Rome Statute)

serious crimes of concern to the international community'.[2] The Nuremberg and Tokyo Tribunals' jurisdiction was expanded by the ICC, and the court intervened to emphasize the need for international peace and security by declaring her jurisdiction over four different categories of crimes, including war crimes, crimes against humanity, genocide, and the crime of aggression. As a result, the establishment of the ICC attracted significant international support.

Around the world, especially in poor nations, it has become routine practice to violate international human rights and humanitarian law. A proper International Criminal Court with some form of universal jurisdiction—that is, the ability to assume jurisdiction over an accused person regardless of where the alleged crime was committed, regardless of the accused's personality and nationality—should be established as soon as possible to handle cases that are classified as international crimes under customary international law.

This way of thinking was what prompted the establishment of the International Criminal Court by the global community.[3] One of the important features of the ICC is its referral capacity. There are four unique ways to refer cases to the Court:

i) A state that has ratified the Court's Statute and is a member of the Assembly of States parties may refer a case to the court.[4]
ii) A Country that has chosen to accept the ICC's jurisdiction is qualified to send a case.
iii) The Security Council sends the case subject to veto from the five permanent members.[5]

---

2 Joel F. England, the Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else? (2021) Vol. 18 (3) *Arizona Journal of International and Comparative Law*, available at <azjournal@law.arizona.edu> [Accessed September 5 2022]

3 The international Criminal Court is a permanent court established under the United Nations system, having its headquarters in The Hague, Netherland

4 Article 14 of the Rome Statute of the ICC

5 Article 15 (7) of the Rome Statute

iv) The ICC Prosecutor initiates a case for investigation and prosecution *proprio motu, (*on its own discretion) on the basis of information on crimes within the jurisdiction of the of the court.[6]

The article is structured into seven parts, including an introduction and a history of the International Criminal Court, to properly elucidate the topic under consideration. The goals for why the court was founded as well as the ICC's jurisdiction and purview are discussed in Parts 3 and 4. Section 5 looks at the court's many obstacles, which it became clear may prohibit it from carrying out its mandate to uphold international peace and security. The possibilities and plans for the ICC are examined in Part 6, and the final remarks are found in Part 7.

2.0. BRIEF BACKGROUND OF THE INTERNATIONAL CRIMINAL COURT

The United Nations recognized the need to establish a more permanent international court to handle cases relating to international crimes in 1948 after the Second World War and immediately after the conclusion of proceedings at the War Crimes Tribunals of Nuremberg and Tokyo. This was intended to provide justice for those who were victims of such heinous crimes as genocide, sexual slavery, and ethnic cleansing.[7]

The Rome Statute of the ICC[8] can be considered as an ideal treaty, which harmonized the thinking of powerful world leaders' right from the 1940s on ending impunity to serious international crimes. It was this statute that created the International Criminal Court,[9] as a critical permanent court to oversee the

6 Article 15 Rome Statute of the ICC

7 The world leaders were confronted with this major problem especially in the case of Rwanda when the impunity of its perpetration rose to an unprecedented level; same was the cases in Serbia, the former Yugoslavia and Kosovo.

8 This is also referred to as the Rome Statute or the ICC Statute

9 Article 1 of the ICC Statute, available at <http://www.un.org/law/icc/staute/> [Accessed 20 September 2022]

trial of individuals accused of the international crimes of genocide,[10] crimes against humanity[11] and war crimes[12] and the crime of aggression.[13]

The Rome Statute clearly outlined the structure of the court, providing for its functions together with its jurisdiction.[14] The constituent document was however open for signature by states in July 1998 and subsequently came into force on July 1 2002.[15] It should be mentioned that certain countries voted against the Court's Statute at its founding in early 1997 because they were concerned about potential interference with their territorial sovereignty and internal affairs.

The United States of America, China, Israel, Libya, Qatar, and Yemen are a few of the nations that voted against the Rome Statute's implementation; under the terms of the current agreement, these nations are not state parties to the Rome Statute. The main concern for the US was that its military and government employees may be subject to political prosecution and other types of international retaliation. [16]

3.0. KEY OBJECTIVES OF THE INTERNATIONAL CRIMINAL COURT

The following are the primary goals of the ICC that were considered by the international community and states that have ratified its Statute:

3.1. Ending Impunity

Article 1 to the Rome Statute of the ICC clearly identifies the major aims and objectives of the Court. The most important objective of the court is the punishment of core International Crimes.[17] The court seeks to establish the rule

---

10 Article 6
11 Article 7
12 Article 8
13 Article 8
14 Article 5 Statute of the ICC
15 ICC Overview, available at <http://www.un.org/law/icc/staute/romefra.htm> [Accessed 20 September 2022]
16 "The United States Defends Position on international Criminal Court" available at <http://usinfo.state.gov/dhr/archive> [Accessed 25 September 2022]
17 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute), preamble.

of law throughout the international community and put an end to the impunity for significant international crimes.[18] This is accomplished by enforcing adherence to particular international law principles with the intention of criminalizing and punishing offenders of fundamental international crimes.[19] The major responsibility of the court therefore is to act as a court of last resort to prosecute offenders for genocide, War Crime, crime against humanity and the crime of aggression,[20] where national governments are unable or unwilling to do so.

3.2. Increasing Respect for International Law.

Paragraph 11 of the Statute Preamble states, "resolved to guarantee lasting peace and enforcement of international justice."[21] The promotion of global criminal justice is the goal here. That is done in order to foster greater adherence to international law, particularly human rights and humanitarian law.[22] When the rules and decisions of the court are obeyed, it leads to a situation where crimes are exposed and discouraged.[23] This might significantly improve accountability within the international community, which would ultimately result in an end to the practice of international crimes going unpunished.[24]

3.3. Ensuring International Peace and Security

The objective of ensuring peace and security has primarily been the overall aim for the creation of the United Nations as well as the International Criminal ad-hoc tribunals. According to Article 24 of the United Nations Charter, the International Criminal Court (ICC), which receives its authority from the Rome Statute rather than the Security Council Resolutions like the ad hoc criminal

---

18 The Declaration of the High-level Meeting of the General Assembly on the Rule of law at the National and international levels, A/67/L. 1, September 19, 2012.
19 ibid
20 Article 5 ICC Statute
21 Rome Statute, preamble
22 See Badagard and Klamberg, "The Gatekeeper of the ICC, p. 653
23 Mirjan R. Damaska, "What is the point of International Criminal Justice?" Chicago-Kent Law Review 83 (2008), p. 344
24 Ibid

tribunals, is also burdened with the duty of preserving world peace and security.[25]

3.4. Giving Reparations to Victims of International Crimes

The interests of those who have been harmed by international crimes can be seen as the ICC's main priority. According to the court's preamble, women, girls, together with men have for decades have been victims of all kind of crimes.[26] Crime victims are explicitly allowed to participate in court proceedings in cases involving them under the court's Statute and the Rules of Process and Evidence.[27] There is a good reparation system put in place in the interest of victims in the Statute.[28]

In all cases, the interest of the victims of crime are always put into consideration.[29] The Victims and Witness Unit (VWU), an integral component of the Court Registry, is tasked with ensuring the safety and well-being of individuals participating in court proceedings, particularly victims.[30] This includes providing necessary security measures, as well as offering critical information and assistance to enable victims to effectively engage with the legal process.

Furthermore, the Trust Fund for Victims is another good initiative found in the Statute. The Trust Fund for Victims (TFV) is an independent body established by the Rome Statute of the International Criminal Court (ICC).[31] It was created with the mandate of providing assistance and support to victims of the crimes under

---

25 Article 2 Rome Statute and 115(b) which clearly explains the relationship between the ICC and United Nations together with the funding of the court. It must be noted that the united nations Security council has the power to extend the jurisdiction of the court by making referral s of cases to the court in line with Chapter VII of the U.N. Charter, basically, ensuring international peace and security is seen as the major aim of such referral

26 Rome Statute, Preamble

27 This is in line with article 68 of the Rome Statute, International Criminal Court, Rules of Procedure and Evidence, IT/32/ Rev. 50, 2015, rules 89-93 (hereinafter RPE)

28 Article 75 of the Rome Statute and Rules of Procedure and Evidence, particularly rules 94-99

29 Article 53 (1) (c), Article 53 (2) (c) of the Rome Statute

30 Article 43 (6) of the Rome Statute, and Rules 16-19 of the Rules of Procedure and Evidence.

31 Article 79 of the Rome Statute, rule 98, Rules of procedure and evidence.

the jurisdiction of the ICC. The TFV operates through two distinct programs: the Assistance Program, which provides physical, psychological, and material support to victims, and the Reparations Program, which provides reparations to victims and their families.

The Reparations Program is the first of its kind in international criminal justice and provides for both individual and collective reparations. Overall, the TFV plays a critical role in ensuring that the rights and needs of victims of international crimes are addressed and recognized.

4.0. THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

From its inception, the International Criminal Court was endowed with international jurisdiction, rendering it an international court. The court is empowered to have jurisdiction over and in respect of crimes committed in and within the territory of a State party.[32] An individual can be prosecuted under the ICC statute for a criminal offence he/she committed anywhere around world, in as much as they are citizens of a State party to the Statute.[33]

It must be noted that the jurisdiction of the court is limited to the crimes committed on or after July 1, 2002, the official date of the establishment of the court. The implication of the above is that the court cannot investigate or prosecute any crime that was committed before date of the establishment of the court. Under the Statute of the ICC four types of crimes are provided for, although at the moment, the court only assumes jurisdiction over three of the crimes. This is because what constitutes definition of aggression as a fourth crime under the statute is yet to be made known.

Article 6 of the Rome Statute delineates the crime of genocide and provides a comprehensive definition of the acts that constitute this crime. According to the Statute, genocide is committed with the intent to destroy, in whole or in part, a

32 Article 12(2) (a) of the Rome Statute
33 Article 12(2)(b) of the Rome Statute

national, ethnic, racial, or religious group. The acts that constitute this crime include killing members of the targeted group, inflicting serious bodily or mental harm upon members of the group, and deliberately creating conditions of life designed to bring about the physical destruction of the group, such as by denying access to food or forcibly transferring children of the group to another location.

In addition, measures intended to prevent births within the group, such as forced sterilization, are also considered genocidal acts. The inclusion of these various acts in the definition of genocide underscores the gravity of this crime and the urgent need to hold accountable those responsible for its commission.[34] Article 7 of the International Criminal Court's statute defines the category of Crimes against Humanity. This provision stipulates that the crime must be part of a widespread or systematic attack against the civilian population, and the perpetrator must have knowledge of such an attack.

The Crimes against Humanity enumerated in the statute include:

i) Murder
ii) Extermination
iii) Enslavement
iv) Deportation or Forced Transfer of a Population
v) Imprisonment or other forms of Deprivation of Liberty
vi) Torture
vii) Rape, Sexual Slavery, Enforced Prostitution
viii) Enforced Pregnancy, Enforced Sterilization,
ix) Sexual Violence
x) Persecution based on Political, Racial, National, Ethnic, Cultural, Religious, or Gender grounds
xi) Apartheid and;

[34] Article 6 of the Rome Statute

xii) Inhumane Acts causing great suffering or serious injury to the body or to mental or physical health.[35]

Article 8 of the International Criminal Court prohibits and provides jurisdiction over war crimes. Specifically, the court has jurisdiction over war crimes committed as part of a plan or policy, or as part of a large-scale commission of such crimes.[36] The Rome Statute considers several acts as war crimes, including murder, causing great suffering or injury, hostage taking, attacking civilian populations, sexual violence, and the enlistment of children under the age of 15 into armed forces.[37]

The fourth crime outlined in the Statute of the International Criminal Court (ICC) is that of aggression. This crime is defined as the use of armed force by one State against the sovereignty, territorial integrity, or political independence of another State, or in a manner that is inconsistent with the Charter of the United Nations. According to United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, any of the following acts, regardless of whether or not they are accompanied by a declaration of war, qualify as acts of aggression: those clearly enumerated in Article 8 (a-g) of the Rome Statute.[38]

Despite efforts by state parties, reaching a consensus on the precise definition of the crime of aggression has proven to be challenging. Nevertheless, progress was made in June 2010 during the Rome Statute review conference held by the Assembly of States in Kampala, Uganda. During this conference, a definition of the crime of aggression was adopted. In the conference, aggression was defined to mean the planning, preparation, initiation or execution of an act of using

35 Article 7 of the Rome Statute

36 Article 8(1) of the Rome Statute. See generally the Nuremberg Tribunal. The charter provides for the prosecution of individuals for crimes against peace, war crimes and crimes against humanity

37 Article 8(20 (a-f) of the Rome statute of the ICC, 1st July 2002, available at <http://www.icc-cpiint/iccdocs/PIDS> [Accessed 12 October 2022]

38 Article 8 (a-g) of the Rome Statute

armed force by a state against the sovereignty, territorial integrity or political independence of another state.[39]

At the Kampala conference, the acts of aggression was explained to include acts of invasion, military occupation by use of force, blockade of ports or coasts. A person who is effectively in a position of authority to control or command the political or military acts of the state can also commit an act of aggression, it should be emphasized.[40] It must be noted that the ICC is a treaty-based court, which implies that countries can decide whether or not they want to be a party to the Rome Statute.[41]

Owing to this, the ICC cannot be said to have universal jurisdiction, rather, the Court as it were can assume jurisdiction in relation to the under listed crimes:

i. The Court may try or prosecute citizens of a non-party states in cases directed to the international criminal court prosecutor or a state party or by the United Nations Security Council;[42]
ii. The ICC may also assume jurisdiction over citizens of non- party state who has committed a crime on the territorial soil of a state that is a party to the ICC Statute or has accepted the jurisdiction of the Court in relation to that crime.[43]
iii. The ICC will in addition assume jurisdiction over citizens of a non-party State where the non-party State has consented to the exercise of jurisdiction in respect to specific crime.[44]

Under Article 17 of the Rome Statute, it is clear that although the ICC may have jurisdiction over a case, it could be prevented from prosecuting that case if such

39 See the Open Society Foundations, Fact Sheet for international Crimes, available at <http://www.opensocietyfoundationlorg> [Accessed 28 September 2022]
40 ibid
41 Judge Phillippe Kirsch, President of the ICC, address at the Rayburn House Office building(February 13, 2009), available at <http://globalsolutions.org/files/> [Accessed 28 September 2022]
42 Article 13 of the Rome Statute.
43 Article 12 (2) of the Rome Statute.
44 Article 12(3)

case is considered not admissible. The international Criminal Court shall consider a case inadmissible thus:

i. Where the case in question is already being investigated or prosecuted by the State with effective jurisdiction on the case, except such State is unwilling and unable to genuinely carry out the investigation or prosecution
ii. Where the case in question has already been investigated by a State with effective jurisdiction on the case, and such a State decided not to prosecute the individual (s) involved.
iii. Where the individual involved already has been tried for acts which is the subject matter of the complaint and such trial by the court is not allowed by article 20
iv. Where the case in question does not attract sufficient gravity to justify the attention of the court[45]

The ICC's intervention in the criminal cases of States is predicated on the principle of complementarity. Under this principle, the ICC is empowered to carry out its functions as a court of last resort, and by extension, helping in the development of the judicial systems of sovereign States.[46] However, if the court is able to determine that the country in question is not willing or unable to investigate or prosecute, the complementarity principle will be discarded and such a case will be admitted at the international criminal court.

The willingness and ability of the investigating country to ensure genuine and effective proceedings is what typically determines whether the principle of

45 See article 17 of the Rome Statute
46 Judge Phillippe Kirsch, president of the ICC, Address at the Rayburn House office Building (February 13, 2009) <http;//globalsolutions.org/file/general/philippe_Kirsch_2-13-09.pdf> [Accessed September 8 2022]

complementarity stops a case from being considered at the international criminal court.[47]

5.0. PRESENT CHALLENGES FACING THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is committed to promoting international peace and security by pursuing international criminal justice through the prompt trial of individuals who have committed international crimes. However, the ICC is currently facing numerous challenges that threaten its ability to carry out this mission effectively.[48] The International Criminal Court (ICC) is currently facing significant challenges that threaten to undermine its legitimacy.

These challenges have raised concerns about the court's ability to effectively carry out its mandate of holding individuals accountable for war crimes, crimes against humanity, and genocide.[49] The effective resolution of the challenges confronting the ICC is crucial as it impacts the international community's confidence in approaching the court. Failure to address these challenges will impede the court's ability to fulfil its mandate of ensuring international peace and security. The challenges faced by the ICC include, but are not limited to:

5.1. Restricted Jurisdiction

The jurisdiction of the ICC is limited. One of the primary challenges facing the International Criminal Court (ICC) is its limited jurisdiction, which restricts its ability to effectively prosecute international crimes. The ICC is only authorized

---

47 The *Prosecutor v. Germain Katanga and Muthieu Ngudjolo Chiu,* Case No. ICC-01/04-01/07 the court in this case gave the reason admitting the case despite the motion challenging the case.

48 Richard Steinberg, Contemporary Issues Facing the International Criminal Court (Leiden, Netherlands: Nijhoff Publishers 2016), p .23

49 Milena Sterio, " The International Criminal Court: Current Challenges and Prospect of Future Success" Vol 52, Issue 1, Art 21, Case Western Reserve Journal of International law, (2020) p. 468, available at: <https://scholarlycommons.law.case.> [Accessed 28 September 2022]

to investigate and prosecute a specific set of crimes,[50]including war crimes, crimes against humanity, and genocide. This narrow focus can limit the court's ability to address other serious crimes, such as human rights abuses and corruption, which are also of concern to the international community.

As a result, the ICC's level of performance has been called into question, and its ability to achieve its mandate of ending impunity for the most serious crimes has been challenged. Although the International Criminal Court (ICC) began operating with jurisdiction over war crimes, crimes against humanity, and genocide, the crime of aggression was initially excluded. The ICC Statute has not yet provided a precise definition of the crime of aggression, nor has it specified the conditions under which jurisdiction can be assumed.[51]

The temporal limitation on the jurisdiction of the ICC poses a significant challenge to the court's mandate to hold perpetrators accountable for the most serious crimes of concern to the international community. By only assuming jurisdiction over crimes committed after July 1st, 2002, the ICC is effectively prevented from adjudicating offenses that were committed prior to its inception, irrespective of the gravity of such crimes. As a result, numerous victims of crimes that predate the establishment of the ICC have been denied justice, as they are unable to seek legal redress for the harm they suffered.

This temporal limitation is a result of the Rome Statute, the treaty that established the ICC. The ICC's jurisdiction is limited to crimes committed on the territory of a state party or by a national of a state party, and to crimes referred to the court by the United Nations Security Council. Additionally, the court can only prosecute crimes committed after July 1st, 2002, the date on which the

---

50 Akua Kuenyyehia, "The International Criminal Court: Challenges and Prospects, (Annual lecture on Human Rights and Global Justice, Center for International Law and Justice; March 21 2011), p. 2

51 International Criminal Court, Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute, (Liechtenstein Institute on Self-Determination 2012), available at <http://crimeofagression.info/documents/1/handbook.pdf> [Accessed 5 October 2022]

Rome Statute entered into force. While this limitation was intended to provide states with the opportunity to ratify the Rome Statute and allow the court to build its credibility and legitimacy, it has created a gap in accountability for victims of pre-2002 crimes.

Again, the ICC is restricted in exercising jurisdiction over non- member states. The jurisdiction of the court is invoked when an international crime is committed within the territory of a member state or committed by its citizens.[52] The operation of the court is greatly restricted in a situation in which the country where the specific crime was committed is not a state party to the Rome Statute of the ICC. However, it must be noted that by Article 12 (3) of the ICC Statute, countries regarded as non-member States are permitted to willingly give up to the court's jurisdiction in respect to a specific crime.

It is usually rare to have non-State parties willingly submitting to the jurisdiction of the international criminal court when international crimes are committed. On the other hand, the court has on several occasions assumed jurisdiction over non- member states based on prompt referral from the United Nations Security Council.[53] The United Nations Security Council would usually make this kind of referral when its mandate of maintaining international peace and security is invoked.[54]

5.2. Unnecessary Focus on the African States

The establishment of the ICC was greatly aided by the African Union (AU) member states. The Rome Statute was swiftly and early ratified by African member states, which contributed to the establishment of the court.[55] There has

---

52 Article 12 of the Rome Statute

53 Instances here include the situations in Sudan and Libya, See Julius Onyoni Opini, The Role of the ICC in Maintaining Justice: Issues, Challenges and the Way Forward (Master Thesis, University of Nairobi, 2016), p. 36

54 Julius Onyoni OPini, The Role of the ICC in Maintaining Justice: Issues, Challenges and the Way Forward (master Thesis, University of Narobi, 2016), p. 36

55 United Nations. 2002, Ratification Ceremony at the UN paves way for the International Criminal Court. Rome: United Nations 2016: available at <www.un.org/apps/news/story.asp> [Accessed on 2 October 2022]

been a perceived bias against the African States based on the decisions of the ICC, particularly between 2008 -2016. The African Union Assembly has criticized most of the court's investigations and prosecutions. Some African states have accused the ICC of conspiracy and tagged the court as part of a larger neo-colonial project of instituting regime change and subjugating African political institutions.[56]

Of the eleven cases before the ICC for investigation, ten of such cases involve the African States including: the Central African Republic[57], Cote d'Iviore[58] and the Democratic Republic of Congo. There are other countries like Kenya[59], Libya[60], Mali, Sudan, Uganda, Gabon, Guinea, Nigeria and Burundi are also under preliminary investigation. Uganda referred the first case to the ICC.[61] However, because of the court's decisions, the African Union Assembly has criticized most of the decisions of the ICC's investigations and prosecutions.

