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Editor-In-Chief's Note

The Makerere Law Journal, since its inception, was intended as a medium for discourse on the "immense problems of Law," as our pioneer Chief Editor, Omara Atubo, so aptly put it. This volume is a depiction of that vision and also a testament to the diversity of legal thought across Africa, with contributions from various countries within Africa, each offering unique perspectives on the pressing legal issues of our time.

This volume's papers cover topics ranging from Cyber Crime and Digital law to Human rights law to Banking and Financial Law. The volume also includes papers from a legal writing program that was organized by the Makerere Law Journal and the Human Rights and Peace Centre (HURIPEC). These papers not only enrich the Journal but also show the importance of mentorship and the potential of law students to give valuable contributions to legal discourse.

I would like to extend my thanks to Dr. Busingye Kabumba, the Director of the Human Rights and Peace Centre (HURIPEC) for his role in organizing the legal writing program.

Special thanks to the Makerere Law School administration for their continuous support in making this volume possible.

I am grateful to the 2023 -2024 editorial board, whose efforts have been vital in bringing this volume to life. Their commitment to upholding the standards of excellence that the Makerere Law Journal is known for have made this publication possible.

It is my hope that this volume not only informs but also inspires further legal discourse and innovation within and beyond our borders.

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.

Reagan Siima Musinguzi
Editor-in-Chief
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PROCEDURAL ASPECTS OF CYBER CRIMES INVESTIGATIONS IN RWANDA: A COMPARATIVE STUDY

Kabano Jacques*

Habarurema Jean Pierre*

ABSTRACT

The use of internet technology has dramatically affected our ways of learning, communication and information sharing. The routine of daily use of social media makes it nearly impossible to conceive any illicit activity not having a cyber component. The multinational nature of Internet raises a dilemma for states wishing to apply their laws in the cyberspace. Individuals are increasingly involved in transactions that cross international territorial borders, which significantly reduces the ability of the state to exercise its authority to combat the consequences of these acts on its population. Within a comparative approach, this work basically focuses on the Rwandan law regarding the investigation of cybercrimes and procedures surrounding the collection of evidences in the Rwandan cyberspace.

1.0 INTRODUCTION

The internet has transformed the world into a global village. It improves business productivity, revolutionises working methods and makes possible the emergence of new business models allowing communication, negotiation, exchange and

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marketing in real time. In this sense, its contribution is essential for societies. It has become so indispensable over time that few organizations and individuals can do without it today. However, this revolution has also made possible new forms of crime linked to cyberspace.

Indeed, the Internet was not developed, from the start, in a secure way. Its multiple hardware, software and protocol components were and remain marked by numerous security flaws such as Injection flaws[3] which enable attackers to submit hostile data to an application. this can have very real consequences in the event of exploitation.[4] This has encouraged the emergence of deviant behaviour in cyberspace.

The Computer Crime and Abuse Act enacted in 1986 in the United States is the first ever legal instrument to establish criminal liability for malicious activities committed over computers.[5] Since then, many nations across the globe, step by step, undertook a long process of adopting different regulations within their cyber capabilities to fight cybercrimes. In this direction, the most important instrument was the Cybercrime convention of 2001 as the first international instrument to address the issues of computer crime and harmonisation of national laws to improve the investigation of malicious activities operated over computers.

Besides having cybercrimes preventing provisions scattered around different laws and regulations, the fully established law on the investigation and

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3 Peter Loshin, 'Application Security' (techtarget.com, January 2022) available at<https://www.techtarget.com/searchsoftwarequality/definition/application-security> [Accessed on 4 May 2023]

4 Diane Hosfelt, 'Fearless Security: Memory Safety' (hacks.mozilla.org 23 January 2019 available at <https://hacks.mozilla.org/2019/01/fearless-security-memory-safety/> [Accessed on 4 May 2023]

5 Leighton Johnson, Security Controls Evaluation, Testing, and Assessment Handbook (2nd Edn, Academic Press 2019) 115-120

punishment of cybercrimes in Rwanda was adopted in 2018.[6] The task to establish regulations of the implementation of the 2018 cybercrime law was left to the National Cyber Security Authority created on 31 May 2017.[7] Apart from cyber legal frameworks, Rwanda like other countries has adopted a system of strategizing its national cyber policies into a National Cyber Security Strategic Plan. This is a five-year plan where the country displays all activities toward an effective cybersecurity framework and their costs throughout that period of time.