Thus, in October 2016, South Africa wrote to notify the United Nations Secretary General of its plan to cease to be a member of the ICC,[62] although a High Court in South Africa in February 2017 decided that the South African government's notice to withdraw from the court was invalid and unconstitutional.[63] Therefore, on March 7 2017 the South African government withdrew and revoked its earlier

---

56 Richard Steinberg, Contemporary Issues Facing the International Criminal Court, Brill/Nijhoff (2016), p. 350, see also Malone B. "Africans Push the UN to Call off Racist court", Al-Jazeera, 15 November 2013, available at <www..aljazeera.com/indepth/features/2013/11/> [Accessed 3 October 2022]

57 *Prosecutor v. Jean- Pierre Bemba Gombo, Case No.ICC-01/05-01/08*

58 *Prosecutor V. Laurent Gbagbo, Case No. ICC-02/11-01/11*

59 *Prosecutor v. Francis Kirimi Muthaura &Uhuru Kenyatta, Case No.ICC-01/09-02/11 (case alleging crimes against Humanity).*

60 *Prosecutor v. Muammar Gaddafi & Ors, Case no.ICC-01/11-01-11-01/11 (a warrant of arrest issued against him for crimes against humanity)*

61 Milena Sterio, 'The International Criminal Court: Current Challenges and Prospect of Future Success, Case Western Reserve Journal of International Law (2020), 52, p. 469

62 Chan and Simons, "South Africa to withdraw from the International Criminal Court, New York Times October 21, 2016, available at: <www,nytimes.com/2016/10/22/world/Africa/>, [Accessed 7 October 2022]

63 "ICC withdrawal Unconsitutional and invalid high court rules" Available at <www.news24.com/SouthAfrica/news/> [Accessed 15 September 2022]

decision to leave the court.[64] Similarly, Burundi in October 2016 indicated its intention to pull out of the ICC as soon as the court commenced investigation on the political situation in the country[65].

Several other African nations, including Gambia, Uganda, Kenya, and Namibia, have announced their intentions to withdraw from the International Criminal Court (ICC). Their decision stems from the perception that the court has unfairly targeted African leaders, while ignoring war crimes committed in other parts of the world. Specifically, these nations have cited the fact that all of the individuals indicted by the ICC since its establishment have been from Africa. Furthermore, they argue that the court has made no effort to investigate or prosecute war crimes associated with the 2003 invasion of Iraq or the recent crimes against humanity committed in Syria.[66]

5.3. Cumbersome Procedures for Victim Participation

According to article 68 of the ICC statute, victims may participate in the prosecution process at the appropriate moment as long as it does not interfere with their personal interests or jeopardize their right to a fair trial.[67] It is important to note that victim participation in ICC proceedings is determined solely by the relevant chamber of the court. However, the involvement of victims in the trial process at the ICC is subject to a rigorous set of procedures that may have negative emotional effects on the victim. The prolonged trial process at the ICC may lead to significant psychological trauma for victims of crime.

5.4. Absence of Independent Police Force

As a court of last resort, the International Criminal Court (ICC) operates under the complementarity principle, which stipulates that it can only intervene in cases where national courts of member states are either unable or unwilling to

---

64 "South Africa formally revokes ICC withdrawal." available at <http://ewn.co.za/2017/03/08/> [Accessed 15 October 2022]

65 Burundi's notification to the United Nations Security Council, available at: <https://treaties.un.org/doc/> [Accessed 22 October 2022]

66 ibid

67 Article 68 of the Statute of the ICC

investigate and prosecute international crimes. Consequently, the ICC relies on national governments to apprehend and surrender perpetrators for investigation and trial. However, this poses a significant challenge to the ICC in fulfilling its mandate of maintaining international peace and security.

It is difficult for national leaders, who may be implicated in international crimes, to surrender themselves or their subordinates for investigation and trial by the ICC. In the absence of an independent police force capable of entering member states to apprehend and investigate perpetrators, especially in situations where states are unable or unwilling to prosecute, impunity will continue to prevail. For example, when the ICC indicted President Al Bashir, the government of Sudan refused to cooperate with the ICC prosecutor to surrender him for trial.

The enforcement of ICC decisions is crucial to fulfilling its mandate of world peace and security. For the ICC to enforce its decisions, the cooperation of member States is required. According to Valerie, cooperation of member States is an important element in realizing the mandate of ICC. This is owing to the fact that the ICC has no police force, no military and no territory of its own.[68] Thus, it relies on the goodwill of States to investigate, arrest collect evidence, the protection of witnesses and the sentencing of persons who are perpetrators of serious international crimes.

Nonetheless, this is seen as a structural weakness because the court is unable to guarantee the execution of its own judgments.[69] It must be noted that the responsibility of states to fully cooperate is of two types: first is the duty to cooperate through arrest, investigation and surrender.[70] Additionally, they have

---

68 Valerie Oosterveld, Mike Perry and John MacManus, "The Cooperation of States with the international Criminal Court" Fordham International Journal 23, No. 3 (2001); p. 767

69 Hans-peter Kaul and Claus kress, "Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromies" (1999) 2, *Yearbook of International Humanitarian Law, P. 157*

70 Article 87 of the statute of the ICC

a responsibility to take action to include the Rome Statute's requirements in their State legislation and national laws.[71]

5.5. Lack of Sufficient Support from UN Security Council Permanent Members.

One of the key challenges confronting the International Criminal Court (ICC) pertains to the limited participation of crucial members of the United Nations Security Council, namely the United States, China, and Russia, who are not state members of the ICC. While China has outrightly refused to sign the Rome Statute, Russia and the United States have declined to ratify the ICC Statute. Of note, during the presidency of George W. Bush in August 2002, the United States signed into law the American Service Members' Protection Act (ASPA), which specifically prohibits major government agencies from collaborating with the ICC.

ASPA also restricts participation in United Nations peacekeeping operations and prevents the United States Army from providing support to State Parties to the Statute. The exclusion of these influential countries hinders the ICC's capacity to investigate and prosecute international crimes and weakens its legitimacy as a global institution of justice. The American Service Members' Protection Act further empowers the U.S. Army to engage the use of force to release any U.S. citizen detained by the court.[72]

The United States has also gone ahead to enter into several Bilateral Immunity Agreements, the BIA referred to as Article 98 Agreements. It signed this agreement with countries to stop the arrest and surrender of specific set of Americans to the ICC for prosecution. These people include current and former government officials, military personnel, and ordinary Americans at work.[73] States that refuse to sign BIA with the United States of America are often

71 Article 88 of the Statute of the ICC

72 Elizabeth Orji "Responsibility for Crimes Under International Law" (Lagos, Odade Publishers 2013) p. 251

73 Ibid, at p. 252

punished through denial of military aid and economic support funds.[74] The perceived lack of participation by the United States of America and other states typically viewed as superpowers has been regarded as a significant impediment to the legitimacy of the International Criminal Court.

5.6. Enforcement of ICC Judgements

Presently, the ICC lacks a permanent prison facility where those found guilty of international crimes can go to jail to fulfil their sentences. The ICC has no prison, and usually relies on Member States for subsequent enforcement of sentences of imprisonment.[75] State parties are to voluntarily lend their assistance by agreeing to let those who have been found guilty of international crimes serve their sentences in state prisons they control.[76]

By Article 103 (3) (a),[77] State Parties are expected to share in the responsibility of enforcing orders of imprisonment issued by the court. Where State Parties fail to offer this assistance, then the Netherlands as the host country is to take up the responsibility to provide such facility for the convicted criminal. Under the Rome Statute, once a convicted person has been sentenced, the ICC will immediately name the State where the individual would serve his jail term.[78]

One major challenge with this kind of arrangement is the possibility of moving convicted persons to State with no prison facility that suits the international requirements.[79] The ICC also may not be able to guarantee the safety and wellbeing of the convicted persons transferred to consenting State parties.

---

74 Mathew Weed, "International Criminal Court and the Rome Statute: 2010 Review Conference," Congressional Research Service 5 (2021) available at <hhp://www.fas.org/sgp/crs/row/r41682.pdf.> [Accessed September 18 2022]

75 Elizabeth Orji, "Responsibility for Crimes under International Law, (Lagos, Odade Publishers 2013), p. 247

76 ibid

77 Rome Statute of the ICC

78 Article 103(1) (a) Rome Statute.

79 Ibid, at P. 248

5.7. Weakness in Investigation and Prosecution Processes

One additional challenge facing the ICC pertains to its rules of procedure governing the gathering of evidence and pre-trial proceedings, which may impede the court's effectiveness. Specifically, the Pre-Trial Chamber is responsible for determining whether a charge should be issued against an accused individual, a process that can be protracted and resource-intensive. In many cases, victims may be required to invest significant financial resources in the pre-trial stage before their cases can be scheduled for a hearing.

Moreover, some of the issues addressed during pre-trial proceedings could conceivably be resolved during the trial process, further complicating matters. Another significant challenge relates to the difficulty of conducting investigations and collecting evidence related to serious crimes committed in areas that are geographically remote from the court. Some of the regions may be difficult to access and unsafe to penetrate for investigation.[80] Another major problem is the limitation of financial resources in carrying out investigation and other important assignments of the court.[81]

5.8. Attacks by Hostile Non-Member States

The ICC is also faced with serious challenges from non-member states who from time to time seek to prevent the ICC prosecutor from investigation and at the same time strive to weaken and discredit the operation of the court.[82] During the Trump administration, the United States government launched a severe attack on the International Criminal Court (ICC). Secretary of State Michael Pompeo announced that the United States would impose a visa ban on any ICC officials found to be involved in investigating US citizens for international crimes

---

80 This fact was stated by Chief Prosecutor Moreno- Ocampo, while addressing the fourth Assembly of States parties to the Rome Statute in the Hague, (November 28, 2005)

81 ibid

82 Marina Riera, Support Needed to Tackle ICC Shortcomings: Court Faces Internal, External Challenges on 21st Anniversary, Human Rights Watch, July 16, 2019

committed in Afghanistan.[83] Thus, in April 2019, the United States subsequently revoked the visa of the ICC prosecutor.[84]

6.0. THE WAY FORWARD

In order to fulfill its mandate of maintaining global peace and security, the International Criminal Court (ICC) relies on the complementarity principle outlined in its statute to prosecute international crimes when domestic courts are unable or unwilling to do so. To effectively carry out this principle, the ICC requires a robust police force capable of freely entering member countries where such crimes have been committed to apprehend and try offenders of international crimes.

However, the current level of cooperation from state parties in this regard has been limited. It is not feasible for the ICC to rely solely on national governments to apprehend and hand over offenders for trial, as these leaders may themselves be perpetrators of international crimes and are unlikely to voluntarily surrender themselves or their subordinates for trial. The ICC could follow the model of the International Court of Justice (ICJ), which has the Security Council enforcing its major decisions.

Establishing an independent police force or an organ to enforce its decisions would further enhance the ICC's mandate of maintaining international peace and security within the international community. Therefore, this paper argues that the ICC must explore alternative options for ensuring the apprehension and trial of offenders of international crimes to strengthen its ability to effectively carry out its mandate.

In combating international crimes, the domestication of the Court's Statute by member States is widely considered a crucial approach. This is particularly important given that national courts serve as the primary arena for the

83 ibid
84 ibid

prosecution of international crimes. By using their national legislation to domesticate and execute their obligations under the Rome Statute, State parties can significantly augment the scope and jurisdiction of their national courts. This, in turn, expands the range of crimes that can be prosecuted, such as war crimes, crimes against humanity, and genocide, even when these offenses are committed within their territorial boundaries. Thus, national courts are empowered to effectively carry out their mandate of prosecuting international crimes at the domestic level.

In order to enhance the International Criminal Court's (ICC) ability to end impunity for international crimes, the prosecutor must continuously collect evidence and prosecute not only heads of states and prominent leaders but also other individuals who commit lower level offenses. Focusing on the latter group would enable the prosecutor to gather evidence and witnesses more easily, leading to better convictions.

To ensure effective justice delivery and world peace and security, a review of the ICC's trial procedures is urgently needed. Specifically, the Pre-Trial Chamber should be eliminated as part of this review process. By implementing these recommendations, the ICC can strengthen its mandate and more effectively fulfill its role in international criminal justice. The Trial Chamber could actually deal with most of the cases presented to the Pre-Trial Chamber. This can serve as a means eliminating delays in the trial process.[85]

Considering the limited number of cases currently being handled by the International Criminal Court (ICC), it is suggested that the activities of the pre-trial chamber be merged with the trial chamber to optimize efficiency. By doing so, the ICC can streamline its processes and better allocate its resources towards the trial proceedings. Such a consolidation of the pre-trial and trial chambers

[85] Douglas Guilfoyle, A Tale of Two Cases: lessons for the prosecutor of the International Criminal Court(Part 11), (Aug 29, 2019) Available at: <http://www.ejitalk.org/> [Accessed 25 October 2022]

may contribute to the ICC's ability to fulfill its mandate of bringing perpetrators of the most serious crimes to justice.[86]

7.0. CONCLUSION

The International Criminal Court (ICC) is widely recognized as a significant judicial institution in the international criminal justice system, playing a key role in ending impunity for international crimes and promoting global peace and security. Since its creation and effective operation in 2002, the ICC has been instrumental in holding national leaders accountable for serious international crimes. Nevertheless, the current challenges confronting the court threaten its existence and legitimacy.

The identified challenges in this paper are not insurmountable, and the court must take urgent action to address them. The ICC should critically review its policies, practices, investigative and prosecutorial approaches, and make necessary adjustments and changes. An independent and competent group assigned with the responsibility of assessing the criticisms and challenges faced by the court could also provide valuable insight and solutions for the court's future.

This paper proposes a way forward in extensive terms, emphasizing the importance of addressing the challenges facing the court. In conclusion, the ICC must take immediate steps to confront these challenges and ensure its continued effectiveness in the international criminal justice system.

86 ibid

LIST OF REFERENCES

"ICC withdrawal Unconsitutional and invalid high court rules" Available at <www.news24.com/SouthAfrica/> [Accessed 15 September 2022]

"South Africa formally revokes ICC withdrawal." Available at <http://ewn.co.za/2017/03/08/> [Accessed 15 October 2022]

Badagard and Klamberg, "The Gatekeeper of the ICC", P. 653

Burundi's notification to the United Nations Security Council, available at: <https://treaties.un.org> [Accessed 22 October 2022]

Chan and Simons, "South Africa to withdraw from the International Criminal Court, New York Times October 21, 2016, available at: <www,nytimes.com/2016/10/22/world/Africa/> [Accessed 7 October 2022]

Douglas Guilfoyle, A Tale of Two Cases: lessons for the prosecutor of the International Criminal Court(Part 11), (Aug 29, 2019) Available at: <http://www.ejitalk.org/a-tale-of-two-case> [Accessed 25 October 2022]

Elizabeth Orji "Responsibility for Crimes Under International Law" (Lagos, Odade Publishers 2013) P. 251

Hans-peter Kaul and Claus kress, "Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromies" (1999) 2, Yearbook of International Humanitarian Law, P. 157

International Criminal Court, Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute, (Liechtenstein Institute on Self-Determination 2012), available at <http://crimeofagression.info/documents>, [Accessed 5 October 2022]

Joel F. England, the Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else? (2021) Vol. 18 (3) Arizona Journal of International and Comparative Law, available at <azjournal@law.arizona.edu> [Accessed September 5 2022]

Judge Phillippe Kirsch, President of the ICC, address at the Rayburn House Office building(February 13, 2009), available at <http://globalsolutions.org/>, [Accessed 28 September 2022]

Judge Phillippe Kirsch, President of the ICC, address at the Rayburn House Office building(February 13, 2009), available at <http://globalsolutions.org/files/> [Accessed 28 September 2022]

Judge Phillippe Kirsch, president of the ICC, Address at the Rayburn House office Building (February 13, 2009), available at <http;//globalsolutions.org/> [Accessed September 8 2022]

Julius Onyoni OPini, The Role of the ICC in Maintaining Justice: Issues, Challenges and the Way Forward (master Thesis, University of Narobi, 2016), p. 36

Marina Riera, Support Needed to Tackle ICC Shortcomings: Court Faces Internal, External Challenges on 21st Anniversary, Human Rights Watch, July 16, 2019

Mathew Weed, "International Criminal Court and the Rome Statute: 2010 Review Conference," Congressional Research Service 5 (2021) Available at <hhp://www.fas.org/sgp/crs/row/r41682.pdf.> [Accessed September 18 2022]

Mathew Weed, "International Criminal Court and the Rome Statute: 2010 Review Conference," Congressional Research Service 5 (2021) Available at <hhp://www.fas.org/sgp/crs/row/r41682.pdf.> [Accessed September 18 2022]

Milena Sterio, 'The International Criminal Court: Current Challenges and Prospect of Future Success, Case Western Reserve Journal of International Law (2020), 52, P. 469

Mirjan R. Damaska, "What is the point of International Criminal Justice?" Chicago-Kent Law Review 83 (2008), p. 344

Open Society Foundations, Fact Sheet for international Crimes, available at <http://www.opensocietyfoundationlorg> [Accessed 28 September 2022]

Prosecutor v. Francis Kirimi Muthaura &Uhuru Kenyatta, Case No.ICC-01/09-02/11 (case alleging crimes against Humanity).

Prosecutor v. Jean- Pierre Bemba Gombo, Case No.ICC-01/05-01/08

Prosecutor V. Laurent Gbagbo, Case No. ICC-02/11-01/11

Prosecutor v. Muammar Gaddafi & Ors, Case no.ICC-01/11-01-11-01/11 (a warrant of arrest issued against him for crimes against humanity)

Richard Steinberg, Contemporary Issues Facing the International Criminal Court (Leiden, Netherlands: Nijhoff Publishers 2016), p .23

Richard Steinberg, Contemporary Issues Facing the International Criminal Court, Brill/Nijhoff (2016), p. 350, see also Malone B. "Africans Push the UN to Call off Racist court", Al-Jazeera, 15 November 2013, available at <www..aljazeera.com/indepth/features> [Accessed 3 October 2022]

Richard Steinberg, Contemporary Issues Facing the International Criminal Court, Brill/Nijhoff (2016), p. 350, see also Malone B. "Africans Push the UN to Call off Racist court", Al-Jazeera, 15 November 2013, available at <www..aljazeera.com/indepth/features/> [Accessed 3 October 2022]

Rome Statute and Rules of Procedure and Evidence

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute), preamble. <http://www.un.org> [Accessed 20 September 2022]

The Declaration of the High-level Meeting of the General Assembly on the Rule of law at the National and international levels, A/67/L. 1, September 19, 2012.

The Prosecutor v. Germain Katanga and Muthieu Ngudjolo Chiu, Case No. ICC-01/04-01/07 the court in this case gave the reason admitting the case despite the motion challenging the case.

The Statute of the International Criminal Court, (Hereinafter the ICC) 17 July 1998, U.N. Doc. A/CONF. 183/9 (Hereinafter Rome Statute)

United Nations Charter

United Nations. 2002, Ratification Ceremony at the UN paves way for the International Criminal Court. Rome: United Nations 2016: available at <www.un.org/apps/news/story.asp/> [Accessed 2 October 2022]

Valerie Oosterveld, Mike Perry and John MacManus, "The Cooperation of States with the international Criminal Court" Fordham International Journal 23, No. 3 (2001); p. 767

MAKERERE LAW JOURNAL FEBRUARY 2023

Volume 52 Issue 2

PARTNERSHIPS AND THE PROBLEM OF WRONG NOMENCLATURE: A CASE FOR REFORM OF UGANDA'S PARTNERHSIP LAW

Okello Isaac Echipu

Recommended Citation: Okello Isaac Echipu (2023), "Partnerships and the Problem of Wrong Nomenclature: A Case for Reform of Uganda's Partnership Law" Volume 52 Issue 2 Makerere Law Journal pp. 159-185

PARTNERSHIPS AND THE PROBLEM OF WRONG NOMENCLATURE: A CASE FOR REFORM OF UGANDA'S PARTNERHSIP LAW

Okello Isaac Echipu*

ABSTRACT

The Partnerships Act, No. 2 of 2010 in Uganda provides for limited liability partnerships, yet the relevant provisions of the Act apply to Limited Partnerships instead. This article examines the flaws of the legislation and advocates for reform and parliamentary activism to ensure that laws are drafted with precision to achieve their intended purpose. Inaccurately drafted laws fail to meet their objectives, and the existence of this error for over a decade constitutes an abuse of parliamentary power, detrimental to commerce, and misleading to all Ugandan citizens. This article analyses the impact of the flawed law on the legal landscape and proposes a way forward to rectify the situation. Through this analysis, the article underscores the importance of drafting laws with utmost accuracy to achieve their objectives effectively.

1.0 INTRODUCTION

1.1 Defining a Partnership

A partnership is a relationship subsisting between or among persons, not exceeding twenty in number, who carry on business in common with a view to making profit and not exceeding fifty where a partnership is formed for the purposes of carrying on a profession.[1] In the case of *Palter v Zeller,*[2] the

* Fourth year Student of Law at Makerere University School of Law.

1 *Section* 2(1) & (2) of the Uganda Partnerships Act, No.2 of 2010.

2 (1997) 30 OR (3d) 796.

defendant, Zeller, had set up a law practice and was later joined by his wife after their marriage. It was advertised by Zeller that Lieberman had "joined me in the practice of law". Factually, there was no proof in the firm's stationary or business cards that they were partners. The plaintiffs had entrusted the management of their accounts to Zeller through their relationship to Lieberman; and when Zeller misused the funds, they sought to make Lieberman jointly liable with Zeller because they were partners.

During the court proceedings, the argument was raised that a husband and wife share a partnership both legally and practically, and are partners in every aspect of their lives. However, the court held that the nature of their social and marital relationship is not relevant to determining whether they are business partners. Instead, what matters is how they conduct their joint business affairs, regardless of their personal relationship.

The Partnerships Act[3] provides for instances where a partnership will not exist. The first is where there exists a relationship between or among persons of any company or association, which is first registered as a company under the Companies Act or any other Act relating to the registration of joint stock companies.[4] The second is a company formed or incorporated by or in pursuance of any written law.[5]

Based on the reading of *Section 2(1)* of the Partnerships Act, it can be concluded that an association will be considered a partnership when there is a business conducted in common with the objective of making a profit, and this business is operated by a limited number of partners. The maximum number of partners allowed is twenty for general partnerships and fifty for professional partnerships. It is apposite to note, however, that it is easier to see than define or establish the existence or nonexistence of a partnership. However, the Partnerships Act does

3 No.2 of 2010.
4 Ibid, *Section* 3(a) & (b).
5 Ibid

in a great deal under *section 3* provide rules for determining the existence of a partnership.

Briefly, the Act provides the following criteria:

i) Under *Section 3(d)*, the rule that a partnership may be determined using ordinary evidence, such as whether the accounts are prepared for internal use or for other purposes, any admissions by the members of the partnership and advertisements, which include the alleged partners, among others.

ii) Under *Section 3(a)* the rule, though in negative tone, postulates that "joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership."

iii) Under *Section 3(b)*, the sharing of gross returns does not lead to the conclusion that there exists a partnership between those persons sharing the same, whether the persons sharing those returns have or do not have a joint or common right or interest in any property or part ownership, or from the use of which, the returns are derived.

iv) In *Section 3(c)*, the receipt of a share of the profits of a business is prima facie evidence that he is a partner. This general rule is in line with the definition of a partnership under *section 2(1)*; "with a view of making profits." However, this is subject to exceptions under paragraphs (i)–(v) of *Section 3(c)*, where the receipt of such profit may not be conclusive proof of the existence of a partnership.

In the case of *Abubaker Walakira V Abubaker Walusimbi,*[6] the plaintiff and defendant entered into a business partnership through a Deed of Partnership dated July 23, 2008. The plaintiff offered his land located in Busiro Block 438 Plot 1273 at Abayita Ababiri for the partnership business. It was agreed that the defendant was to build developments on the said land for business purposes. It

6 Civil suit no. 579/2012

was further agreed that the plaintiff was entitled to 40% shareholding while the defendant was entitled to 60% shareholding in the business.

In 2012, the plaintiff sought to dissolve the partnership, request the defendant to provide an account of the business, obtain an order for a valuation of the business and payment of the profits owed to the plaintiff, obtain a permanent injunction to prevent the defendant from interfering with the partnership property, and recover general damages and costs of the suit. The plaintiff argued that the defendant had violated the obligations outlined in the Partnership Deed, had taken complete control of the business, had deposited all profits into their personal account, and had failed to compensate the plaintiff for their share of the business proceeds.

On the question of whether there was partnership, Justice Kainamura posited thus:

> *"The definition of a partnership in the Partnerships Act is instructive in determining whether a partnership still subsists between the parties. Section 2(1) of the Act states as follows; "Subject to subsection (2), a partnership is the relationship which subsists between or among persons, not exceeding twenty in number, who carry on a business in common with a view to making profit". It appears to me, from the above, that in order to say that a partnership is in existence and operational, there must be business being carried on by the partners. David.J Bakibinga in his Partnership Law in Uganda, states as follows, and I agree: "The High Court of Northern Nigeria (as it then was) held that no partnership existed between the parties. The court further stated; … the existence of partnership depends on the carrying on of business in partnership and not on the agreement to form a partnership … if the parties have begun to carry on business (though prematurely) they will be regarded as partners. In similar tone, Jones S.P.J. thus observed in Bank of the North V Dabare 1976 NCLR 448 (High Court of Kano) (see Bakibinga Ibid pg. 37)."*

He held thus:

> *"I have taken into consideration the submission raised for the plaintiff that a company is a separate legal entity and that the defendant could not bring any matters which concerned the Company to court. However,*

> *I find that the existence of the company at the location where the partnership business was being carried on is relevant in determining the existence and operations of the partnership. There is no proof that the partnership had registered a business name so as to be compelled to file a notice of cessation of business with the Registrar, in accordance with Section 14 of the Business Names Registration Act. Even then, the wording of the said section does not imply that incase the parties do not file a notice of cessation of business, then the business is to be presumed as being in existence even when it was ended by the parties. It is my finding that in the circumstances of this case, the plaintiff and the defendant ceased to carry on business under the partnership."*

In this case therefore court found the partnership to have ceased to exist on grounds that where there was a partnership before now existed a company. Generally, partnerships can be classified into three main types, and these are general partnerships, limited partnerships, and limited liability partnerships.[7] Of recent emergence is the Limited Liability Limited Partnership (LLLP),[8] which I will briefly describe in this paper.

2.0 HISTORICAL EVOLUTION OF PARTNERSHIPS

A partnership is an ancient form of business enterprise, and the laws governing it date as far back as 2300 BC when the Code of Hammurabi explicitly regulated the relations between partners. Partnerships were also an important part of Roman law and played a significant role in merchant law, the international commercial law of the middle Ages.[9] This makes a partnership one of the oldest forms of business organization involving more than one person.[10]

It was traditionally non-statutory, with its creation being comparatively simple, inexpensive, and informal.[11] Partnership law, however, progressively developed

---

7 C.E. Halliday and G.C. Okara, "*Limited Liability Partnerships and Limited Partnerships as Vehicles for Business in Nigeria Challenges and Prospects".*

8 Robert R. Keatinge et. al, "*The Next Step in the Evolution of the Unincorporated Business Organization"*, The Business Lawyer; Vol.51, November 1995, pp 147-207.

9 Foundations of Business Law and the Legal Environment, <https://saylordotorg.github> [Accessed 24 June 2022]

10 Philip J. Scaletta, Jr and George D. Cameron III, *Foundations of Business Law* (1986), p 662.

11 Ibid.

on a case-by-case basis, and it was through this lack of uniformity that a lack of clarity on certain points of law was created. This prompted the National Conference of Commissioners on Uniform State Laws to draft the Uniform Partnership Act (UPA) in 1914.[12]

The Uniform Partnership Act (UPA) played a crucial role in consolidating various court decisions on partnership law into a single statutory form. Its impact has been felt across numerous common law jurisdictions, including Uganda, where the UPA became applicable through the 1902 Order in Council. However, the task of adapting to the UPA has been a persistent challenge for Uganda's legislature. This was especially evident during the 2010 amendment of Cap.114, where the provisions of the new Act on limited liability partnerships diverged significantly from the corresponding provisions under common law.

This paper discusses the lacuna present in Uganda's Partnerships Act[13], which provides for limited liability partnerships, but the contents thereunder are provisions which apply to limited partnerships. It is a clarion call for reform and Parliamentary activism to ensure that laws are clearly drafted to obtain the desired objective. The law cannot attain its objective if it is erroneously drafted, therefore the presence of such a mistake for over 11 years is an abuse of parliamentary power and a misguidance to all citizens of Uganda.

3.0 LIMITED PARTNERSHIPS AT COMMON LAW

3.1 Definition, Justification and Characteristics

The traditional partnerships fell short of being appropriate for all business situations. The only available means of raising additional capital that was available to the general partnerships was through adding more partners to the business.[14] These new partners would usually have a right to an active role in the management of business, yet this was not acceptable to a person who simply

12 Ibid n.12, 663
13 No. 2 of 2010.
14 A. James Barnes, et al; *Law for Business*, 3rd Edition (1987), p 463.

wanted more capital and was not ready to share managerial roles with any other person.[15] It is also argued that other persons would desire to invest in a business but may have neither the time nor the expertise to concern themselves with the actual operation of the business.[16] Actual investors were also often scared away by the thought that they could be held liable for debts in excess of their actual investment.

The aforementioned concerns gave rise to a demand for a business structure that could merge the characteristics of both partnership and corporate forms of businesses, and the solution came in the form of a Limited Partnership. The primary objective of limited partnerships is to provide certain investors with limited liability, while also relinquishing their right to engage in the management of the partnership business in exchange for such protection.[17]

In this form of partnership, like a corporate shareholder, the limited partner may lose his investment, but no more.[18] When taxation is sought in a partnership but investors want to reduce their obligation, this route is frequently taken. It is always considered as a vehicle of investments such as real estate investment activities, oil and gas, and other "tax shelter endeavours."[19]

Limited Partnerships are characterised by the existence of at least one general partner with unlimited liability, and at least one limited partner.[20] Usually limited partners have no obligation for the debts of the partnership and the management of the business rests in the hands of the general partner(s).[21] Often, there is a requirement for formalities when it comes to Limited Partnerships, since they are a privilege granted by a state through a statute.[22]

---

15 Ibid n. 15,
16 Ibid n.16, 464.
17 Ibid n. 18, 464.
18 Ibid, p 467.
19 Ibid, p 467.
20 Philip J. Scaletta, Jr and George D. Cameron III; Foundations of Business Law, 1986, p 694.
21 A. James Barnes, J.D. et al; Law for Business 3rd Edition, 1987
22 Ibid. p 464.

3.2 Rights and Liabilities of Limited Partners

Under common law, a limited partner is generally not obligated to take on specific duties and is instead viewed as an investor. However, under section 10 of the Uniform Partnerships Act of the UK, limited partners are afforded certain rights. For instance, they have the right to inspect the partnership's books and to receive all relevant information regarding matters that may affect the partnership's affairs when it is deemed just and reasonable under the circumstances.[23]

This means that, despite the fact that a limited partner may not have a say in how the limited partnership is run, he is not have to watch while the general partner(s) engages in dishonest and wasteful behaviour.[24] It is also the position under common law that a limited partner may petition a court with jurisdiction to have the limited partnership dissolved and wound up. He is, upon this, entitled to have a share of the profits or compensation as income, and in other cases, have his capital contributions returned in accordance with the provisions of the local law and subject to the agreement between the partners.[25]

In the case of *Philips v Kula 200, Wick Realty, Inc.*[26], KULA 200 was established as a limited partnership with the purpose of purchasing, selling, and developing real estate. The general partners of KULA 200 were Wick Realty, Inc. and Erling P. with Erling Wick serving as the president of Wick Realty and also being a partner in Wick Associates. During a land purchase transaction, Wick Associates received $165,000, which was not disclosed to the limited partners.

However, Wick Realty was paid $135,000 for organizing the limited partnership, and $269,000 in commission on sales by KULA. Two of the limited partners filed a lawsuit against the general partners, claiming that they had breached their duties by making these payments without disclosure. The main issue was whether the limited partners had the right to bring legal action against the

---

23 Scaletta, Jr and D. Cameron III; *Foundations of Business Law* (1986), pp 696-697.
24 Ibid, p 697.
25 Ibid, n.25, p 697.
26 629 P.2d 119 (Intermediate Court of Hawaii 1981)

general partners. The court ruled in favour of the limited partners, affirming their right to sue the general partners and to seek damages for their breach of fiduciary duty towards the limited partnership.

4.0 LIMITED LIABILITY PARTNERSHIPS (LLPs) AT COMMON LAW

4.1 Definition, Justification and Characteristics

A Limited Liability Partnership is an entity formed by registration that becomes a corporate body upon registration with perpetual succession. It is a legal personality separate from its partners, and a change in the partners does not affect the existence, rights and obligations of the LLP.[27] In an LLP, partners have equal roles in decision making and share equally in the business profits and losses.[28]

Limited Liability Partnerships are legally required to have the acronym 'LLP' at the end of the business name and are a common type of organisation in professional businesses like accounting, legal practice, and medicine.[29] LLPs are a preferred type of business organisation as they limit liability and come with taxation benefits to the business,[30] among others.

4.2 Liability of Partners in Limited Liability Partnerships (LLPs)

At common law, liability of members of a company normally depends on the number of shares they possess in the company and their capital contributions in that regard. In some cases, it depends on their guarantee upon dissolution.[31] This position is not different from what is found in Limited Liability Partnerships, where the partners are not personally liable for the partnership debts.[32]

---

27 Limited Liability Partnership Act of Kenya, CAP. 30A, *Section 6*.
28 Scaletta, Jr and D. Cameron III; *Foundations of Business Law* (1986), p 697.
29 Legal Department Financial Services Commission, *Concept Paper on Limited Liability Partnerships*.
30 Ibid
31 C.E. Halliday and G.C. Okara, *Limited Liability Partnerships and Limited Partnerships as Vehicles for Business in Nigeria; Challenges and Prospects*
32 Ibid

An LLP has the capacity to sue and be sued because it is in law a separate legal entity from the members that constitute it. It is however relevant to note that limited liability partners may be held personally liable in cases of fraud, misrepresentation, and for any other improper conduct and if it is in the interest of the public for an action to be maintained against an individual limited liability partner.[33]

The liability of partners in LLPs is similar to that of shareholders in corporations; that is, limited only to the amount contributed by each partner for the formation or running of the partnership. His or her estate is not jointly/severally liable for the debts incurred by the LLP while he or she was partner.[34] LLPs are important tools for generational wealth transfer, as shares and benefits held therein are easily transferable subject to the agreement between the partners.

This form of partnership equally comes with the concept of perpetual succession, which is not commonly present in a general or limited partnership unless agreed otherwise. Therefore, in an LLP, the death of a partner does not affect the existence of the partnership. The case of *Henry V Mason*[35] involved two partners in an orthopaedic surgery practice, which they registered as an LLP in 2001. Disputes arose, after which they agreed to wind it up in 2003.

In a subsequent issue resulting from the settlement agreement they had signed, Mason argued that the lower court erred in ordering members of an LLP to contribute when, in fact, the partnership was an LLP. The court had ordered them to contribute to the partnership's winding up. The Texas Court of Appeal agreed that an LLP is personally liable for its debts rather than the partners. This was because, in law, it is a separate entity from its members. It however found that it did not apply in the state of winding up and that the agreement did

33 Ibid n.33

34 Halliday and Okara, *Limited Liability Partnerships and Limited Partnerships as Vehicles for Business in Nigeria; Challenges and Prospects*

35 S.W. 3d 2010 WL 5395640 (Tex. App. 2010)

not preclude them from contributing during winding up and actually provided that they would contribute for such purposes.

From the preceding discussion of the common law position and understanding of what limited partnerships are, and what limited liability partnerships mean, it can be seen that they are not the same thing. Next, I discuss the conundrum arising from the 2010 Partnerships Act following an exposit discussion of the Uganda Law Reform Commission's recommendations of 2004.

5.0 LIMITED LIABILITY LIMITED PARTNERSHIPS (LLLPs)

As signified above, the development of partnerships has significantly grown historically, making this the fourth type of partnerships. It is the type in which the liability of the general partner is limited in the same way as the liability of a partner in an LLLP.[36] Both limited partnerships (LPs) and limited liability limited partnerships (LLLPs) are types of partnerships with limited liability, which means that the personal assets of the partners are not at risk if the partnership is sued or goes bankrupt.

However, there is a key difference between the two.[37] In a limited partnership, there are two types of partners: general partners and limited partners. The general partners have unlimited liability for the debts and obligations of the partnership, while the limited partners have limited liability and are not responsible for the debts and obligations beyond their investment in the partnership. Limited partners typically do not have management authority over the partnership.

On the other hand, in a limited liability limited partnership, all partners have limited liability, including the general partners. In an LLLP, the personal assets of the general partners are protected from the debts and obligations of the

---

36 Robert R. Keatinge et. al, *The Next Step in the Evolution of the Unincorporated Business Organization*, The Business Lawyer; Vol.51, November 1995, p 196.

37 Meridith Turits, *What is an LLLP (Limited Liability Limited Partnership)?*, <https://www.nerdwallet.com> [Accessed 25 July 2022]

partnership, which is not the case with a traditional limited partnership. In summary, while both LPs and LLLPs offer limited liability protection to the partners, an LLLP is a special type of limited partnership where all partners, including the general partners, have limited liability.

6.0 THE UGANDA LAW REFORM COMMISSION STUDY REPORT ON REFORM OF BUSINESS ASSOCIATIONS-PARTNERSHIP LAW

6.1 Justifications for Reform

According to a report by the Uganda Law Reform Commission (ULRC), Ugandan society has undergone various phases of change, like any other society. However, the country's laws have remained unchanged since 1902 when they were introduced under the 1902 Order in Council.[38] The ULRC acknowledged the emerging government policies like decentralization, poverty eradication, privatization and economic liberalism and maintained that there was a great need to reform the law.

It further observed that the then *Partnership Act. Cap. 114* was a photocopy of the United Kingdom Partnership Act, which had long undergone reforms, while it remained the same.[39] The suggested reforms required the amendment of certain areas of the Act and the introduction of limited partnerships. The ULRC justified reform on the grounds that even when the main law applicable to partnerships was the *Partnerships Act Cap.114*, other laws were being applied in partnership regulation. These included the *Bankruptcy Act Cap. 76*, The *Companies Act Cap 110* and the *Stamps Act Cap. 342* among others.[40]

38 Uganda Law Reform Commission, *A study Report on the Reform of Business Associations-Partnership Law*, Law Com Pub. No. 26 of 2004.
39 Ibid
40 Ibid, n.40

6.2 The Recommendations

6.2.1 Limited Partnerships

The ULRC called for the law to:[41]

i) provide for the formation of limited partnerships and that
ii) In such a limited partnership subject to the agreement of partners, only general partners should be involved in the management of the firm.
iii) The law should require mandatory registration of a limited partnership and
iv) Possibility of converting a limited partnership into a general partnership.

In justifying its decision, the Commission argued that the introduction of limited partnerships would encourage large-scale investments and trading by legal entities, similar to joint ventures. By limiting the role of general partners to individuals with expertise in the relevant field of business, the new partnership structure would also promote greater professionalism. Furthermore, the Commission noted that mandatory registration and lower formation costs would improve tax planning and collection, making limited partnerships a more attractive option than private limited partnerships.

The Commission also believed that financial institutions would be more likely to trust these partnerships, making it easier for them to access credit compared to general partnerships.

6.2.2 Limited Liability Partnerships

Under recommendation (1.5.1.), the ULRC proposed the introduction of limited liability partnerships in Uganda, since there seemed to be a growing demand for the partnership law in Uganda to borrow a leaf from the developments in the United Kingdom and the United States of America on Limited Liability

41 Under recommendation 1.5,

Partnerships.[42] However, the Commission noted the unique nature of Ugandan enterprises, which are often simple and comfortable with loose business formations that do not require many formalities. While the Commission saw the potential benefits of the proposed idea, it emphasized the need for a separate law on Limited Liability Partnerships (LLPs), as they are distinct from traditional partnerships and should not be governed by the Partnerships Act.

7.0 THE PARTNERSHIPS ACT No.2 OF 2010; PROVISIONS ERRONEOUSLY ATTRIBUTED TO LIMITED LIABILITY PARTNERSHIPS.

7.1 The Problem

Under its long title, the Partnerships Act, No.2 of 2010 is described as:

> *"An Act to amend and consolidate the law relating to partnerships; to provide for the formation of limited liability partnerships; to repeal the Partnerships Act, Cap.114; and to provide for other related matters."*

By ignoring the ULRC's recommendations, Parliament made the first blunder by including "Limited Liability Partnerships" in the Partnerships Act rather than a distinct law. Second, as will be seen later, it included provisions for "Limited Partnerships" under the heading "Limited Liability Partnerships." For the past eleven years, these two errors have resulted in an absurdity in the legislation, prompting calls for revision.

7.2 Illustration

I will illustrate the above conundrum by reproducing verbatim the provisions of *sections 47, 48* and *52* of the Partnerships Act No.2 of 2010, and show how these provisions only apply to limited partnerships. This will give an illustration of what the true but related provisions are for a limited liability partnership.

a) Section 47 of the Partnerships Act

The provision reads:

---

42 Uganda Law Reform Commission, *A study Report on the Reform of Business Associations-Partnership Law*, Law Com Pub. No. 26 of 2004.

"47. Limited Liability Partnership.

1) *A limited liability partnership may be formed in the manner prescribed by this Act.*
2) *A limited liability partnership shall consist of not more than twenty persons, and shall have one or more persons called general partners who shall be liable for all debts and obligations of the firm.*
3) *A limited liability partnership shall, in addition to general partners have one or more persons called limited liability partners who shall contribute a stated amount of capital to the, and shall not be liable for the debts or obligations of the beyond the amount of capital so contributed.*
4) *A limited liability partner shall not, during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his or her contribution to the partnership, and if a limited liability partner draws out or receives back any part of his or her contribution, he or she shall be liable for the debts and obligations of the partnership up to the amount so drawn out or received back.*
5) *A body corporate may be a limited liability partner."*[43]

While *Section 47* is on limited liability partnerships, in its definition, it brings in the concept of the existence of a general and a limited partner which is an attribute relegated to limited partnerships under common law, as discussed above.

b) Section 48

The section provides:

"48. Registration of Limited Liability Partnership

1) *A limited liability partnership shall, subject to subsection (2), be registered with the Registrar in accordance with section 50; and a limited liability partnership that is not so registered shall be taken to be a general partnership and all its members' general partners.*
2) *A partnership registered as a limited liability partnership under section 50 shall, at the end of its name, add the letters "(LLP)."*[44]

The provision that mandates a company with both general and limited partners, as described in *Section 47* and required in *Section 50*, to register under the name of "LLP" is problematic. As discussed earlier, the acronym "LLP" denotes a limited

43 *Section 47* of the Partnerships Act No.2/2010.
44 Ibid, *section 48*.

liability partnership, which has a distinct legal structure and requirements. However, the business that is being mandated to register under this name is not actually a limited liability partnership in content.

The primary issue with this provision is that it requires the presence of a general partner in the business, which goes against the fundamental principle of limited liability partnerships. In an LLP, all partners have limited liability, and there is no concept of a general partner who assumes unlimited liability for the partnership's debts and obligations. By mandating businesses with both general and limited partners to register under the name of "LLP," the provision creates confusion and misleads stakeholders about the actual legal status and liabilities of the business. This could potentially lead to legal disputes and financial risks for the partners and investors involved.

In conclusion, the provision that requires companies with both general and limited partners to register under the name of "LLP" is a flawed approach that fails to consider the nuances of different business structures and legal requirements. A more appropriate and accurate naming convention should be adopted to reflect the actual legal status and liabilities of the business.

c) Section 52

The section states:

> *"52. Management of Limited Liability Partnership.*
> 1) *A limited liability partner shall not take part in the management of the partnership business and shall not bind the firm.*
> 2) *Without prejudice to subsection (1), a limited liability partner may, upon giving seven days' notice to the general partners, in person or by that partner's agent, inspect the books of the firm and ascertain the state and prospects of the partnership business.*
> 3) *Where a limited liability partner takes part in the management of the partnership business, that partner shall be liable for all debts and obligations of the firm incurred while he or she takes part in the management as though he or she were a general partner.*
> 4) *For the purposes of this section, a limited liability partner does not participate in the management and control of the partnership business solely by doing one or more of the following —*

a) being a contractor for or an agent or employee of a limited liability partnership or of a general partner, or being an officer, director or shareholder of a general partner in the limited liability partnership, which is a corporation;
b) consulting with and advising a general partner with respect to the business of the limited liability partnership;
c) acting as surety for the limited liability partnership or guaranteeing or assuming one or more specific obligations of the limited liability partnership; or
d) exercising a right or power permitted by or under this Act or which a shareholder in a company may exercise.
5) A limited liability partnership shall not be dissolved by the death or bankruptcy of a limited liability partner, and the mental incapacity of a limited partner shall not be a ground for dissolution of the partnership by the court unless the contribution of the limited liability partner who is mentally incapacitated cannot otherwise be ascertained and realised.
6) In case of the dissolution of a limited liability partnership, its affairs shall not be wound up by the general partners unless the court directs otherwise.
7) Subject to any agreement express or implied between or among the partners—
a) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;
b) a limited liability partner may, with the consent of the general partners, assign his or her contribution in the partnership, and upon such assignment, the assignee shall become a limited partner with all the rights of the assignor;
c) partners shall not be entitled to dissolve the partnership by reason of any limited liability partner suffering his or her contribution to be charged for his or her separate debt;
d) a general partner may be introduced as a limited liability partner without the consent of the existing limited liability partners; and
e) a limited liability partner shall not be entitled to dissolve the partnership by notice."[45]

Section 52 of the Limited Partnership Act outlines the requirements for the management of limited partnerships, which traditionally involve a clear distinction between general and limited partners, with the latter not taking an active role in the business's management. However, in contrast to this common

[45] Ibid, *Section 52*

law understanding, all partners in a limited liability partnership (LLP) participate fully in the management and running of the partnership, as discussed in the previous section.