In 2017, Rwanda established an independent investigative organ, Rwanda Investigation Bureau (RIB), amongst its missions was to '*prevent and pre-empt criminal acts by identifying and investigating all kinds of physical or cyber-attacks'*.[8] From this mission, RIB operates under eleven divisions including the *Cyber-crime Investigation Division*.[9] In the same year, Rwanda also created the National Cyber Security Agency (NCSA) with different responsibilities such as:

> "*Conducting cyber intelligence on any national security threat in cyberspace and provide information from such intelligence to the relevant organs; and establishing guidelines on the basis of national, regional and international ICT security principles."*[10]

This work examines the cyber investigations in Rwanda in comparison with the high level of uncertainties and complexes surrounding cybersecurity today with the aim to propose an extension of viable options fit for the Rwandan context.

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6 'Law N° 60/2018 of 22 August 2018 on Prevention and Punishment of Cybercrime' (amategeko.gov.rw, 22 August 2018) available at <https://amategeko.gov.rw/document/legislation/2018> [Accessed on 23 April 2023]

7 Ibid Article 53.

8 Art. 9 of the 'Law N°12/2017 of 07/04/2017 Establishing the Rwanda Investigation Bureau and Determining Its Mission, Powers, Organisation and Functioning' (amategeko.gov.rw 7 April 2017) <Law N°12/2017 of 07/04/2017 Establishing the Rwanda Investigation Bureau and Determining Its Mission, Powers, Organisation and Functioning> [Accessed on 23 April 2023]

9 'RIB Leadership Structure' (rib.gov.rw) available at <https://www.rib.gov.rw/index.php?id=23> [Accessed on 23 April 2023]

10 Art. 9 of the 'Law No 26/2017 Of 31/05/2017 Establishing the National Cyber Security Authority and Determining Its Mission, Organisation and Functioning' (amategeko.gov.rw) available at <https://amategeko.gov.rw/document/legislation/2017> [Accessed on 10 May 2023]

2.0 CYBERCRIME INVESTIGATIONS AND EVIDENCE GATHERING IN RWANDA

The question of the application of legal frameworks to cyberspace and their implementation is ardently debated while generating a lot of confusion.[11]By its nature, as a cross-border space and cantered on the flow of immaterial data, cyberspace raises challenges for governance, traditionally defined in relation to the territorial state. Indeed, while the physical infrastructure of cyberspace may be subject to the jurisdiction and authority of the State, the latter can, on the other hand, find it difficult to exercise "effective control" over the flow of data and information.

This has led many actors to call for the development of new normative regimes to regulate cyberspace.[12]The transition from analog to digital system has instigated a new age of technology whose multiple legal consequences do not leave indifferent on the question of national criminal procedure, in particular that of digital criminal evidence, which remains a crucial issue today in the fight against cybercrime on the national level. The question raised by digital criminal evidence in cyberspace is mainly related to its constitution and reliability rather than its legality.

2.1 PROBLEMATIC OF CYBER CRIME DEFINITION

Cybercrime has not received a unanimous definition both nationally and internationally. This lack of consensus on the concept would indeed be at the origin of a myriad of definitions proposed on all sides by States and official international organizations, which confront several interests and systems.

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11 United Nations, 'UNCITRAL Expedited Arbitration Rules 2021: UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (United Nations 2022) available at <https://www.unilibrary.org/content/books/9789210021753> [Accessed on 23 April 2023]

12 'UN OEWG in 2023 - DW Observatory' (30 September 1998 available at <https://dig.watch/processes/un-gge> [Accessed on 23 April 2023]

Classically, these definitions limit cybercrime to the modus operandi of the cyber-offenders or to the object of the offence.

This is the case, among others, of the definition developed by the Organization for Economic Co-operation and Development (OECD) which, alluding to the processing or security of data, adopts cybercrime as '*any unlawful or unethical or unauthorized conduct relating to automatic data processing and/or data transmission'*.[13] Similarly, the United Nations also limits cybercrime to attacks on the security of computer systems.[14]

Other definitions, in particular those of the United States[15] and the United Kingdom, are limited solely to fraudulent access to a computer system, which undoubtedly excludes a significant part of the offense spectrum of cybercrime, namely, all offenses which can be committed through a system.[16] In Rwanda, cybercrime has not been defined either in the Penal Code, Criminal Procedure or in any other legal text, regardless the fact that the Law N° 60/2018 of 22/8/2018 on Prevention and Punishment of Cyber Crimes has mentioned this term from start to finish.