This blending of principles applicable to limited partnerships with those akin to an LLP is a flawed combination, resulting in a sour cocktail. The Kenyan perspective, which will be discussed shortly, demonstrates the negative effects of this mix of principles, as it creates confusion and inconsistency in the legal framework governing partnerships. Rather than providing clarity and certainty, the conflation of these two distinct legal structures leads to ambiguity and uncertainty in determining the roles and responsibilities of partners in a partnership, which can lead to disputes and legal challenges.

Therefore, it is crucial to revisit the legal framework governing partnerships and clarify the distinctions between limited partnerships and LLPs to ensure a more robust and coherent legal system.

8.0 THE PARTNERSHIP REGULATIONS, 2016

The Partnership Regulations, 2016[46] confirmed the intentions of the law makers and the mistakes made. Regulation 9, which requires registration to be done by filing the statement provided for in form 6, makes it a legislation explicitly for limited liability partnerships. This is so because the form does not provide for a general partner and only requires the listing of the limited partners, their form of liability, and mode of contribution.

Similarly, a look at form 7 under schedule 2 of the Regulations, which provides for the form of a certificate of registration of limited liability partnership, makes it apparent that it must include the abbreviation "LLP." These regulations, oblivious of the nature of the provisions of the Partnerships Act, require persons to call a Limited Partnership – "a limited liability partnership." In my opinion, this huge mishap has stayed in the letter of the law for far too long. There needs

46 SI No.15 of 2016

to be a reform of the laws in Uganda on Limited and Limited Liability Partnerships.

9.0 THE NEIGHBOURS PERSPECTIVE: THE KENYAN LIMITED LIABILITY PARTNERSHIPS ACT:

Just as recommended by the ULRC in 2004, Kenya has a separate law providing for Limited Liability Partnerships, which is in line with the common law understanding of this type of partnerships as discussed there above. The LLP Act of Kenya[47] has the right codification of the common law principles that apply to LLPs, and the relevant provisions related to the problems criticised above shall, for comparison purposes, be quoted verbatim hereunder:

9.1 Section 6

The section provides:

> *"Limited liability partnership to have separate legal personality*
> 1) *A limited liability partnership is an entity formed by being registered under this Act.*
> 2) *On being registered under this Act, a limited liability partnership becomes a body corporate with perpetual succession with a legal personality separate from that of its partners.*
> 3) *A change in the partners of a limited liability partnership does not affect the existence, rights or obligations of the limited liability partnership."*[48]

9.2 Section 10

The section provides:

> *"Liability of partners in limited liability partnership to be limited*
> 1) *A limited liability partnership shall be solely obligated to an issue arising from contract, tort or otherwise.*
> 2) *A person is not personally liable, directly or indirectly, for an obligation referred to in subsection (1) only because the person is a partner of the limited liability partnership.*
> 3) *Subsection (1) shall not affect the personal liability of a partner in tort for the wrongful act or omission of that partner.*
> 4) *A partner is not personally liable for the wrongful act or omission of another partner of the limited liability partnership.*

47 Limited Liability Partnerships Act No. 42 of 2011, L.N. 15/2012
48 Ibid

5) *If a partner of a limited liability partnership is liable to a person other than another partner of the partnership as a result of a wrongful act or omission of that partner in the course of the business of the limited liability partnership or with its authority, the partnership is liable to the same extent as that partner.*
6) *The liabilities of a limited liability partnership are payable out of the property of the limited liability partnership."*[49]

There are also default positions provided for under schedule 1 of the Act that explain thus:

"DEFAULT PROVISIONS FOR A LIMITED LIABILITY PARTNERSHIP

1) *Subject to the terms of the limited liability partnership agreement (if any), the mutual rights and duties of the partners, and the mutual rights and duties of the limited liability partnership and the partners, shall be determined in accordance with this Schedule.*
2) *All the partners of a limited liability partnership are entitled to share equally in the capital and profits of the partnership.*
3) *A limited liability partnership shall indemnify each partner in respect of payments made and personal liabilities incurred by the partner in—*
    a) *the ordinary and proper conduct of the business of the limited liability partnership; or*
    b) *doing anything necessary for the preservation of the business or property of the limited liability partnership.*
4) *Each partner in a limited liability partnership is entitled to participate in the management of the partnership.*
5) *A partner in a limited liability partnership is not entitled to remuneration for acting in the business or management of the partnership.*
6) *A person can only become a partner in a limited liability partnership with the consent of all the existing partners.*
7) *A matter relating to a limited liability partnership is to be decided by a resolution passed by a majority of the partners. For the purpose of deciding a matter relating to a limited liability partnership, each partner shall have one vote.*
8) *Each partner in a limited liability partnership shall provide to the partnership and to the other partner's true accounts and full information of all matters affecting the limited liability partnership about which the partner has knowledge or over which the partner has control.*

[49] Ibid n. 46

9) *If a partner in a limited liability partnership, without the consent of the partnership, carries on a business of the same nature as, and competing with the partnership, that partner shall account for, and pay over to the limited liability partnership, all profits made by that partner in that business.*
10) *A partner in a limited liability partnership shall account to the partnership for any benefit derived by the partner without the consent of the partnership from any transaction concerning the partnership, or from any use by that partner of the property, name or any business connection of the partnership.*
11) *A partner in a limited liability partnership may not be expelled by a majority of the other partners unless a power to do so has been conferred by an express agreement among the partners."*[50]

9.3 Section 20

"Requirements for names of limited liability partnerships
1) *The name of a limited liability partnership shall end with—*
a) *the expression "limited liability partnership"; or*
b) *the abbreviation "llp" or "LLP".*
2) *A limited liability partnership that is registered under this Act may not carry on business under a name that is not registered under section 18 or 32.*
3) *The registration of a name under which a limited liability partnership carries on business does not authorise the use of that name if, apart from that registration, the use of that name is prohibited.*
4) *A limited liability partnership that contravenes this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings."*[51]

9.4 General Appraisal and Commentary.

The foregoing provisions of the Kenyan LLP Act are in contradistinction with the provisions of the Ugandan Partnerships Act discussed above. Whereas *Section 47* of the Ugandan Act mentions the existence of a limited and general partner, *section 10(4) of the LLP Act of Kenya* provides for limited liability of all partners without the existence of a general partner, which is the correct position of the law relating to Limited Liability Partnerships as understood at common law.

50 Limited Liability Partnerships Act No. 42 of 2011, L.N. 15/2012
51 Ibid

Section 48(2) of the Ugandan Partnerships Act 2010 mandates that a limited liability partnership must have the suffix "LLP" in its name, similar to *section 20* of the Kenyan LLP Act. However, the application of this provision in the Ugandan Act can lead to incorrect naming of the entity, as it pertains to a limited partnership rather than a limited liability partnership. In addition, *section 52* of the Ugandan Partnerships Act provides that a limited liability partner shall not participate in the management of the LLP while the Kenyan LLP Act[52] correctly states that a limited liability partner has a right to participate in the management of the LLP.

10.0 A CALL FOR REFORM

After a thorough examination of Uganda's legal framework, it is clear that the country must adopt a more proactive and dynamic approach to legislative reform. With rapid changes in the global business environment, it is imperative for Uganda's laws to keep pace with modern trends and best practices. Failure to do so creates an unfavourable business environment that may hinder investment and economic growth.

One area requiring immediate attention is the Partnerships Act of 2010. Despite being a step forward in modernizing Uganda's business laws, the Act falls short of global best practices, particularly with regard to Limited Partnerships and Limited Liability Partnerships. These business structures have become increasingly popular globally owing to their flexibility, simplicity, and reduced liability for investors.

To address this gap, Uganda must amend the Partnerships Act of 2010 to accommodate the Limited Partnerships under *Section 47*. This amendment would ensure that Uganda aligns with the ULRC report's recommendations and aligns its laws with modern global trends. In addition, Uganda should follow the

52 Under schedule 1 paragraph 4

lead of neighbouring countries such as Kenya and enact a separate Act to provide for Limited Liability Partnerships.

The benefits of these reforms are manifold. First, it would enhance Uganda's reputation as a business-friendly destination and promote investment in the country. It would also simplify the process of starting and running a business and reduce the risks associated with investment. Ultimately, this would contribute to the country's economic growth and development.

To achieve this goal, it is crucial that the Parliament amend the Partnerships Act, No.2 of 2010, to reflect the common law's understanding of Limited Partnerships. This would involve replacing each instance of "limited liability partnerships" with "Limited partnerships" and aligning the principles applicable to this type of partnership. With the right legal framework in place, Uganda can position itself as a hub for investment and business in the region, creating a prosperous and vibrant economy for all.

11.0 CONCLUSION

In conclusion, with such contemplated reforms will come a basic and orderly guide that will help people make the suitable choice of partnership for their business enterprise. This will, in the long run, encourage foreign investments in Uganda, with the understanding that limited partnerships act as vehicles for capital investment with limited liability partnerships being a shield against unprofessional conduct in partnerships with its limit on liability to all partner.[53]

These, according to Keatinge et.al, can be used in medical and legal practice to avoid liability in negligence cases owing to faults of individual partners in the business where such faults are expected due to differences in professional ethics and ability.[54] It is important to note that as of the writing of this article, the Partnerships Act of 2010 had been amended by the Partnerships (Amendment

---

53 Robert R. Keatinge et. al, "*The Next Step in the Evolution of the Unincorporated Business Organization*", The Business Lawyer; Vol.51, November 1995, pp. 147-207.

54 Ibid

Act) of 2022. However, these amendments did not address the problems discussed above. Instead, the amendments defined beneficial ownership in relation to limited liability partnerships, required beneficial owners to register, and empowered the minister to make regulations on beneficial ownership and related matters. It is unclear how these changes will be applied when the act does not provide for limited liability partnerships as known under common law, as discussed earlier.

It is long overdue that the Partnerships Act No.2 of 2010 be amended and the law relating to Limited Liability Partnerships be rethought and properly provided for, as understood under common law and reflected in the Kenyan Limited Liability Partnerships Act. Such changes will go a long way in promoting the formation and growth of limited liability partnerships in Uganda, which offer numerous advantages over traditional partnerships. By allowing partners to limit their liability for the partnership's debts and obligations, limited liability partnerships encourage investment and entrepreneurship, as well as promote economic development.

It is my hope that policymakers will take the necessary steps to amend the Partnerships Act of 2010 and provide a more conducive legal framework for limited liability partnerships, in line with global best practices. This will not only benefit entrepreneurs and investors in Uganda, but also enhance the country's attractiveness as an investment destination.

LIST OF REFERENCES

A. James Barnes, Terry Morehead Dworkin and Eric L. Richards; *Law for Business*, 3rd Edition (Homewood, Illinois, 1987).

Abubaker Walakira V Abubaker Walusimbi, civil suit No. 579 of 2012.

C.E. Halliday and G.C. Okara, *Limited Liability Partnerships and Limited: Partnerships as Vehicles for Business in Nigeria; Challenges and Prospects*

Foundations of Business Law and the Legal Environment, <https://saylordotorg>(accessed on June 24th, 2022).

Henry V Mason, S.W. 3d 2010 WL 5395640 (Tex. App. 2010)
Legal Department Financial Services Commission, *Concept Paper on Limited Liability Partnerships.*

Limited Liability Partnerships Act, Cap. 30A, Kenya of 2011, Act No. 42 of 2011, L.N. 15/2012

Meridith Turits, "*What is an LLLP (Limited Liability Limited Partnership)?*", <https://www.nerdwallet.com>(Accessed on 25th July 2022)
Palter V Zeller, (1997) 30 OR (3d) 796.

Philip J. Scaletta, Jr and George D. Cameron III, *Foundations of Business Law* (Plano, Texas: Business Publications Inc., 1986)

Philips V Kula 200, Wick Realty, Inc., 629 P.2d 119 (Intermediate Court of Hawaii 1981)

Robert R. Keatinge et. al, "*The Next Step in the Evolution of the Unincorporated Business Organization*", The Business Lawyer; Vol.51, November 1995, pp. 147-207.

The Partnership Regulations, SI No.15 of 2016.

The Partnerships (Amendment) Act, 2022.

The Uganda Partnerships Act, No.2 of 2010.

Uganda Law Reform Commission, *A study Report on the Reform of Business Associations-Partnership Law*, Law Com Pub. No. 26 OF 2004.

MAKERERE LAW JOURNAL MAY 2023

Volume 52 Issue 3

DEFENDING THE RIGHT TO LOVE: A CASE FOR REGISTRATION OF CUSTOMARY MARRIAGES.

Lawrence Alado & Reagan Siima Musinguzi

Recommended Citation: Lawrence Alado & Reagan Siima Musinguzi (2023); "Defending the Right to Love: A Case for Registration of Customary Marriages" Volume 52 Issue 3 Makerere Law Journal pp.186-218

DEFENDING THE RIGHT TO LOVE: A CASE FOR REGISTRATION OF CUSTOMARY MARRIAGES.

Lawrence Alado and Reagan Siima Musinguzi*

ABSTRACT

Customary marriages occur frequently in Uganda, but the inability to prove these marriages has resulted in many parties being unfairly deprived of the benefits and rights that come with being legally married. This paper argues for the mandatory registration of customary marriages to safeguard these rights. The authors conduct a comprehensive analysis of the existing frameworks governing customary marriages by identifying the gaps within the framework, examining the advantages that would arise from mandatory registration, addressing potential challenges, and outlining how the registration process should be carried out. The authors contend that the failure to mandate registration denies spouses and their offspring the rights that they are entitled to as a result of their marriage.

1.0 INTRODUCTION

On June 3, 2016, Ms. Damalie Kantinti attempted to object to a marriage that was taking place at All Saints Cathedral in Kampala. She claimed that Mr. Sonko, the groom, was her husband. They had a traditional marriage in 2006 and had been together for five years, with four children as their marital issues. The couple had marital problems, which led to Mr. Sonko leaving their marital home and attempting to marry another woman.

* Third-year law students at Makerere University. We are grateful to the virtuoso team at the Makerere Law Journal for making necessary editing that we could not make. All mistakes and errors are ours.

Ms. Kantinti's requests to enter the church were denied because her marriage certificate was not registered when she was asked to present it. To her chagrin, the wedding went off without a hitch. The Reverend Diana Nkesiga, who officiated the wedding, was widely chastised for marrying the couple before the groom dissolved his traditional marriage. The Reverend's defence was that a marriage that was not registered with the government was not legally recognized.[1]

This is the quandary that the current position on the registration of customary marriages poses, and it is all too common. In this paper, we emphasize mandatory registration of customary marriages as the best option the state has for securing the constitutional rights of customary couples, particularly the right to love and receive the benefits that come with it. The goal of this paper is to advocate for the registration of all marriages and the use of a single registration system for all people, regardless of race, religion, or community.[2]

In this three-part analysis, we will first trace the history of customary marriages, then demystify the form of marriage and its legal positioning in Ugandan jurisprudence, then discuss the importance of customary marriage registration, and finally make recommendations that should be implemented.[3]

1.1. What is a Customary Marriage?

Customary marriage is the most popular form of marriage in Uganda[4] and is the most convenient way of creating a matrimonial relationship for the majority of

---

1 Ainebyoona E., All Marriages Must Be Registered – Government. Daily Monitor Newspaper Article published on the 6th of June 2016. < https://www.monitor.co.ug/uganda/news/.> [Accessed 5 November 2022]

2 The paper is intended to have the same effect as the 1968 Report of the Commission on the Law of Marriage and Divorce in Kenya, in which it was noted by the Commission, that because of the difficulty of proving customary marriages and the several conundrums that come from it, there should be mandatory registration of customary marriages and other forms of marriages in Kenya.

3 See, the Report on Laws on Registration and Divorce of Marriage by the 18th Law Commission. Available at <https://indiankanoon.org/doc/185208939/> [Accessed 14/10/2022].

4 Mujuzi, J. D. (2013). The Ugandan Customary Marriage (Registration) Act: a comment. *Journal of Third World Studies*, *30*(1), 171-191.

Ugandans.[5] A customary marriage is one celebrated according to the rites of an African community and one of the parties.[6] Section 1(b) of the Customary Marriages (Registration) Act, defines a customary marriage as "a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part III of this Act.[7]

The definition in the Act, however, excludes the aspect of the customary community's collective responsibility. For the purposes of this discussion, we will use J. C. Bekker's definition, which states that it is "a union that creates reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible."[8]

Marriage in Uganda is a social institution that involves many interests exceeding those of the two individuals getting married, at times involving the entire community.[9] A vivid illustration of the benefit accrued to society with marriage is that it has an interest in the lineage group,[10] the establishment of alliances as well as providing domestic services for the society as a whole. Individual interests are viewed within the wider interests of the community.[11]

---

5 The other forms of marriage are Civil Marriages and Christian Marriages governed by the Marriage Act (Chapter 251): Hindu Marriages governed by the Hindu Marriages and Divorce Act (Chapter 250): Muslim Marriages governed by the Marriage and Divorce of Mohammedans Act (Chapter 252).

6 Section 1(b), Customary Marriages (Registration) Act, Cap 248 Laws of Uganda

7 Section 1(b), Customary Marriages (Registration) Act, Cap 248 Laws of Uganda.

8 J. C Bekker & M Buchner -Eveleigh, The legal character of ancillary customary marriages, available at <http://www.dejure.up.ac.za/images/files/2017.pdf> [Accessed 11 November 2022]

9 See generally, Irene Among, "Gender and Social Inclusion Analysis: Uganda". Publication produced for review by the United States Agency for International Development, August 2017. Available at: <https://www.usaid.gov/sites/1860/08.23.17.pdf.> [Accessed 6 December 2022]

10 Customary marriage is typically guided by the traditional norms and practices of a community and is unregulated by national legal statutes on marriage, including those governing inheritance and the division of property

11 Roscoe Pound, Interests of Personality. Harvard Law Review, Feb. 1915, Vol. 28, No. 4 (Feb. 1915), pp. 343-365 Published by: The Harvard Law Review Association Stable. Available at https://www.jstor.org/stable/1326270. [Accessed 6 December 2022]

Consequently, customary marriage is considered more of a social rather than a legal institution.[12] In the African setting, a man needed many sons to ensure the survival of the lineage and to increase his power within the clan, and daughters, who by their marriages would swell his herds and create beneficial alliances with other clans.[13] As members of the family, children were also important participants in the household economy. The whole clan thus had an interest in the children of its members, their upbringing, socialization, and eventually, marriage.

Moreover, the role of the wider family and community in marriage in Africa is not only limited to the couple but also extends to the upbringing and socialization of children, as they are seen as important participants in the household economy, and the clan has a vested interest in their future marriage. It would be perverse to argue for the abolition of the role of the wider family and the community in marriage in Africa.[14] Customary marriage is typically guided by the traditional norms and practices of a community and is celebrated according to the rites of an African Community in which one of the parties to the marriage must be a member.[15]

---

12 Bonthuys, A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System. Oñati Socio-legal Series, 2016, 6 (6), 1303-1323. Available at: <https://ssrn.com/abstract=2891014> [Accessed 6 December 2022]

13 Children are at the centre of the African concept of marriage as an arrangement serving interests wider than the immediate needs of the spouses

14 This was expressed by Nhlapo in the book 'The African Family and Women's Rights: Friends or Foe's?' 1991 Acta Juridical 135 143.

15 Bemanya Twebaze (Register General), Press Statement on Registration of Marriages in Uganda, URSB. 2016. <https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/> [Accessed 11 November 2022]

They are thus governed by customary law; the unwritten rules which have been developed from the tradition and practices of communities in Uganda.[16] Since it is unwritten, customary law is characterized by dynamism and flexibility as it develops and takes on different permutations in response to changing circumstances.[17]

Unlike civil marriages, customary unions occur gradually and are not defined by the occurrence of a single event like the signing of an official document.[18] The fluid nature of customary law, and the fact that it is unwritten, poses a challenge in determining its applicability, and to what extent it is relevant.[19] Particular customary laws are recognized as part of the laws in Uganda under Sections 14 and 15 of the Judicature Act.[20]

The way customary marriages are conducted varies from community to community. This was recognized in *Mifumi (U) ltd & 12 Others V Attorney General & Another,*[21] where Justice Tumwesigye took judicial notice of the custom of bride price. He observed that customs vary from tribe to tribe, and there is no

16 According to Ssekandi, "Customary law is indigenous to our soil and flourishes and will continue to flourish whether or not attempts are made to kill it, as was notoriously the view of some jurists at the time of independence. Attempts have been made to incorporate it in statutes, e.g., adultery and elopement, which were codified in the Penal Code, and rules of succession in the Succession Act. The cases that go to court under the statutes, however, are but a drop in the ocean compared to the many others that are decided in the courts based on the evidence of existing custom or solved under the mango tree, outside the judicial system, by elders administering customary law." Ssekandi, Francis M, "Autochthony: The Development of Law in Uganda". NYLS Journal of International and Comparative Law: 1983, Vol. 5: No. 1, Article 2. Available at: <https://digitalcommons.nyls.edu/> [Accessed 06th December 2022]

17 Dr. Winifred Kamau, CUSTOMARY LAW AND WOMEN'S RIGHTS IN KENYA. Equality Effect, p. 2. Available at <http://theequalityeffect.org/wpcontent/.pdf.>[Accessed 06th December 2022]

18 A broader discussion can be found in Ward, W. P. (1990). *Courtship, love, and marriage in nineteenth-century English Canada*. McGill-Queen's Press-MQUP.

19 Wafula Fred, "A Critical Analysis of the Evolution on The Law Governing Divorce in Customary Marriages in Uganda". Available at <https://ir.kiu.ac.ug/.pdf > [accessed 10th November 2022]

20 This provision sets a prerequisite for customary law to be applied as the law should not be repugnant to natural justice, equity, and good conscience and should be compatible with written law. Therefore, customary law that is inconsistent with written law such as marrying off of children or killing of twins is not applicable in Uganda.

21 Constitutional Appeal No. 02 OF 2010

universal form of customary marriage. One of the major reasons why customary marriage registration has not been emphasized is that this type of marriage was not legally recognized in Ugandan history.

2.0. RECOGNITION OF CUSTOMARY MARRIAGES IN UGANDA'S HISTORY

To fully appreciate the position in *Mifumi* above, we must begin with a brief study of how customary marriages were treated under British colonial rule. The history of customary marriages in Uganda is complex and rich because originally, they were not considered by the colonialists as legal relationships. As far back as 1917, only 23 years after the British took over Uganda, a British Judge Justice Hamilton dismissed the concept of customary marriages and equated them to mere 'wife purchases'.[22] This was the position for many years during colonial rule.

This position was not any different from other British colonies in Africa that also did not recognize the concept of a customary marriage. Notably, in the South African case of *Nquobela V Shikele,*[23] the existence of customary marriage was rejected by Chief Justice De Villiers:

> *A union...founded only upon native usages and customs within the colony proper is not a marriage... In the absence of special legislation recognizing such a union as a valid marriage, courts of law are bound (however much they may regret it) to treat the intercourse, I will not say as immoral, but illicit...*[24]

In pre-independent Uganda, customary marriages were not recognized by statute law and as a result, there was no need for registration. The laws not only did not protect customary marriages, but they also did not recognize them as marriages[25] on the same level as all other types of marriages with the same

---

22 *R V Amkeyo*, 7 E.A.L.R. (1917)
23 (1983) 10 JUTA 346
24 ibid
25 Bojosi Othlogile, "Is Customary Marriage a "Union"? Botswana Notes and Records, 1989, Vol. 21 (1989), pp. 61-66, available at <https://www.jstor.org/stable/> [Accessed 11 November 2022]

benefits accrued to them. The non-recognition of customary marriages, which were mostly polygamous, had a huge impact on people involved in these marriages, as they were denied legalization and recognition of their rights.[26]

This position was however changed after independence when Sir Udo Odoma, CJ in a landmark ruling,[27] declared that the non-recognition of customary marriages was an error in law and fact. He stated:

> *"In my opinion, the views expressed by the learned chief magistrate are both extraordinary and dangerous having regard to the situation and the social structure of Uganda and the different and complex forms of marriage recognized by laws of Uganda."*[28]

The recognition of customary marriages was a major leap because they are the basic standard for matrimonial institutionalization in Uganda.[29] Customary marriage is the norm in rural Uganda, with very few couples opting to have statutory marriages.[30] The reasoning behind this is that many Africans believe that once they marry under statutory law, radical changes take place in the applicability of their personal lives, as they can no longer practice polygamy and their ability to get divorces as well as the succession of their property is dependent on English law.[31]

---

26 JG Horn & AM Janse van Rensburg Practical implications of the recognition of customary marriages, (2002) Journal for Juridical Science 27(1): 54-69, available at <https://journals.ufs.ac.za/index.php/jjs/article/download/2829/2745> [Accessed 11 November 2022]

27 *Alai v Uganda*, [1967] EA 596

28 Id.

29 Ojok D. 2017. The Socio-legal Dynamics of Customary Marriage in Uganda; CEPA Policy Series Paper Number 7 of 2017. Kampala. Available at <https://cepa.or.ug/wp-content> [Accessed 12 October 2022]

30 Cheryl Doss, Mai Truong, Gorrettie Nabanoga, and Justine Namaalwa, Women, marriage and asset inheritance in Uganda. Working Paper April 2011 No. 184, Chronic Poverty Research Centre www.chronicpoverty ISBN: 978-1-906433-90-1, p. 5. Available at <https://www.files.ethz.ch/isn/128555/> [Accessed 6 December 2022]

31 H.F Morris, The Development of Statutory Marriage Law in Twentieth-Century British Colonial Africa, Journal of African Law, Spring, 1979, Vol. 23, No. 1 (Spring, 1979), pp. 37-64 at p 37

The Customary Marriages (Registration) Act is the most recent legislation enacted to govern this form of marriage in Uganda,[32] arising partially, from the works of the 1965 Commission of Inquiry into Marriage, Divorce and Status of Women. The Commission, also known as the Kalema Commission, was formed to investigate the structural inequalities embedded within Uganda's family law.[33] Many of the provisions recommended by this commission were ignored, save for a few provisions that were incorporated in the Succession (Amendment) Decree of 1972 and the Administration of Estates Decree of the same year.[34]

3.0 THE LEGAL POSITION ON CUSTOMARY MARRIAGES POST-1995.

Preserving culture was one of the long-term targets envisaged by the drafters of the 1995 constitution of Uganda.[35] Objective XXIV of the National Objectives and Directive Principles of State Policy in the Constitution provides that the cultural values of the Ugandan nations will always be protected and promoted.[36] The institution of customary marriages is protected in the Constitution.

Article 37 not only protects the right to engage in lawful cultural practices, but Articles 21 and 33 of the Constitution prohibit laws, cultures, customs, or traditions that are contrary to the dignity, welfare, or interest of women or undermine their status.[37] Further still, the Uganda National Culture Policy provides that "[e]everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance, and respect for each other's customs, traditions and beliefs."[38]

---

32 This can be attributed to the fact that customary marriages were only recognized as legally binding marriages in 1967 after the ruling in Alai V Uganda

33 Bakibisemu Edrine, "An Examination On The Right Of Women On Inheritance And Ownership Of Property In Marriage". A Research Dissertation Submitted to the School of Law in Fulfilment of the Requirements for the Award of a Diploma in Law of Kampala International University in Uganda, APRIL, 2019, p. 10.

34 Maria Nassali (ed), The Politics of Putting Asunder; Divorce, Law and the Family 2017, p 37.

35 The 1995 Constitution of Uganda.

36 Objective XXIV of the National Objectives in the Constitution.

37 See Justice Tumwesigye in Mifumi v Attorney General (Supra)

38 Objective 7.7 of the Uganda National Culture Policy.

Through these provisions in the *grund norm*, it is clear that the framers of the Constitution intended to protect the institution of the family with respect to culture. Customary marriages are not formally governed by the government, but they are legally recognized by the Customary Marriage (Registration) Act, which requires those marriages to be formally registered with the government, as will be seen later. This legislation, in its entirety, is a comprehensive blueprint for traditional marriages in Uganda.[39]

Even though non-registration does not affect the validity of a customary law marriage, in practice the absence of a registration certificate severely affects the spouses.[40] A registration certificate is, therefore, a necessity to access marital benefits such as pension, inheritance, and several others.[41] Proponents of registration of all marriages raise several justifications for its necessity.[42] It is generally true that marital legalization strengthens the position of women in their homes and lessens their likelihood of being unfairly divorced, and mistreated when it comes to property inheritance. In fact, the Kalema Report of 1965 recommended customary marriage registration as an antidote to this conundrum.[43]

Since its passage, the Customary Marriage (Registration) Act has been criticized for various constitutional flaws as well as violations of international human rights obligations that Uganda has ratified.[44] The Act acknowledges and

---

39 Ojok D., The Socio-legal Dynamics of Customary Marriage in Uganda; CEPA Policy Series Paper Number 7 (2017) Kampala, Available at <https://cepa.or.ug/wp-content/#> [Accessed 12 October 2022]

40 The registration of customary marriages: Banda v General Public Service Sectoral Bargaining Council (JR3273/2009) (26 February 2014)

41 See De Souza 'When non-registration becomes non-recognition: Examining the law and practice of customary marriage registration in South Africa' 2013 Acta Juridica 239-272 at 244 for the effect non-registration of a marriage has on children.

42 One of the most compelling arguments is that with all marriages registered, there would be a compiled marriage database that would be a safeguard against bigamy, polygamy, and polyandry all of which are illegal in Uganda.

43 Ibid n (15)

44 See Gaffney-Rhys, R. (2011). International law as an instrument to combat child marriage. *The international journal of human rights*, *15*(3), 359-373.

recognizes that a girl above the age of sixteen can get married customarily,[45] yet condones the marriage of men below the age of 18 years. This is even though the constitution of Uganda states that marriages should be between a man and a woman above 18.[46] The Constitution provides that the laws should be non-discriminatory and apply to everyone irrespective of their gender.[47] These provisions are also contrary to Article 28(2) of the African Charter on Rights and Welfare of the African Child, which was ratified in 1994.[48]

The Act recognizes the registration of marriages, but it does not specifically address the rights and obligations of each party during the marriage, it is particularly silent on the procedure necessary (if any) to dissolve a customary marriage.[49] The Uganda Registration Services Bureau (URSB) estimated in 2016 that up to 70% of couples under the age of 40 had not registered their customary marriages in their database. The actual figure could be higher given that the majority of Ugandans, including the elite, are unaware of customary marriage registration.[50]

4.0 CUSTOMARY MARRIAGE REGISTRATION

Registration of customary marriages, like registration of any other marriage in Uganda is not considered significant.[51] The Constitution provides for the

45 Customary Marriage Registration Act Section 11
46 Constitution Article 31
47 Constitution Article 21
48 It provides that "[c]hild marriage … shall be prohibited and effective action shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.
49 ibid n 7
50 ibid n 10
51 Several countries also do not recognize the registration of customary marriages, for example, in Ghana, The Customary Marriage and Divorce (Registration) Law 1985 provided for the proper registration of customary marriages and divorces, and was retroactive (i.e., applied to customary marriages and divorces contracted before, as well as after, its enactment). According to the Law, non-compliance was punishable by fine or imprisonment, but the marriage would still be regarded as valid. However, the Customary Marriage and Divorce (Registration)(Amendment) Law 1991 was later enacted and it provided that the registration of customary marriages and divorces would no longer be mandatory.

conditions precedent for any marriage, but does not make mention of registration as one.[52] The Customary Marriage (Registration) Act is a comprehensive blueprint for traditional marriages in Uganda.[53] It also provides that marriage districts are sub-counties, town councils, and municipalities where the customary function took place.[54] Furthermore, under the Act, sub-county chiefs and town clerks are given authority as marriage registrars and are required to have a customary marriage registration book in their possession, where they also record the necessary settlements agreed upon and completed by the parties.[55]

According to Section 6 of the Customary Marriage (Registration) Act, the married couple is required to go to the office of the sub-county chief or town clerk within six months to register the details of their traditional matrimonial union. When the couple, their witnesses, and the marriage registrar sign the prescribed certificate form, the registrar issues the parties a customary marriage certificate, which must be registered with the Uganda Registration Service Bureau (URSB).[56]

Section 20 of the Customary Marriage (Registration) Act makes non-registration illegal by penalizing any marriage that is not registered within six months. The section states that "[t]he parties to a customary marriage who fail to register their marriage within the time specified in section 6 commit an offence and are liable to a fine not exceeding five hundred shillings."[57]

---

52 Article 31 (1) of the Constitution provides that “[a] man and a woman are entitled to marry only if they are each of the age of eighteen years and above" and clause 31 (2a) only puts a bar on same-sex marriage.

53 Ojok D. 2017., ibid at 5.

54 Section 2 (1) of the Act provides that “[E]very sub-county, the city of Kampala, the municipalities of Jinja, Masaka, and Mbale and every township specified in the First Schedule to this Act shall be a marriage district for the purpose of the registration of customary marriages under this Act.” Subsection 2 gives the Minister of Justice and Constitutional Affairs the authority to divide or create new marriage districts.”

55 Section 3 of the Act provides that “[A]ll sub county chiefs and the town clerks of the city of Kampala, the municipalities of Jinja, Masaka, and Mbale and the townships specified in the First Schedule to this Act shall be registrars for their respective marriage districts.”

56 Ibid. n (7)

57 Section 20 of the Customary Marriage (Registration) Act

These legal provisions state that failure to register a customary marriage does not invalidate that marriage, but it is an offence that attracts a fine not exceeding five hundred Ugandan shillings.[58] According to Mujuzi, section 20 should be read together with section 8, which provides that a Registrar of a marriage district may register a customary marriage after the expiration of the six-month period specified in section 6 on payment of such fee as may be prescribed.[59]

Other sections of the Customary Marriage (Registration) Act operationalize sections 6 and 20. This includes sections like 4 (1) which stipulates that customary marriages may be celebrated in any part of Uganda,[60] and section 5 which provides that a registrar of marriages shall register customary marriages in a book called customary marriages register book.[61] Section 7 requires the registrar to issue a certificate to both parties at the registration of a customary marriage,[62] and section 8 requires the Registrar to register a marriage settlement.[63]

These provisions were discussed in *Steven Bujara v Polly Twegye Bujara*,[64] where the respondent filed a divorce petition under section 3 of the Divorces Act,[65] seeking the dissolution of her civil marriage to the appellant. The marriage in question had been celebrated on the 12th of April 1985 at the office of the District Commissioner in Kabale.[66] The court gave a decree nisi but the Appellant made an appeal to the High Court at Mbarara, where he abandoned all grounds of the

58 Ibid at n (2)
59 Id.
60 Section 4 (1) of the Customary Marriage (Registration) Act
61 Section 5 provides that, "Every registrar of a marriage district shall cause to be kept in his or her office a "customary marriage register book" in the prescribed form"
62 Section 7 provides that, "At the time of registration of a customary marriage, the registrar shall, upon payment of the prescribed fee, issue the parties with a certificate in the prescribed form"
63 Section 8 provides that, "A registrar of a marriage district may register a customary marriage after the expiration of six months period specified in section 6 on payment of such fee as may be prescribed."
64 *Steven Bujara v Polly Twengye Bujara*, Civil Appeal No.81 of 2002 (Court of Appeal Judgement of 20 April 2004) (unreported)
65 Cap 249 Laws of Uganda
66 The petition was based on cruelty and adultery as the grounds for the divorce.

initial appeal and focused on only one ground; that there was no marriage in the first place, because he was married to other women prior to the civil marriage to the respondent.

He claimed that the evidence presented before the Magistrates Court showed that he had been customarily married to three wives, and that the trial Magistrate should have checked whether there was a valid marriage between the two parties to the suit, which would effectively call the customary marriages into question. According to the Learned Judge, the High Court ruled that there was no valid customary marriage between the Appellant and his other wives:

> *"[The]mere mention of women or wives, was no evidence of marriage since the marriages in question had not been registered in accordance with the Customary Marriage (Registration) Act"*[67]

On appeal to the Court of Appeal, counsel for the Appellant argued *inter alia* that non-registration does not invalidate a customary marriage, an argument which the trial court had agreed with and held that the earlier unregistered marriages were valid. The Court stated that the validity of customary marriages is governed by Section 11 of the Customary Marriage (Registration) Act.[68] The court went ahead to hold that there was no evidence adduced in the Magistrate Court to prove that the appellant was customarily married as submitted by his counsel, the Justices held that:

> *"[m]ere mention of wives or women did not mean that the appellant was not legally married customarily to other women. A customary marriage like any other marriage must be proved by evidence. One such evidence is a certificate of registration. The law requiring customary marriage to be registered was not made in vain. If the appellant was customarily married to other wives before he married the respondent, he should have*

---

67 *Steven Bujara v Polly Twengye Bujara*, p.3.

68 Section 11 of the Act states as follows: "A customary marriage shall be void if-
(a) the female party to it has not attained the age of sixteen years;
(b) the male party to it has not attained the age of eighteen years;
(c) one of the parties to it is of unsound mind;
(d) the parties to it are within the prohibited degrees of kinship specified in the Second Schedule to this Act or the marriage is prohibited by the customs of one of the parties to the marriage; or
(e) one of the parties has previously contracted a monogamous marriage which is still subsisting".

> *registered his marriage like he registered the one he contracted with the respondent…[T]here has to be evidence of customary ceremonies of the community or tribe having been performed before one can legally consider himself/herself customarily married and also to have the marriage registered. The registration must be witnessed by two people who were present when the ceremonies were performed.*[69]

The case depicts the lacuna that is brought by the Customary Marriage (Registration) Act when it comes to proving customary marriages. However, one may ask, what is the difficulty? And how can it be remedied? In Uganda's jurisdiction, unfortunately, less attention has been given to the registration of customary marriages compared to other aspects like payment of marriage gifts.[70] Indeed, judicial officers have held that there has to be evidence of customary ceremonies of the community or tribe before one can legally consider himself/herself customarily married.[71]

Judicial officers have failed to recognize that the money required for registration of the marriages is lower than that which can be given as a marriage gift.[72] The Customary Marriage Registration (Prescription of Forms and Fees) (Amendment) Regulations[73] provides just Sh. 20,000 as the Fees to be paid for entering details of customary marriage in the customary marriages register book within six months.[74]

4.1 Difficulty in Proving Customary Marriage without Registration.

---

69 *Steven Bujara v Polly Twengye Bujara.*, pp. 6-7.

70 The Supreme Court, for example, in *Mifumi (U) Ltd & Anor v Attorney General & Anor* (Constitutional Appeal 2 of 2014) [2015] UGSC 13 took judicial notice of the fact that marriage gifts are paid in every traditional society in Uganda, this means that proof of the payment of the gifts is a valid proof of the customary marriage.

71 *Steven Bujała v Polly Twengye Bujała.*, ibid n (6)

72 Unfortunately, even the Marriage Bill of 2017 only makes provision for the sharing of marriage gifts as a voluntary act that takes place during the marriage, leaving out the requirement of registration of customary marriages. Clause 15 (1) of the Bill, provides that where a marriage gift has been given by a party to a marriage, it is an offence to demand the return of the Marriage gift.

73 Statutory Instrument No. 2 of 2005.

74 Rule 2 of the Customary Marriage Registration (Prescription of Forms and Fees) (Amendment) Regulations

As seen above, Steven Bujara was aware that he was married to three other women. Despite this knowledge, he proceeded to enter into a civil marriage and declared prior to the marriage that he was a bachelor, so when he later claimed before the court that he had prior customary marriages for which he could not produce certificates, the Court determined that there was no such customary marriage.[75]

In *Patrick Namenkere v Florence Mwanja*,[76] the late George William Mwanja wedded Nakalankya Mary Mwanja in the Anglican Church in December 1974. However, Florence Mwanja was later married to him in 1977 according to customary law. They lived together with their children on a plot that appeared to belong to the Ministry of Works and was offered to the late George for purchase, but after his death, the appellant sought to evict the respondent and filed a civil suit in the High Court. She claimed that because she was the widow of the late George William Mwanja, she was entitled to quiet possession, ownership, and use of her matrimonial home.

As a result, she asked the court for a permanent injunction to prevent the appellant from evicting or disturbing her and her dependents from the residential premises. The appellant claimed in his written statement of defence that the respondent was not the deceased's wife. The case raised two important issues; one was the tension between people's cultural practices and the Customary Marriage (Registration) Act and the other, was the indirect effect of the Court's finding on the property of people in unregistered customary marriages when such marriages involve children.[77]

The Court of Appeal held that the learned trial judge erred in law and fact when she held that the respondent was the widow of the late Mwanja. Justice Kitumba (as he was then) stated that "the learned Judge appears to have considered only

75 *Steven Bujara v Polly Twengye Bujara.*, pp. 6-7.
76 Civil Appeal NO. 37 OF 2004
77 *Jamil Ddamulira Mujuzi*. 2013., ibid at 181.

the formalities of a customary marriage and did not consider the law."[78] The court determined that the December 1974 marriage was a monogamous marriage under the Marriage Act, and thus the customary marriage was null and void under Sections 11(a) and 12 of the Customary Marriage (Registration) Act, as well as Section 36 of the Marriage Act.[79]

Although the respondent and the late Mwanja were close companions, their relationship was not that of husband and wife. The case vividly depicts the plight of women who believe they have completed a customary marriage; they fulfill all of the requirements and are even recognized in society as customarily married, only to lose all of the protection they are entitled to by virtue of marriage.[80]

Women in unregistered customary marriages struggle to establish their right to matrimonial property. Mujuzi vehemently contends that women like Florence have property rights guaranteed by Section 26 of the Constitution regardless of their marital status, stating:

> *"This was a woman, like many women in Uganda, who honestly believed that she was married. Everyone, including her relatives and neighbors even the deceased's church wife, believed that she was married to the deceased. But in the eyes of the law, she was not only denied the status of the deceased's widow but she was not even recognized as the deceased's dependent…Even if the Court had found that there had been no valid marriage between the deceased and Florence, it could have held that in terms of Article 26 of the Constitution Florence had the right to property, the house, which had been given to her by her late companion. Her right to property was independent of her legal status. The law does not prohibit a married man from giving some of his property to his mistresses."*[81]

---

78 Civil Appeal NO. 37 OF 2004, at page 7.

79 Cap. 251 of the Laws of Uganda.

80 In her evidence, Florence testified that she had gotten married to the deceased in 1977 and that the deceased had paid dowry to her relatives. Also, Anania Suleiman Kasale Wanyosi, testified that he was the LC1 of Uhuru cell and had all the time known the respondent as the wife of the deceased as he used to attend all official functions with her. The witness only came to know of Mary much later. Additionally, Mary recognized Florence as her co-wife which meant that the respondent was a customary wife in the African context.

81 Jamil Ddamulira Mujuzi. 2013., supra at 182-183.

Although the Customary Marriage (Registration) Act makes non-registration illegal, the courts do not declare likewise. In *Engineer Ephraim Turinawe and another v Molly Kyalikunda Turinawe and 4 others,*[82] Eng. Turinawe was assigned a residential house by the defunct Kampala City Council (KCC) in 1989. Mr. Turinawe was offered the opportunity to purchase the house by KCC in 1999, but he was unable to raise the necessary funds.

As a result, he sought out Elizabeth Kabutiti, who agreed to buy the house for Shs70 million, allowing Turinawe to profit by Shs. 5 million. The house was transferred to Turinawe by KCC, and the land was transferred to Kabutiti by Turinawe. Turinawe's wife, Molly Turinawe, and their four children filed a High Court petition in 2004. They argued that when the property in which they were residing was offered to the head of their family for purchase, it became their family property and residence, therefore, his decision to transfer the ownership of the property to Kabutiti without their consent was illegal, null, and void.

The Court of Appeal heard the appeal and had to decide inter alia whether there was a valid marriage between the Appellant and his wife under which she can claim the right of occupancy. The Court called upon the wife to adduce evidence to prove that she was customarily married to the Appellant and also asked her to present photos taken of the marriage ceremony. She brought her brother as one of the witnesses who testified that Ephraim 'married his sister by paying the dowry to their father.'[83]

There were no photographs brought and the court still decided that there was a subsisting customary marriage between the couple. They unanimously agreed to the decision of Kitumba JA, who declared in his judgment that:

---

82 *Engineer Ephraim Turinamwe and others v Molly Kyalikunda Turinawe and 4 others* (Civil Appeal No. 1 8 of 2009) [2009] UGCA 49. The respondents later appealed to the Supreme Court but the issue of the Customary marriage was not in contention. The Supreme Court decided in favor of Engineer Ephraim Turinamwe and held that the transfer was legally made.

83 Ibid, p. 2.

> *"The first respondent testified that the first appellant went to her father and paid the dowry, necessary for Kikiga customary marriage... [The respondent's] brother corroborated her evidence. Both witnesses testified that the first appellant paid shillings 700,000/= and 5 cows at her father's home ...That after paying the dowry the marriage was complete. I am of the considered opinion that the first appellant was married to the first respondent according to Kikiga custom and was, therefore, his spouse.*[84]

Similarly, in *Joseph Baguma v Sefuroza Matende*,[85] the late Eridadi Matende died intestate at Mulago Hospital. He was legally married in church to Molly Matende, the plaintiff's mother at Rukungiri. The late Matende owned land and a house in Rukungiri, where Molly lived at the time, but the letter for the administration of the deceased's estate was given to the respondent. The applicant thus petitioned the court, requesting that the defendant's letters of administration be revoked and that the same be granted to the plaintiff, his brothers or brothers in the order of the ages, or Mrs. Molly Matende.

He also prayed for an order to restrain the defendant from dealing or meddling in the estate of the intestate and finally sought an order that the defendant makes an account of or returns any property forming the estate of the late Matende to the Plaintiff. The defendant, on the other hand, stated that the deceased took her on as a wife and cohabited with her from 1966 to 1984 till his death. They were also blessed with three children.

The first issue before the court was whether the defendant was the wife of the deceased as solemnly declared. In answering this issue, the court based on two authorities; Section 11 of the Customary Marriage Registration Decree 16/73[86]

---

84 *Engineer Ephraim Turinamwe and others v Molly Kyalikunda Turinawe and 4 others*, p. 5.

85 Civil Suit No. MFP 12 of 1985[1991] UGHC 23 (4 November 1991)

86 section 11 of the Customary Marriage Registration decree (Decree 16/73) states: — *"Notwithstanding the provisions of section 37 of the Marriage Act where a person was married under the Marriage Act or under any other law relating to marriage and subsequently contracted a customary marriage during the subsistence of the previous monogamous marriage but before the coming into force of this decree such subsequent customary marriage shall be deemed to be a valid marriage".*
Decree 16/73 came into force on 1/10/1973. See statutory instrument 1973 No. 110 (The customary marriage Registration order 1973).

and *Farzia Rwobuganda.V. Donato Banemuka.*[87] It held that the marriage would have been invalid if it had been celebrated after customary marriage registration Decree 16/73. However, since the decree did not make it invalid,[88] there was a valid customary marriage since there was the payment of the bride price. Justice Ignatius Mukanza stated:

> *"I believe the defendant when she testified that Matende gave the bride price to her parents in the form of 2 goats and 5,000/=...on payment of the dowries to the parents of the defendant…there existed a subsisting customary marriage between the late Matende and the defendant at the time of the formers death even though a monogamous marriage did exist between the said intestate and Molly Matende it being immaterial that the marriage had never been registered under decree 16/73…I do disagree with him (Counsel for the plaintiff) that such marriage should have been registered by then."*[89]

A certificate of a customary marriage is conclusive evidence of the marriage. Section 10 of the Customary Marriage (Registration) Act provides that a certificate of a customary marriage or a certified copy of the certificate shall be conclusive evidence of the marriage for all purposes in any written law.[90] This

---

87 (1978) HCB P.244 The plaintiff in the case was a widow of the deceased who applied for letters of administration of the deceased's Estate but the defendant opposed it. The facts were that the deceased in 1964 married in church one Frediana but they separated in 1965 but never legally divorced. Fredina never returned to the home of the deceased until his death, however, after the separation the deceased took on the plaintiff in 1967 and the dowry was paid in 1970 so she contended that she was lawfully married under the customary law.
The defendant also presented a will dated l0th August 1966 in which the deceased appointed her as his executor which was not challenged. It was held that the plaintiff was married under customary law marriage. The marriage would have been invalid if it was conducted after the Customary Marriages Registration Decree (Decree 16/73).
The court held that in terms of section 56 (1) of the Succession Act, every will is revoked by the marriage of the maker. The will, therefore, stood revoked when the deceased married plaintiff in 1970. Deceased would be regarded as having died intestate. However, in terms of section 31 (1) of the Succession Act as amended by decree 22 of 1972 no spouse of an intestate shall take an interest in the estate of an intestate if at the death of the spouse was separated from the intestate as a member of the same household. The deceased's first wife had separated since 1965 up to the time of the deceased death, she would, therefore, take no interest in the estate of the deceased

88 Section 11 of the Customary Marriage Registration decree, Decree 16/73., supra.

89 Civil Suit No. MFP 12 of 1985[1991] UGHC 23., supra.

90 Section 10 provides, " A certificate of a customary marriage issued under this Act or a certified copy of the certificate shall be conclusive evidence of the marriage for all purposes in any written law."

was reflected in the decision of the High Court in *Evelyn Aciro and Alfred Bongomin v Y.E.Obina.*[91] In Aciro's case, the plaintiffs, a widow and son of the deceased sued the father of the deceased who applied for and obtained letters of administration without the knowledge or consent of the plaintiffs.

He was not the best person to be granted letters of administration, and he mismanaged the deceased's estate. The court determined that the marriage followed Acholi customary marriage practices because the deceased paid shs. 100,000/= as dowry, leaving a balance of shs. 200,000/=. He also compensated them with shs. 50,000/= for the children they had before marriage. The marriage was witnessed by a document written by the deceased's uncle, who testified that "notwithstanding the non-payment of the balance of the dowry, the marriage was valid under the customary law of Acholi."[92]

Having looked at the above cases, the ultimate question is, "whether these conundrums could have been remedied in case there was the registration of the customary marriage or at least an attempt to do so?" We answer in the positive. Mujuzi wrote on the same and argued that although it may not be the duty of the court to inquire about the existence of a customary marriage, they should be able to do so whenever the parties before the court do not know that the onus is upon them to prove the existence of the customary marriage.[93] He stated that:

> *"[I]n cases where the parties to the marriage are not represented by counsel…and where they are not familiar with the law relating to marriage, the court should require for more evidence or details to be adduced by one of the parties alleging that they were or are married customarily. This will give the applicants an opportunity to explain to the court what they meant when they said that they were or are married and for the court to decide whether indeed such a marriage existed or was thought to have existed by those involved in it.*[94]

91 (Civil Suit 20 of 1997) [1999] UGHC 18
92 Ibid.
93 Jamil Ddamulira Mujuzi. 2013., ibid at 178.
94 Ibid.

Several Ugandans have the same mind-set about their customary marriages like Bujara; they think they are customarily married but have no proof of their marriages. Some women could be married in a customary marriage but end up being regarded as unmarried when the man enters into and registers a monogamous marriage.[95]

As we have seen, Ugandan judicial officers are bent towards payment of marriage gifts and take it as the requirement for customary marriage irrespective of the registration status of the marriage. In addition, the cases discussed above show that registration is more than significant in preserving the rights of married couples both during and after marriage. The significance of registration is also reflected in several jurisprudences around the world.

4.2 Significance of Registration of Customary Marriages.

The state's interests in marriage are varied, substantial and include "keeping records, promoting health, and preventing child or incestuous marriages,"[96] as well as providing a safe, healthy, and nurturing environment for children and families; facilitating private networks of mutual support and obligation; and supporting public morality.[97] Registration of marriages gives the state the necessary data to enable it achieve all these interests. The Indian Supreme Court, in *Smt. Seema vs Ashwani Kumar,*[98] cited with authority the report of the National Commission for Women wherein the reasons for compulsory registration of marriages were listed. The affidavit stated:

> *"That the Commission is of the opinion that non-registration of marriages affects the most and hence has since its inception supported the*

95 H.F. Morris, 'Uganda: Report of the Commission on Marriage, Divorce and the Status of Women (1966) 10:1 Journal of African Law.

96 David S. Caudill, Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-law Marriage, 49 TENN. L. REV. 537, 558 (1982).

97 Andrew W. Scott, Estop in the Name of Love: A Case for Constructive Marriage in Virginia, 49 Wm. & Mary L. Rev. 973 (2007), <https://scholarship.law.wm.edu/wmlr/vol49/iss3/8.> [Accessed 04/10/2022].

98 Transfer Petition (Civil) 291 of 2005.

> *proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women-related issues such as:*
>
> *(a) prevention of child marriages and to ensure minimum age of marriage.*[99]
>
> *(b) prevention of marriages without the consent of the parties.*
>
> *(c) Check illegal bigamy/polygamy*
>
> *(d) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.*
>
> *(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.*
>
> *(f) Deterring men from deserting women after marriage.*
>
> *(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage."*[100]

Registration of customary marriage is significant, not only because a certificate of a customary marriage is conclusive evidence of the marriage,[101] but also because every other monogamous marriage contracted after the customary marriage with a different partner is void. Section 11 of the Customary Marriages (Registration) Act provides that a customary marriage shall be void if, amongst other things, 'one of the parties has previously contracted a monogamous which is still subsisting'[102] and section 13 which states that:

> *"Where a person contracts a customary marriage under this Act and subsequently contracts a monogamous or Muslim marriage with another person, the validity of the customary marriage shall not be affected by*

---

99 In India, Registering Authorities do not register the marriages of any person, who has not completed the mandatory minimum age, as provided under Section 2(a) of the Marriage Prohibition Act, 2006. However, the Kerala High Court in *Punarjani Charitable Trust V State of Kerala* WP(C). No. 16181 of 2013 held that the registration of even child marriages would ensure that there is better transparency and adequate proof to penalize the offenders under the Prohibition of Child Marriage Act.

100 Transfer Petition (Civil) 291 of 2005.

101 Section 10 of the Customary Marriage (Registration) Act

102 Section 11 of the Customary Marriages (Registration) Act

> *the monogamous or Muslim marriage, but the monogamous or Muslim marriage shall be void."*[103]

Non-registration creates confusion and exasperates the situation where one has to prove their customary marriage but cannot do so. No wonder, some of the kingdoms in Uganda have taken up the initiative to issue customary marriage certificates.[104] Besides, according to a statement by URSB, every certificate of marriage that has been filed with the bureau is admissible as evidence of the marriage to which it relates; in any court of law or before any person having by law or consent of the parties, authority to receive evidence on it.[105]

The challenge that arises where there is no registration was explored by the High Court in *Negulu Milly Eva v Dr. Solomon Serugga.*[106] Here, two parties cohabited for thirteen years (from 1996 to 2009) but their relationship went sour and the appellant filed for divorce. The respondent, however, made a preliminary objection claiming that the petition was "misconceived and unsustainable in its current form," on grounds that the petitioner was relying on a customary marriage that never existed and had never been registered as required by law.

In reply, the appellant averred that the customary marriage had been formalized when she introduced the respondent to her parents in 2002. The Magistrate, at trial, upheld the preliminary objection and stated that the petitioner, having failed to comply with one of the requirements of the Customary Marriages (Registration) Act, could not use the same Act to enforce rights arising out of an alleged marriage that had not been completed.[107]

Justice Godfrey Namundi, on appeal, held that the omission to register the customary marriage does not necessarily invalidate it. He reasoned:

---

103 Section 13 of the Customary Marriages (Registration) Act

104 Ojok D. 2017., supra at 6. Ojok in his survey found that only 1 person from his survey, on WhatsApp – a social media platform among 10 people, had been issued a customary marriage certificate from a traditional kingdom.

105 Bemanya Twebaze. 2016. Loc Cit.

106 *Negulu v Serugga*, (Civil Appeal 103 of 2013) [2014] UGHCCD 64.

107 *Negulu v Serugga*, p. 4.

> *"If section 20 is not redundant, then it was an administrative requirement, for purposes of keeping records, rather than a validation of the customary marriage. If it was the latter, then other laws on marriage in Uganda e.g. The Marriage Act Cap. 251 would have an equivalent to section 20 of Cap. 248."*[108]

The learned Judge held that Section 20 is only redundant because the "Registrar General's Department has never provided Registers for Customary Marriages and they are non-existent in any part of this country."[109] He also went ahead and found "fortitude" in Article 126 of the Constitution which provides that Judicial Officers should not be barred by undue regard to technicalities when administering Substantial justice.

The judgment, however, is problematic because, aside from the fact that both parties appear to agree that they cohabited, neither of them clearly stated where the customary marriage occurred; the appellant claimed that the customary marriage occurred in Bukole village, Lumino Sub-county, Busia District in Kenya, while the respondent contested that there was no marriage at all. To add to the confusion, the trial magistrate appeared to have been guided by the confusion as to where the marriage occurred to conclude that there was no marriage at all, and that the alleged marriage was illegal regardless of the country of marriage.

In his ruling, he specifically pointed out that the country where the ceremony took place was not mentioned, leaving doubt as to whether the said village and District happened to fall in Uganda or Kenya.[110] Furthermore, the lady claimed that the ceremony only consisted of introducing the Respondent to her parents, which is one of the ceremonies that makes the marriage legal in many tribes. It was insufficient to make the marriage valid.

---

108 *Negulu v Serugga*, p. 8.
109 Ibid.
110 *Negulu v Serugga*, p. 5.

While it may be argued that the learned justice was correct in exercising "undue regard to technicalities", there were several unanswered questions pertaining to the marriage that could have helped inform a more just decision. Specifically, the justice should have established the validity of the customary marriage in question before proceeding. Additionally, Article 126 stipulates that courts must adhere to the law before resorting to dispensing substantive justice. It should be noted that the Divorce Act[111] does not apply to presumed marriages and requires that the marriage must be recognized under the Constitution and the relevant legal instruments.

A registered customary marriage is a safeguard for spousal benefits like insurance, pension, citizenship, immigration, emigration, family resettlements as well as inheritance of estates upon the demise of a spouse.[112] A marriage certificate helps parents protect their children's right to inherit their property if they divorce or if either of the parents dies. A customary marriage certificate makes it easier to protect widows' and widowers' rights to inherit the property of their spouse.

Having a marriage certificate makes it easier to obtain other documents like Letters of Administration or Certificates of No Objection.[113] Registering a marriage provides legal clarity regarding the requirement of spousal consent for the sale of family land. In the event that one spouse seeks to dissolve the marriage and abscond with all assets, the marriage certificate can serve as evidence of the other spouse's rightful claim to the property.[114] Registration can also assist the Government of Uganda in building a credible marriage database.

---

111 The first paragraph of Article 126 (2) reads, "[I]n adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles…"

112 Bemanya Twebaze. 2016. Loc Cit.

113 Amito Nancy Immaculate, Sharing of Properties under Customary Marriages in Uganda: An Examination of the Law. A Dissertation Submitted to The School of Law in Partial Fulfilment of the Requirement of a Ward of a Diploma in Law at Lump Ala International University, pp. 14 – 15, 2018. Available at <https://ir.kiu.ac.ug/bitstream/20.500.12306> [Accessed 14 October 2022]

114 Ibid.

Registration is sufficient to operate as a constructive notice on the mortgagee that the second respondent was a married person notwithstanding her assertion to the contrary. In *Wamono Shem V Equity Bank,*[115] Hon. Justice Madrama emphasized that the court should not encourage unregistered marriages to operate as constructive notice or rely on presumptions of marriage where there are third-party rights that will be adversely and unfairly affected.

It goes without saying that a customary marriage is uncertain, and the customs are difficult to prove, which is why all customary marriages should be required to be registered.[116] Moreover, it has been suggested that the issue of uncertainty could be further resolved and simplified if traditional authorities were entrusted with the responsibility of acting as registrars for such marriages.[117]

5.0 RECOMMENDATIONS

Ultimately, it has become clear that simply advocating for a law mandating the registration of customary marriages is insufficient. Although the current legal framework requires registration and provides institutions for this purpose, the efficacy of this provision has been undermined by judicial officers.[118] Not only should the Customary Marriages (Registration) Act be amended to provide for mandatory registration of customary marriages, but the provision must also be strictly applied by the judicial officers.[119]

The Amendment should provide that the customary marriages be registered at any time within two years after the law comes into force and that registration

115 [2013] UGCommC 98

116 Prisca N Anyolo, "Children in polygamous marriages from a customary perspective" in Oliver Christian Ruppel, "Children's Rights in Namibia", Macmillan Publishers), Windhoek, (2009) at p. 265. Available at <https://www.kas.de/c/document_library/> [Accessed 24 October, 2022]

117 Ibid.

118 Jane Godia, op cit., p. 3.

119 UNICEF, "Early Marriage Child Spouses", Innocenti Digest no. 7, p. 4. Available at <https://www.unicef-irc.org/publications/pdf/digest7e.pdf> [Accessed 24 October 2022]

will be free during that period.[120] After that, there will be a fee for registering customary marriages that took place before the law came into force.

In Uganda, customary marriages are often celebrated within the context of traditional practices and cultural norms. As such, they are not always registered with the relevant authorities. This poses a challenge, particularly when it comes to the recognition of these marriages by law and the protection of the rights of those involved. To address this issue, it is proposed that the authority to register customary marriages should be vested in clan leaders,[121] who are often the custodians of customary laws and practices.

By doing so, clan leaders would be entrusted with the responsibility of ensuring that marriages within their respective clans are registered with the Uganda Registration Services Bureau (URSB) on a monthly basis. To facilitate this process, a clear guideline on the registration of customary marriages should be established.[122] The guideline should specify the processes for registration, the responsible government ministries and agencies, and the penalties for non-compliance. The government should also provide adequate resources to sensitize the public on the importance of registering customary marriages and enforce compliance with registration requirements.

By involving clan leaders in the registration process, there is a higher likelihood of compliance as they are often respected and trusted members of the community. Additionally, having monthly registers of registered marriages submitted to the URSB would enable the bureau to have an accurate record of the number of customary marriages taking place and provide data to inform

120 Law Reform and Development Commission, Recognition of Customary Marriages: A Summary of the Law Reform and Development Commission Proposal (2005) at p. 5 Available at <https://www.lac.org.na/projects/grap/Pdf/custommar2.pdf.> [Accessed 4 October 2022]

121 This borrows the leaf from Buganda Kingdom's method of ensuring that all marriages celebrated in the kingdom are concluded and a certificate issued signed by the clan leader given to the couple.

122 Bemanya Twebaze., Supra.

policy-making. Ultimately, this would help to protect the rights of those involved in customary marriages and ensure that they are recognized by law.

We have seen that not only should the laws and the judicial officers have the same voice, but the masses must also know that the law protects their interests.[123] There are several customs and cultures in Uganda and each of these cultural groups should be made to realize that if they enter into marriages that cannot be recognized by the state, such will not confer the benefits that come with having the marriage registered.[124]

It is essential to sensitize the public about the benefits of registering marriages, particularly customary marriages. Registering a marriage serves as a safeguard tool for spousal benefits, which include insurance, pension, citizenship, immigration, emigration, family resettlements, and inheritance of estates upon the demise of a spouse. When a marriage is registered, it becomes recognized by law, and the spouses become eligible for various benefits that they might not have access to otherwise.

For instance, spouses in registered marriages are entitled to social security benefits, which include access to medical insurance, retirement benefits, and disability benefits. In the event of the death of a spouse, the surviving spouse is entitled to inherit the estate of the deceased spouse. This is crucial, especially in the case of customary marriages, where property rights are often not clear. Moreover, registered marriages provide a legal framework for settling disputes that may arise between spouses. If a marriage is registered, disputes regarding property rights, child custody, and other related issues can be resolved in a court of law.

---

123 See Article 8 of the Universal Declaration of Human Rights which provides that if the rights of an individual are violated, they are entitled to fair and skilful judgment. The provision entitles the judicial officers to only act according to the law and in the spirit of justice.

124 Bell, Duran, "Defining Marriage and Legitimacy", Current Anthropology, vol. 38, no. 2, 1997, pp. 237–53. JSTOR. Available at: <https://doi.org/10.1086/204606>[Accessed 12 December, 2022]

It is crucial to recognize the role that the registration of customary marriages can play in promoting gender equality and inclusive economic development in Uganda. By registering customary marriages, disputes over the solemnization of marriages between two persons can be avoided to a significant extent. The record of marriage can serve as a crucial piece of evidence in cases where disputes arise over the existence and validity of a marriage.

Moreover, non-registration of marriages often affects women disproportionately. Without proper registration, women in customary marriages may lack legal recognition and protection, leading to the denial of their rights and entitlements, including inheritance and property ownership. Registration of customary marriages can provide women with the necessary legal recognition and protection to ensure that their rights are protected and that they can participate fully in economic development.

6.0 CONCLUSION

In conclusion, customary marriages constitute the largest form of marriage in Uganda, rooted in the customs and cultural practices of the people. While the Customary Marriages (Registration) Act attempts to regulate these marriages, it falls short in several areas, including the lack of compulsory registration. As we have discussed, the registration of customary marriages is of utmost importance for ensuring gender equality, protecting women's rights, and promoting inclusive economic development in Uganda.

By involving clan leaders in the registration process and providing clear guidelines, the government can ensure that customary marriages are registered on a monthly basis with the Uganda Registration Services Bureau (URSB). This would not only help to avoid disputes over the solemnization of marriages but also provide women with the necessary legal recognition and protection to ensure their rights and entitlements are respected and upheld.

Therefore, we advocate for the registration of customary marriages as the best option for ensuring that the citizens of Uganda and the state can achieve their interests when it comes to customary marriages. By taking this step, Uganda can demonstrate its commitment to promoting gender equality and inclusive economic development, while also protecting the rights of all its citizens.

LIST OF REFERENCES

Ainebyoona E., All Marriages Must Be Registered – Government. Daily Monitor Newspaper Article published on the 6th of June 2016. < https://www.monitor.co.ug/uganda/news/national/all-marriages-must-be-registered-government-1653072.> [Accessed 5 November 2022]

Anthony Owino, Customary Marriage: Registration Process in Kenya. Kenyans Newspaper (2019) Available at <https://www.kenyans.co.ke/news/41743-customary-marriage-registration-process-kenya.> [Accessed 25 October 2022].

Bemanya Twebaze (Register General) Press Statement on Registration of Marriages in Uganda, <https://www.jlos.go.ug/i.> [Accessed 11 November 2022]

Bojosi Othlogile, "Is Customary Marriage a "Union"? Botswana Notes and Records, 1989, Vol. 21 (1989), pp. 61-66, available at <https://www.jstor.org/stable/p> [Accessed 11 November 2022]

H.F Morris, The Development of Statutory Marriage Law in Twentieth-Century British Colonial Africa, Journal of African Law, Spring, 1979, Vol. 23, No. 1 (Spring, 1979), pp. 37-64 at p 37

H.F. Morris, 'Uganda: Report of the Commission on Marriage, Divorce and the Status of Women (1966) 10:1 Journal of African Law.

Hamida Chidagaya, Women and the Law: The Registration of Customary Marriages (2020) Available at <https://lawquery.co.ke/2020/09/30/#.> [Accessed 25 October 2022].

Jamil Ddamulira Mujuzi, "The Ugandan customary marriage (registration) act: a comment," Journal of Third World Studies, SPRING 2013, Vol. 30, No. 1, WINDS OF CHANGE: CRISIS AND CRITIQUE IN THE THIRD WORLD (SPRING 2013), p. 179.

JC Bekker & M Buchner -Eveleigh, The legal character of ancillary customary marriages, available at <http://www.dejure.up.ac.za/images/files/vol50-1-2017/Chapter%205_1_2017.pdf > [Accessed 11 November 2022]

JG Horn & AM Janse van Rensburg Practical implications of the recognition of customary marriages, (2002) Journal for Juridical Science 27(1): 54-69, available at <https://journals.ufs.ac.za/index.php/jjs/article/> [Accessed 11 November 2022]

Joshua Nyawa, Presumption of Marriage in Kenya; Contribution of English Law into Kenya's Family Law (2017) at p 1. Available at <https://www.academia.edu/30218609/.> [Accessed 1 November 2022]

Kameri-Mbote, P. (2005). 'The Land Has Its Owners! Gender Issues in Land Tenure under Customary Law in Kenya, Working Paper 2005-9, Nairobi: International Environmental Law Resource Centre. Available at <https://dlc.dlib.indiana.edu/dlc/> [Accessed 11 November 2022]

Law Reform and Development Commission, Recognition of Customary Marriages: A Summary of the Law Reform and Development Commission Proposal (2005) at p. 5 Available at <https://www.lac.org.na/projects/grap/P.> [Accessed 4 October 2022]

Louise Vincent, Polygamy in the Recognition of Customary Marriages Act, Agenda: Empowering Women for Gender Equity, 2009, No. 82, GENDER AND THE LEGAL SYSTEM (2009), pp. 58-65

Margaret F. Brinig, Domestic Partnership: Missing the Target? (2002) 4 J.L. & FAM. STUD. 19, pp. 22-23. Available at: <https://scholarship.law.nd.edu/la.> [Accessed 5 October 2022].

Maria Nassali, The Politics of Putting Asunder; Divorce, Law and the Family 2017, p 37.

Ojok D., The Socio-legal Dynamics of Customary Marriage in Uganda; CEPA Policy Series Paper Number 7 of 2017. Kampala. Available at <https://cepa.or.ug/wp-content/uploads/> [Accessed 12 October 2022]

Patrick Parkinson, Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State. Sydney Law School, Legal Studies Research Paper No. 12/05, (2012) p. 2. Available at: <http://ssrn.com/abstract=1992740.> [Accessed 6 October 2022].

Prisca N Anyolo, Children in polygamous marriages from a customary perspective in Oliver Christian Ruppel, Children's Rights in Namibia. Macmillan Publishers), Windhoek, (2009) at p. 265. Available at <https://www.kas.de/c/document_library/.> [Accessed 24 October 2022]

Rose Njogu, Recognizing Come-we-stay marriages is the Best Way to Protect our Women (2012) at pp. 1-2. Available at <https://www.academia.edu/.> [Accessed 1 November 2022]

The Constitution of Uganda 1995

The Customary Marriages (Registration) Act

The Marriage and Divorce of Mohammedans Act

The Report on Laws on Registration and Divorce of Marriage by the 18th Law Commission. Available at <https://indiankanoon.org/doc/> [Accessed 14 October 2022**]**

Wafula Fred, A CRITICAL ANALYSIS OF THE EVOLUTION ON THE LAW GOVERNING DIVORCE IN CUSTOMARY MARRIAGES IN UGANDAN, available at<https://ir.kiu.ac.ug/bitstream/20.500.12306/11645> [Accessed 10 November 2022]

MAKERERE LAW JOURNAL AUGUST 2023

Volume 52 Issue 4

ONYIRIUKA V. A.G. ENUGU STATE: QUO VADIS THE EXCLUSIVENESS OF THE ORIGINAL CIVIL JURISDICTION OF THE NATIONAL INDUSTRIAL COURT OF NIGERIA?

David Andrew Agbu

Recommended Citation: David Andrew Agbu (2023); "Onyiriuka V A.G. Enugu State: Quo Vadis the Exclusiveness of the Original Civil Jurisdiction of the National Industrial Court of Nigeria" Volume 52 Issue 4 Makerere Law Journal pp. 218-240

ONYIRIUKA V. A.G. ENUGU STATE: QUO VADIS THE EXCLUSIVENESS OF THE ORIGINAL CIVIL JURISDICTION OF THE NATIONAL INDUSTRIAL COURT OF NIGERIA?

David Andrew Agbu*

ABSTRACT

This paper interrogates the exclusiveness of the original civil jurisdiction of the National Industrial Court of Nigeria (NICN) over labour-associated fundamental human rights disputes vis-à-vis the jurisdiction of the Federal High Court (FHC) and State High Courts (SHCs) pursuant to sections 46(1), 251 and 272 of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN). It examines the effect of the Court of Appeal decision in Mrs. Gloria Lewechi Onyiriuka on the development of Nigeria's labour jurisprudence and the mandate of the NICN. The paper argues that the decision is diametrically opposed to the section 254C(1)(d) of the I999 Constitution (Third Alteration) Act, 2010 which made the jurisdiction of the NICN over all and sundry labour and employment disputes exclusive. It is contended that the decision was reached per incuriam hence, should be distinguished by the NICN and not follow it sheepishly. The Court of Appeal is also urged to overrule itself where the opportunity presents itself.

1.0 INTRODUCTION

When an employer-employee relationship is created, rights and obligations accrue between the parties and each one is out to protect their interests.[1] In their

* LL.B, LL.M, BL, PhD, Associate Professor at Nasarawa State University, Keffi, Nigeria. davidmaisongo2@gmail.com

1 CK Agomo, *Nigerian Employment and Labour Relations Law and Practice,* (Lagos, Concept Publications Press, 2011) 9.

bid to protect their interests, just like it happens in every human relationship, there is bound to be conflict. The occurrence of a dispute should not be the end of relationship.[2] Thus, to resolve labour and employment disputes, the National industrial court of Nigeria (NICN) was established by the government of Nigeria.[3] The historical development of the NICN has been a boisterous excursion as she has, at various times, been submerged in various jurisdictional and constitution debacles.[4] From the onset when it was created, the NICN had been granted exclusive original civil jurisdiction over labour and employment matters.[5]

Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria[6] bequeaths to Nigerian citizens various rights and section 46 thereof, gives any citizen whose right is being threatened or has been breached the access to court to seek protection from the threat or remedy for the breach. Thus, the issue is where an employee's fundamental right is threatened or breached, is it the NICN or the regular courts that has jurisdiction over such dispute? This issue came up in *Mrs. Gloria Lewechi Onyiriuka v. Attorney General of Enugu State*[7] and the Court of Appeal held that a suit for the enforcement of the rights contained in Chapter IV arising from or connected to any labour or employment matter, same can be litigated at the Federal High Court or any other court of concurrent jurisdiction hence, the NICN does not have nor exercise exclusive original jurisdiction over such dispute. The court came to this conclusion despite the clear and unambiguous provisions of section 254C (1) (d) of the 1999 (Third Alteration) Act, 2010 which gives the NICN exclusive original civil jurisdiction

---

2 F Agbaje, "The Legal and Constitutional Anatomy of the New Industrial Court Act 2006" (2007) 1(1) *Nigerian Journal of Labour and Industrial Relations,* 77.

3 AE Akeredolu, & DT Eyongndi, "Jurisdiction of the National Industrial Court under the Nigerian Constitution Third Alteration Act and Selected Statutes: Any Usurpation?" (2019) 10 (1) *The Gravitas Review of Business and Property Law, University of Lagos,* 1-16.

4 AB Chiafor, "Reflections on the Constitutionality of the Superior Court of Record Status" (2007) 1(3) *Nigerian Journal of Labour and Industrial Relations* 29.

5 *Skye Bank Plc. V. Victor Anaemem Iwu* [2017] 7 SC (Part 1) 1.

6 1999 Constitution of the Federal Republic of Nigeria Cap, C23 Laws of the Federation of Nigeria 2004.

7 *Mrs. Gloria Lewechi Onyiriuka v. Attorney General of Enugu State* [2020] 11 NWLR (Pt. 1735) 383.

over labour and employment related disputes pertaining to the provisions of Chapter IV of the 1999 CFRN. This article examines the propriety of this decision to determine whether it is in accord with the extant provision of the law. It highlights its impact on the mandate and exclusive jurisdiction of the NICN as well as the development of Nigeria's labour jurisprudence.

The article is divided into four sections. Section one is the introduction. Section two looks at the historical development and jurisdiction of the NICN as a superior court of record and its implication on labour and employment adjudication. Section three contains the facts of the case and interrogates matters arising from the decision. Section four contains the conclusion and recommendations.

1.1 HISTORICAL DEVELOPMENT AND JURISDICTION OF THE NICN

It has been stated that the NICN is a specialised court. Prior to the advent of colonialism in Nigeria, agriculture was the main stay of the economy. Labour relations were arranged on family and communal arrangements wherein, the family/household of a man, constituted his labourers while the prominent members of the community, had the labour of their family including that of the community and remuneration was mainly in kind. However, colonialism brought with it, wage labour and the establishment of various business enterprises. According to Oji and Amucheazi,[8] the advent of colonialism in Nigeria in the 19th century led to rapid industrialisation of the economy leading to the establishment of British owned businesses and this led to the recognition of the need to establish a framework for dealing with impending workers agitations.[9] Thus, in 1941, the British colonial government promulgated the Trade Dispute (Arbitration and Inquiry) Ordinance which was meant to be the legal framework for the settlement of labour disputes within the colony of Lagos and its environ.

8 EA Oji, and OD Amucheazi, *Employment and Labour Law in Nigeria* (Mbeyi and Associates (Nig.) Ltd, 2015) 254 –255.

9 *ibid*

Despite the purpose of the Ordinance, there was no provision for a permanent structure for the settlement of the anticipated labour disputes but only *ad hoc* bodies were being set-up as the need arose and dissolved thereafter.[10] The good thing about this Ordinance was that it adopted the non-interventionism doctrine as applied by Britain in Nigeria to the effect that unless the disputants invites the government, it could not apprehend a trade dispute.[11] Amucheazi and Abba[12] discussing this have stated that:

> *"At this point, industrial relations law and practice in Nigeria were modelled on the non-interventionist and voluntary model of the British system, which was predicated on the consent of the parties to resolve trade disputes through means acceptable to them, with limited intervention by the appropriate minister. The ordinance only empowered the Minister of Labour to intervene by means of conciliation, formal inquiry and arbitration where a negotiation has broken down. In effect, the minister could not compel the parties to accept his/her intervention, but could only appoint a conciliator upon the application of the parties and could only set up an arbitral tribunal by the consent of both parties."*[13]

Owing to the restrictiveness of this Ordinance, the colonial government thought it necessary to expand its applicability hence, in 1957, the Trade Disputes (Arbitration and Inquiry) Federal Application Ordinance was promulgated.[14] After independence in 1960, Nigeria enacted the 1963 Republican Constitution and freed herself from the control of the British crown. In order to improve on the legal framework for the settlement of trade disputes in Nigeria, the Federal Military Government, promulgated two decrees i.e. the Trade Disputes

---

10 JOA Akintayo, and DT Eyongndi "The Supreme Court Decision in Skye Bank Ltd. V. Victor Iwu: Matters Arising" (2018) 9(3) *The Gravitas Review of Private and Business Law, University of Lagos* 98-119.

11 DO Ojere, "The High Courts' Jurisdiction to hear and Determine Inter or Intra Union Dispute is not completely Ousted by the Trade Disputes Act as Amended and the NIC Act" (2007) 1(2) *Nigerian Journal of Labour and Industrial Relations,* 56-72.

12 Offornze D Amucheazi, and Paul U Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure* (Wildfire Publishing House, 2013) 45.

13 AB Adejumo, 'The Role of the National Industrial Court in Dispute Resolution in Nigeria' (Faculty of Law Public Lecture of University of Abuja organized by the Law Student Association of Nigeria, UNIABUJA Chapter, 15 September, 2008).

14 *ibid*

(Emergency Provisions) Decree,[15] and the Trade Disputes (Emergency Provisions) Amendment Decree.[16] The latter decree prohibited strikes and lock-out action and imposed the obligation on the parties to report to the Inspector General of Police, the occurrence of any trade disputes within 14 (fourteen days) from the date of its occurrence.[17] The penalty of imprisonment and fine was imposed on defaulters. The Decree established a permanent tribunal known as the Industrial Appeal Tribunal meant for the adjudication of trade disputes in Nigeria. This decree also put an end to the non-interventionism doctrine that had hitherto been in place.

The FGM continued with its efforts towards regulating trade disputes and its settlement in Nigeria by proposing, making and implementing various policies. In 1975, the General Yakubu Gowon led Federal Military Government (FMG), through the National Salaries and Wages Review Commission (NSWRC) released the Udoji Awards on wages and incomes, structure and hierarchy, compensation and remuneration, etc.[18] This award was not radically different from that of Adebo's Commission Award of 1970.[19] These awards attracted widespread national criticisms by the labour class and culminated into an unprecedented industrial action in Nigeria's history.[20] Owing to this inclement industrial atmosphere that engulfed the nation, the Williams and Williams Commission was set up with a view to review the Udoji's Commission Report.[21] It attempted to restore sanity into the labour polity though to no avail. Due to the aftermath of these policy interventions, the government was constrained to reassess the subsisting legal framework and found it inadequate. Thus, it promulgated the

15 Trade Disputes (Emergency (Provisions Decree) Act 1968, No 21.
16 Amendment No. 2 of Decree No. 53 of 1969.
17 CK Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Concept Publications, 2011) 314 – 315.
18 EO Abiala, Trade Union Laws and Administration in Nigeria: Membership and Jurisdictional Scope, (St Paul's Publishing House 2015) 93.
19 VA Odunaiya, *Law and Practice of Industrial Relations in Nigeria* (Passfielf Publishers Ltd 2006) 130.
20 ibid.
21 ibid.

Trade Disputes Decree No. 7 of 1976.[22] This Decree (which later became the Trade Disputes Act, (TDA), established the National Industrial Court. Section 20 of the TDA provided as follows:

> *"There shall be a National Industrial Court for Nigeria (in this part of this Act referred to as 'the court') which shall have such jurisdiction and powers as are conferred on it by this or any other Act with respect to settlement of trade disputes, the interpretation of collective agreements and matter connected there with."*

The establishment of the National Industrial Court for Nigeria heralded a new dawn in labour and employment adjudication however, the court was confronted with several drawbacks. For instance, Akeredolu and Eyongndi[23] have noted that litigants could not directly access the NICN except through referral by the Minister of Labour, Employment and Productivity (MLEP) who had somewhat supervisory powers over the court.[24] The only exception is in the case of interpreting an IAP award or collective bargaining award. Thus, the NICN declined jurisdiction over a dispute brought to it directly not pertaining to interpretation of an IAP award or a collective agreement in *Incorporated Trustees of Independent Petroleum Association v. Alhaji Ali Abdulrahman Himma & Ors.*[25] Section 20(3) of the TDA provided that no appeal shall lie to anybody or person from the determination of the NICN this was only subject to the jurisdiction conferred on the Supreme Court under section 20(4). The implication of this was that under the TDA, the NICN had original exclusive and final jurisdiction over

---

22 JOA Akintayo and DT Eyongndi, "The Supreme Court of Nigeria Decision in *Skye Bank Ltd. V. Victor Iwu*: Matters Arising" (2018) 9(3) *The Gravitas Review of Business and Property Law* 112.

23 AE Akeredolu & DT Eyongndi "Jurisdiction of the National Industrial Court under the Nigerian Constitution Third Alteration Act and Selected Statutes: Any Usurpation?" (2019) 10 (1) *The Gravitas Review of Business and Property Law,* 1-16.

24 National Industrial Court Rules 1979, Rule 13.

25 *Incorporated Trustees of Independent Petroleum Association v. Alhaji Ali Abdulrahman Himma & Ors.* Suit No. FHC/ABJ/CS/313/2004 ruling delivered on 23 January 2004 (NICN) upon transfer from the FHC pursuant to section 22 of Federal High Court Act, Cap. F12 LFN 2004. Though this is a 2004 decision, the position of the law had not changed up until the time the decision was made by the NICN and the case was being litigated at the FHC before it was subsequently transferred to the NICN pursuant to the Federal High Court's power to transfer cases.

labour matters subject to the appellate jurisdictions of the Court of Appeal and Supreme Court jurisdiction on fundamental rights matters as well as that of the High Court pursuant to section 42 of the 1979 Constitution.[26]

Unfortunately, under the 1979 Constitution, where the Superior Courts of Record were listed, the NICN was omitted. Akintayo and Eyongndi[27] have argued and rightly so in our view that this led to the challenge of the constitutionality of the NICN hence, matters reserved for the exclusive adjudication of the court, were taken to the Federal High Court and State High Courts. Aside from this, the definition of trade disputes under section 47 of the Trade Disputes Act was rather restrictive and this made the challenge against the NICN jurisdiction more contentious to the extent that in *Western Steel Workers Ltd v Iron and Steel Workers Union of Nigeria (No. 2)*[28] the Supreme Court held that the NICN had no power to grant injunctions save to interpret collective agreements. To address the jurisdictional quagmire of the NICN, the FMG promulgated the Trade Disputes (Amendment) Decree No. 47 of 1992 which elevated the NICN to the status of a Superior Court of Record.[29] Despite this effort, when the 1999 Constitution was enacted, the omission under the 1979 Constitution was repeated and once again, the jurisdiction and constitutionality of the NICN resurrected. Section 6(5) (a)-(k) of the said 1999 Constitution listed the SCR and the NICN is conspicuously omitted. Thus, its exclusive jurisdiction was regarded as an affront to the jurisdiction conferred on the Federal High Court under section 251, High Court of the Federal Capital Territory, Abuja under section 257 and State High Court under section 272 of the 1999 CFRN.

---

26 *ibid*

27 Akintayo & Eyongndi (note 22) 98-119.

28 *Western Steel Workers Ltd V Iron and Steel Workers Union of Nigeria (No. 2)* [1987] 1 NWLR (Part 49) [284] – [303].

29 E Akintunde, *Nigerian Labour Law* 4th Edn, (Ogbomoso, Emiola Publishers Ltd 2008) 481.

Eyongndi and Dawodu-Sipe[30]have posited that to address the matter, the National Industrial Court Act 2006 (NIC Act, 2006) was enacted by the National Assembly and section 1 created the NICN as a SCR while 7 conferred exclusive original civil jurisdiction on the NICN over labour and employment matters. Section 11 thereof purportedly made the NICN a SCR. Despite this effort, the problem encountered under the 1979 Constitution resurfaced *National Union of Road Transport Workers v Ogbodo*[31] thus, In *National Union of Electricity Enterprises v. Bureau of Public Enterprises*[32] the Supreme Court dismissed the claim that the Trade Disputes (Amendment) Decree 47 of 1992 and by necessary implication, the National Industrial Court Act 2006 had elevated the NICN to the status of a superior court of record (equal in status to the High Courts) without any amendment of section 6(5) of the 1999 Constitution. The reason was that a mere Act of the National Assembly cannot effectively amend the Constitution unless it is a Constitution Alteration Act hence, the NIC Act, 2006 was subservient to the 1999 Constitution.

Thus, it became clear that unless and until the 1999 CFRN was amended, the jurisdictional tension that has trailed the NICN will persist. Thus, in 2010, the National Assembly enacted the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 with the sole purpose of addressing the jurisdictional and constitutional defects of the NICN. Section 1 of the Act altered section 6(5) of the 1999 Constitution by inserting a new paragraph cc- the National Industrial Court. Section 254C confers exclusive original civil jurisdiction on a wide range of labour and employment matters on the NICN to the exclusion of any other court. Civil appeals from the NICN terminate at the

---

30 DT Eyongndi & OA Dawodu-Sipe, "The National Industrial Court Stemming of Unfair Labour Practice of Forced Resignation in Nigeria" (2022) 12(2) *Nigerian Bar Association Journal,* 183-197.

31 *National Union of Road Transport Workers v Ogbodo* [1998] 2 NWLR (Part 537) [189] - [191]. See also *New Nigeria Bank Plc. & Anor v AM Osoh & 4 Ors.* [2001] 13 NWLR (Part 729) 232.

32 *National Union of Electricity Enterprises V. Bureau of Public Enterprises* [2010] 3 SCM [165] - [167].

Court of Appeal whose decision is final and binding by virtue of section 243A. As at today, Eyongndi and Onu[33] the NICN stands on the same legal footing with the FHC and SHCs.

Jurisdiction of court is germane and non-negotiated.[34] The meaning of jurisdiction is uncontested. The Supreme Court of Nigeria in *Egharevba v Eribothe*[35] per Adekeye JSC held thus:

> *"Jurisdiction is a term of comprehensive import embracing every kind of judicial action. It is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction also defines the power of the court to inquire into facts, apply the law, make decisions and declare judgments. It is the legal right by which Judges exercise their authority. Jurisdiction is equally to the court what a door is to a house. This is why the question of a court's jurisdiction is called a threshold issues, because it is at the threshold of the temple of justice. Jurisdiction is a radical and fundamental question of competence, for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity however well conducted and brilliantly decided they might have been. A defect in competence is not extrinsic but rather intrinsic to adjudication."*

Jurisdiction of court is not a matter of rocket science. The Supreme Court of Nigeria (SCN) in the foremost decision of *Madukolu v Nkemdilim*[36] categorically

---

33 DT Eyongndi & KON Onu, "Legal Diagnosis of the National Industrial Court of Nigeria Rules, 2017 as a Catalyst of Egalitarian Labour Adjudication" (2021) 13(1) *Jimma University Journal of Law,* 47-65.

34 RN Ukeje, *Nigerian Judicial Lexicon,* (Ecowatch Publications Ltd, Lagos 2006) [249] – [250]. He opines that the expression 'jurisdiction of the court' may be used in two different senses- a strict/narrow sense and a wider sense. In its narrow and strict sense, the jurisdiction of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons who seek to avail themselves of its process by reference to the subject matter of the issue; or to the persons between whom the issue is joined; or to the kind of reliefs sought or any combination of these factors. In its wider sense, the jurisdiction of a validly constituted court embraces the settled practice of the court as to the way it will exercise its power to hear and determine issues which fall within its jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances

35 [2010] All FWLR (Part 530) [1213] – [1228].

36 [1962] 2 SCNLR 341.

and comprehensively stated when a Court of law is said to have jurisdiction over a matter and the constituents of jurisdiction. It held thus:

> *"A court is competent when it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction."*

The court further held that any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication. From the foregoing, where either a condition precedent, the subject matter of a dispute, the party or the claim is not within the adjudicatory competence of a court, the court is said to be lacking in jurisdiction.[37]

As far as the NICN is concerned, section 254C of the 1999 CFRN (Third Alteration) Act, 2010 has in an unambiguous manner, vested exclusive civil jurisdiction on it over labour, employment and ancillary disputes. The implication of this is that irrespective of who is involved, once the dispute deals with or arises from labour and employment, the NICN is the only court that can adjudicate over it. Thus, where a court lacks jurisdiction, any proceedings by the court, irrespective of how well they were conducted, only amounts to an exercise in futility.[38] Corollary to the foregoing, is the axiomatic postulation that since jurisdiction is a matter of law, neither parties nor the court can vest in itself jurisdiction which has not been statutorily conferred on it no matter the expedience or desirability of the prevailing situation. Whatever jurisdiction that

---

37 *AG Ogun State v Coker* [2002] 17 NWLR (Part 796) 304.

38 *National Electoral Commission & Anor v Izuogu* [1993] 2 NWLR (Part 275) [270]

is not expressly vested in a court is deemed to have by necessary implication, been taken from that court. The provisions of section 251, 254C and 272 of the 1999 CFRN amplifies this assertion. The mentioned sections, vest exclusive original civil jurisdiction on the Federal High Court, NICN and the various State High Courts in Nigeria.

It is apposite to state that the NICN has and exercises criminal jurisdiction over matters such as stated in its civil jurisdiction. However, while its civil jurisdiction is exclusive, its criminal jurisdiction is not exclusive. Thus, criminal matters arising from or pertaining to matters in its civil jurisdiction can be litigated at the other concurrent courts although, it is desirable that such matters be litigated before the NICN. Section 243 (5) (2) and (3) of the 1999 CFRN (Third Alteration) Act, 2010 would seem to give the impression that only decisions of the NICN pertaining to or arising from questions on fundamental human rights contained under Chapter IV of the constitution can be appealed as of right to the Court of Appeal and all other matters, would be by leave as prescribed by an Act or a Law.

The Supreme Court of Nigeria has adjudicated over this quagmire and held that all civil decisions of the NICN can be appealed against to the Court of Appeal either as of right or with leave of either the NICN or the Court of Appeal. This was the position taken by the Supreme Court in *Skye Bank Plc v Victor Anaemem Iwu.*[39] This decision settled the confusion that arose from the conflicting decision of the Court of Appeal in the cases of *Lagos State Sheraton Hotel v. Hotel and Personal Service Staff Association,*[40] *Coca-Cola Nigeria Ltd v Akinsaya*[41] on the one hand and *Local Government Service Commission, Ekiti State v Mr M A Jegede;*

39 *Skye Bank Plc. V Victor Anaemem Iwu* [2017] 7 SC (Part 1) 1.

40 *Lagos State Sheraton Hotel V. Hotel and Personal Service Staff Association* [2014] 14 NWLR (Part 1426) 45.

41 *Coca-Cola Nigeria Ltd v Akinsaya* [2013] 8 NWLR (Part 1386) 255.

[42]*Local Government Service Commission, Ekiti State v Mr G O Asubiojo.*[43] In the first two cases, the Court of Appeal had maintained that only fundamental human rights cases litigated at the NICN could be appealed to the Court of Appeal by virtue of section 243 (5) (2) of the 1999 CFRN (Third Alteration) Act, 2010 and in the two subsequent cases, it held that all decisions of the NICN are appealable to the Court of Appeal either as of right or with the leave of the court. Thus, in the *Iwu's Case,*[44] the Supreme Court of Nigeria upheld the position in the later cases. The implication of this is that the NICN is not a court whose determination, with the exception of fundamental human rights disputes, is final. To have held otherwise, would have amounted to legitimizing judicial tyranny. The fate of a man should not be determined by a court of first instance without an opportunity to appeal.

2.0 ONYIRIUKA V. A.G. ENUGU STATE EXAMINED

The brief facts of the case are that the appellant was employed in the service of Enugu State Government as a nurse and she rose through the ranks to become Chief Nursing Officer. However, her employment was abruptly terminated on the ground that she is not from Enugu State. Being aggrieved by her termination, she filed a suit at the Federal High Court for the enforcement of her fundamental right to freedom from discrimination as enshrined in section 42 of the 1999 CFRN which entitles her to work in any part of Nigeria and not be discriminated against based on her sex, origin or ethnicity. The Respondent filed a six-paragraph counter-affidavit in opposition to the application. The objection was predicated on the grounds that the applicant's complaint bordered on disengagement and an action on disengagement from service, cannot be brought through the instrumentality of enforcement of Fundamental Human Rights

42 *Local Government Service Commission, Ekiti State v Mr M A Jegede* [2013] LPELR- 21131 (CA).

43 *Local Government Service Commission, Ekiti State v Mr G O Asubiojo* [2013] LPELR- 20403 (CA).

44 *Skye Bank Plc. V Victor Anaemem Iwu* [2017] 7 SC (Part 1) 1.

(Enforcement Procedure) Rules, 2009 as purportedly done. Also, that the complaint on non-payment of entitlement has removed the dispute from the jurisdiction of the trial court to that of the National Industrial Court of Nigeria (NICN). At the conclusion of the hearing, the trial court held that the applicant ought to have filed her case at the NICN consequently, declined jurisdiction. The Applicant being aggrieved by the decision of the trial court, appealed to the Court of Appeal urging the court to determine whether or not the trial court was correct that it lacked jurisdiction over the claim.

2.1 Arguments at the Court of Appeal

Counsel on behalf of the appellant argued that the appellant is a Nigerian citizen and as such, is entitled to work anywhere within Nigeria without discrimination or fear of being discriminated against. This is in line with section 42 of the 1999 CFRN. It is therefore wrong and unconstitutional for the Respondent to have terminated her employment on the basis that she was not from Enugu State. Since the termination was perpetuated on a discriminatory basis, she was entitled to apply to the trial court, pursuant to the Fundamental Rights (Enforcement Procedure) Rules, 2009 for the enforcement of her right to freedom from discrimination. She argued that the jurisdiction of the court is to be determined based on her claim before the court as was held in *Tukur v. Government of Gongola State.*[45] Hence, her principal relief before the trial court was the enforcement of her right to freedom from discrimination and not non-payment of her entitlements as contended by the Respondent. She argued that where a set of facts discloses multiple causes of action, including infringement of a fundamental right, the aggrieved party is allowed to commence two actions, by writ of summons and the other by motion under the Fundamental Rights (Enforcement Procedure) Rules 2009 as was held in *Sokoto Local Government v.*

45 *Tukur v. Government of Gongola State.* [1989] 4 NWLR (Pt. 117) 517.

Amale[46] she therefore contended that the trial court was wrong to have declined jurisdiction on the basis that the suit was under the exclusive jurisdiction of the NICN.

The Respondent contended that the trial court was correct in declining jurisdiction as the Appellant's claim squarely falls under the exclusive original civil jurisdiction of the NICN pursuant to section 12(1) (a) and (d) of the National Industrial Court Act, 2006 and section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 which conferred exclusive jurisdiction on the NICN on matters relating to or connected with any dispute over the interpretation and application of Chapter IV of the 1999 CFRN in relation to any employment, labour or industrial relation. Since the Appellant's claim arose from employment relation and has to do with non-payment of entitlement, it ought to have been litigated at the NICN. It also argued that the main claim of the Appellant was not enforcement of fundamental right but payment of entitlement, the trial court lacked the competence to entertain same as was held in *Borno Radio and Television Corporation v. Basil Egbuonu.*[47] The Court of Appeal was therefore urged to dismiss the appeal and affirm the decision of the trial court.

After a careful review of the arguments of the [parties, the Court of Appeal noted that from the records of appeal, the case of the appellant before the trial court was enforcement of her fundamental right to freedom from discrimination which she alleged was breached by the Respondent which terminated her appointment on the basis that she was not from Enugu state and not claim for payment of her salaries, gratuities and other benefits as was argued by the Respondent.[48] Thus, the principal or main claim of the Appellant is enforcement of her fundamental rights and not pecuniary entitlements. Thus, the court held that:

---

46 *Sokoto Local Government v. Amale* [2001] 8 NWLR (Pt. 714) 224.

47 *Borno Radio and Television Corporation V. Basil Egbuonu.* [1991] 2 NWLR (Pt. 171) 81, 90.

48 *Mrs. Gloria Lewechi Onyiriuka v. Attorney General of Enugu State* [2020] 11 NWLR (Pt. 1735) 383 at 401, Paras. F-H.

> "*from the reliefs claimed by the appellant and the facts deposed to in the affidavit in support of the application. I am of the considered and firm opinion that the applicant's main claim is the alleged breach of her fundamental and constitutional right to freedom from discrimination on the basis of her place of birth and ethnicity*."[49]

It concluded thus "*I am afraid and with due respect to his Lordship, his findings are clearly not borne out of the reliefs sought for by the appellant*."[50] The court held that based on section 46(1) and (2) a High Court, such as the trial Court albeit, the Federal High Court, has an original jurisdiction to hear and determine any application made to it pursuant to the provisions of section 42(1) and (2) of the same Constitution, premised on Chapter thereof, that an applicant's fundamental right has been or is being or likely to be contravened by any person.[51]

By this, the Court of Appeal held that the NICN does not have nor exercise exclusive original civil jurisdiction over fundamental human rights disputes arising from or relating employment. This is so despite the clear and unambiguous provisions of section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 as well as section 12 (1) (2) of the National Industrial Court Act, 2006 which have bestowed exclusive original civil jurisdiction over Chapter IV of the Constitution on the NICN. At this juncture, it is considered apposite to reproduce verbatim, the provision of section 254C (1) (d) of the Constitution. It provides that "notwithstanding the provisions of sections 251, 357, 272 and anything contained in the Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of this

---

49 *ibid* at 402, Para. B.
50 *ibid* at 403, Para. F.
51 *Mrs. Gloria Lewechi Onyiriuka v. Attorney General of Enugu State* [2020] 11 NWLR (Pt. 1735) 383 at 404, Paras. G-H.

Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's association or any other matter which the court has jurisdiction to hear and determine."

The opening portion of the section has subjected the jurisdiction of the Federal High Court, High Court of the Federal Capital Territory, Abuja and the various State High Courts to that of the NICN, for all intents and purposes that the jurisdiction donated to the NICN shall be exercised notwithstanding that conferred on these other courts. As far as labour related fundamental rights disputes are concerned, the jurisdiction hitherto enjoyed over such by the FHC, HCFCTA and SHC has been sequestrated by the clear provision of the section. Thus, from 2010, it is the NICN that has exclusive jurisdiction over such disputes as this is the reasonable inference to be made from the provision. It is hardly, if not impossible, to justify the rationale for the court's decision.

Section 46(1) cannot be used as the basis for its decision that the FHC had the requisite jurisdiction to entertain the dispute. In the interpretation of statutes, especially the Constitution, the law is that clear and unambiguous words should be ascribed their ordinary grammatical meaning unless doing so would lead to absurdity.[52] This is the literal rule of interpretation which requires that there should be no attraction, subtraction or extension of such a clear statutory provision.[53] We submit that the provisions of section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 are clear and unambiguous and the Court of Appeal ought to have given them their ordinary grammatical meaning. Moreover, doing so is incapable of leading to any absurdity. It would seem that the intention of the draftsmen from the comprehensive manner in which the aforementioned section of the Constitution was couched, was that all labour and employment

52 *Calabar Central Co-operative Thrift & Credit Society Ltd. & Ors. v. Bassey Ebong Ekpo* [2008] 1-2 SC 229 at 252; *Balonwu v. Governor of Anambra State* [2010] All FWLR (Pt. 503) 1206 at 1240, Paras. A-C.

53 *Mbilitem v. Unity Kapital Assurance Plc.* [2013] 32 N.L.L.R. (Pt. 92)196.

disputes, irrespective of their nature, be litigated at the NICN and not another court.[54]

The duty of the court is to declare the law as laid down by the legislature and not to rewrite it under the guise of interpretation. Just as blood is vital to the human body, so is jurisdiction to the process of adjudication hence, it must be guarded jealously. The jurisdiction of a court is fundamental because it is intrinsic to adjudication, it can be raised at any point of the proceedings even at the Supreme Court on appeal for the first time. Thus, once the same is raised, irrespective of the manner it was raised, courts are enjoined to keep at abeyance further proceedings and determine it one way or the other.[55] The rationale for this is that, any proceedings, no matter how well conducted, once it is in want of jurisdiction, is a nullity.[56]

3.0 CONCLUSION AND RECOMMENDATIONS

Prior to the enactment of the 1999 CFRN (Third Alteration) Act, 2010, the NICN had been emerged and submerged in jurisdictional and constitutional debacle as its status and stature as a SCR remained contentious. However, the Third Alteration Act, settled the issue. The Court of Appeal decision in the *Onyiriuka's Case* is diametrically opposed to the clear provisions of section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 which confer exclusive original civil jurisdiction to the NICN over disputes pertaining to or arising from the provisions of Chapter IV of the Constitution. The phraseology of section 254C (1) is so vociferous that notwithstanding anything to the contrary in the Constitution, the exclusivity of the original civil jurisdiction conferred on the NICN is sacrosanct,

---

54 B Atilola, M Adetunji & M Dungeri, "Powers and Jurisdiction of the National Industrial Court of Nigeria under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010: A Case for its Retention" (2012) 6(3) *Nigerian Journal of Labour and Industrial Relations,* 5-9.

55 *Aremu v. Adekanye* [2004] 13 NWLR (Pt. 891) 972.

56 *Oloba v. Akereja* [1988] 3 NWLR (Pt. 84) 508.

absolute and untrammelled. Thus, the decision was reach *per incuriam* and does not constitute a binding precedent and it can and should be distinguished.

The decision is a violent usurpation and somewhat sequestration of the NICN's exclusive original civil jurisdiction which has ripple effects on its mandate and adjudication of labour and employment disputes in Nigeria. The decision is not compliant with the principle of law that where there are two conflicting provisions in a legislation, the latter provision supersedes since it was made with the awareness of the earlier one. The NICN is a specialized court which deals with sensitive and seemingly volatile matters which are capable of affecting the society if exposed to the technicalities in the regular court hence, its jurisdiction should be jealously guided and guarded by the court and the appellate court.

Gleaning from the findings above, it is recommended that the NICN should adopt the principle of distinguishing where a similar situation like the one in the case arises since the decision in the instant case was reached *per incuriam* hence, it is not bound to follow it. Following the decision slavishly is capable of leading to unintended consequences thus, it has to resist the urge.

There is a dire need for the Court of Appeal, as a policy making court on civil appeals from the NICN whose decision on such appeals are final, to set aside its decision in the case examined as it does not represent the correct position of the law and it is capable of disrupting the jurisdiction of the NICN with unintended adverse consequences.

LIST OF REFERENCES

1999 Constitution of the Federal Republic of Nigeria Cap, C23 Laws of the Federation of Nigeria 2004.

AB Chiafor (2007) "Reflections on the Constitutionality of the Superior Court of Record Status and Exclusive Jurisdiction Clause of the NICN Act 2006" 1(3) *Nigerian Journal of Labour and Industrial Relations* 20-34.

Adejumo Babatunde Adejumo (2008) 'The Role of the National Industrial Court in Dispute Resolution in Nigeria' (Faculty of Law Public Lecture of University of Abuja organized by the Law Student Association of Nigeria, UNIABUJA Chapter, 15 September, 2008).

AE Akeredolu, & DT Eyongndi (2019) "Jurisdiction of the National Industrial Court under the Nigerian Constitution Third Alteration Act and Selected Statutes: Any Usurpation?" 10 (1) *The Gravitas Review of Business and Property Law, University of Lagos,* 1-16.

AG Ogun State v Coker [2002] 17 NWLR (Part 796) 304.

Amendment No. 2 of Decree No. 53 of 1969.

Aremu v. Adekanye [2004] 13 NWLR (Pt. 891) 972.

B Atilola, M Adetunji & M Dungeri (2012) "Powers and Jurisdiction of the National Industrial Court of Nigeria under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010: A Case for its Retention" 6(3) *Nigerian Journal of Labour and Industrial Relations* 5-9.

Borno Radio and Television Corporation V. Basil Egbuonu. [1991] 2 NWLR (Pt. 171) 81 at 90.

Balonwu v. Governor of Anambra State [2010] All FWLR (Pt. 503) 1206 at 1240, Paras. A-C.

Calabar Central Co-operative Thrift & Credit Society Ltd. & Ors. v. Bassey Ebong Ekpo [2008] 1-2 SC 229 at 252.

CK Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Concept Publications, 2011).

Coca-Cola Nigeria Ltd v Akinsaya [2013] 8 NWLR (Part 1386) 255.

DO Ojere (2007) "The High Courts' Jurisdiction to hear and Determine Inter or Intra Union Dispute is not completely Ousted by the Trade Disputes Act as Amended and the NIC Act" 1(2) *Nigerian Journal of Labour and Industrial Relations,* 56-72.

DT Eyongndi & KON Onu, (2021) Legal Diagnosis of the National Industrial Court of Nigeria Rules, 2017 as a Catalyst of Egalitarian Labour Adjudication" 13(1) *Jimma University Journal of Law,* 47-65.

DT Eyongndi & OA Dawodu-Sipe (2022) "The National Industrial Court Stemming of Unfair Labour Practice of Forced Resignation in Nigeria" 12(2) *Nigerian Bar Association Journal,* 183-197.

EA Oji, and OD Amucheazi (2015) *Employment and Labour Law in Nigeria* (Mbeyi and Associates (Nig.) Ltd.

Emiola Akintunde, *Nigerian Labour Law,* (Ogbomoso, Emiola Publishers Ltd.

Egharevba v Eribothe [2010] All FWLR (Part 530) [1213] – [1228].

F Agbaje (2007) "The Legal and Constitutional Anatomy of the New Industrial Court Act 2006" (2007) 1(1) *Nigerian Journal of Labour and Industrial Relations,* 77.

Federal High Court Act, Cap. F12 LFN 2004.

Incorporated Trustees of Independent Petroleum Association v. Alhaji Ali Abdulrahman Himma & Ors. Suit No. FHC/ABJ/CS/313/2004 ruling delivered on 23 January 2004 (NICN).

JOA Akintayo & DT Eyongndi (2018) "The Supreme Court Decision in Skye Bank Ltd. V. Victor Iwu: Matters Arising" 9(3) *The Gravitas Review of Private and Business Law,* 98-119.

JOA Akintayo, and DT Eyongndi (2018) "The Supreme Court Decision in Skye Bank Ltd. V. Victor Iwu: Matters Arising" 9(3) *The Gravitas Review of Private and Business Law, University of Lagos,* 98-119.

Lagos State Sheraton Hotel V. Hotel and Personal Service Staff Association [2014] 14 NWLR (Part 1426) 45.

Local Government Service Commission, Ekiti State v Mr M A Jegede [2013] LPELR-21131 (CA).

Local Government Service Commission, Ekiti State v Mr G O Asubiojo [2013] LPELR- 20403 (CA).

Mbilitem v. Unity Kapital Assurance Plc. [2013] 32 N.L.L.R. (Pt. 92)196.

Mrs. Gloria Lewechi Onyiriuka v. Attorney General of Enugu State [2020] 11 NWLR (Pt. 1735) 383 at 401, Paras. F-H.

Madukolu v Nkemdilim [1962] 2 SCNLR 341.

National Electoral Commission & Anor v Izuogu [1993] 2 NWLR (Part 275) [270]

National Industrial Court Rules 1979.

National Union of Electricity Enterprises V. Bureau of Public Enterprises [2010] 3 SCM [165] - [167].

National Union of Road Transport Workers v Gboro [1998] 2 NWLR (Part 537) [189] - [191].

New Nigeria Bank Plc. & Anor v AM Osoh & 4 Ors. [2001] 13 NWLR (Part 729) 232.

Offornze D Amucheazi, and Paul U Abba (2013) *The National Industrial Court of Nigeria: Law, Practice and Procedure* (Wildfire Publishing House.

Oloba v. Akereja [1988] 3 NWLR (Pt. 84) 508.

RN Ukeje (2006) *Nigerian Judicial Lexicon,* (Ecowatch Publications Ltd.
Skye Bank Plc. V. Victor Anaemem Iwu [2017] 7 SC (Part 1) 1.

Sokoto Local Government v. Amale [2001] 8 NWLR (Pt. 714) 224.

Trade Disputes (Emergency (Provisions Decree) Act 1968, No 21.

Tukur v. Government of Gongola State. [1989] 4 NWLR (Pt. 117) 517.

Western Steel Workers Ltd V Iron and Steel Workers Union of Nigeria (No. 2) [1987] 1 NWLR (Part 49) [284] – [303].