This law only stipulates acts that should count as cybercrimes rather than defining what does cybercrime really mean. Be that as it may, cybercrime is a protean notion that is generally analysed under two meanings.[17] Literally composed of two words, "cyber" which comes from the Latin "*kubernan*", that is to say to govern or pilot, and "crime" which constitutes all the criminal acts or

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13 OECD (Ed), Computer Related Criminality: Analysis of Legal Politics in the OECD Area, (OECD, 1986)

14 'Model United Nations Topic-Cybercrime' (unodc.org) available at <https://www.unodc.org/e4j/en/mun/crime-prevention/cybercrime.html#/top> [Accessed on 10 May 2023]

15 Chris Kim; Barrie Newberger; Brian Shack, 'Computer Crime' (2012) *49 ACLR 443*

16 National Crime Agency, 'Cybercrime' (nationalcrimeagency.gov.uk) available at <https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/cyber-crime> [Accessed on 10 May 2023]

17 Myriam Quéméner, *Sécurité et stratégie, "Concilier la lutte contre la cybercriminalité et l'éthique de liberté''*(cairn, 2011) 59.

omissions committed at a given period in a society. Cybercrime, in the strict sense, includes cyberattacks, which correspond to attacks on automatic data processing systems utilising viruses or malware. Additionally, it is equally used to describe traditional criminal activities in which computers or networks are used to carry out illicit activity.

2.2 DIGITAL CRIMINAL EVIDENCE

Evidence means the demonstration of the reality of a fact or a law. French Jurist Jean Domat conceptualised evidence as "what persuades the mind of a truth".[18] It is present in all legal matters, including criminal law where it consists precisely in establishing the constitution of an offence and in seeking the perpetrator. Unlike civil law, which includes the constitution of evidence in a set of legal and contractual obligations, the Rwandan criminal law through the law on evidence and its production, provides a relative freedom of the production of the evidence i.e., the proof of a fact or a law, in criminal matter, "*evidence can be established by all means of fact or law provided they are subject to adversarial proceedings*."[19]

The history of criminal law experienced several modes of evidence ranging from rational evidence (admission, testimony and writing) to irrational evidence, which was widely practiced in ancient societies in the framework of sacred justice, which ended up disappearing. These are the judicial duel and ordeals.[20] Today the so-called digital evidence, has emerged as a new form of evidence on the digital market.

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18 J. Domat, Les lois civiles dans leur ordre naturel (éd. Cavelier, 1771)204.

19 'Law N° 15/2004 of 12/6/2004 Relating to Evidence and Its Production in Rwanda', Art.119.

20 A form of medieval justice which consists in subjecting a person accused of a crime to a painful ordeal in which only a god can help him to succeed if he were innocent.

2.2.1. THE CHALLENGE OF DIGITAL CRIMINAL EVIDENCE IN CYBERCRIME INVESTIGATION

The proliferation of clandestine servers that allow criminal organizations to sell stolen information (personal data issued by governments, credit or debit cards, personal identification numbers, bank account numbers, email address lists) to facilitate identity theft clearly demonstrates the growth enjoyed by cybercriminal activity. With the popularisation of cybercriminal operating methods on the Internet, today it is not necessary to have technical skills to launch a cybercriminal operation.

The level of technical expertise required for a cybercriminal project no longer makes sense when it is possible today to freely buy the most elaborated spyware as well as the data collected by this same software: banking information and sufficient personal information to purchase online or transfer funds. In addition, it is also possible to order a cybercriminal act from time to time from specialised service providers who bring their share of expertise to the operation, each link generating profits whose amount responds solely to the laws of supply and demand, with the rarity of a skill increasing prices accordingly.

However, this human-internet dependence or correlation, although favouring human activity, has negative consequences both with regard to the global economy and to the private and professional lives of users of this network, because it causes the explosion in the rate of cybercrime. According to Symantec,[21] cybercrime costs each year, in terms of global damage, approximately 114 billion euros, almost eight (8) times more than the cost of the 2012 Olympic Games in London.

[21] Fahmida Y Rashid, 'Cost of Cybercrime Dips to $110 Billion: Symantec' (*SecurityWeek*, 5 September 2012) <https://www.securityweek.com/cost-cybercrime> [Accessed on 23 April 2023].

This sum increased astronomically in 2020 (over a trillion dollars) according to a study by the computer company McAfee.[22] However, criminal justice will benefit from this technological revolution and, like the fingerprints or DNA used in conventional forensics, the digital traces left by cybercriminals can help to find the perpetrators and possibly reconstitute the acts. Hence the usefulness of digital evidence in the context of cybercrime proceedings.

2.2.2 COLLECTION OF DIGITAL EVIDENCE IN RWANDA

The Rwandan law on evidence and its production does not in any way help in the collection of digital evidence. The only provision regarding digital evidence under this law is the recording of voices using electronic devices and filming using cameras in the article 121, the rest is about production of evidence in the traditional ways for tradition crimes. From Article 8 to article 15 of the Law on the prevention and punishment of cybercrimes in Rwanda, there is a section about investigation of cybercrimes. This law although not a standalone reference, remains the most important gate to the methods used to collect digital evidence in Rwanda.

a. OBLIGATION TO COLLABORATE WITH ORGANS IN CHARGE OF INVESTIGATIONS.

The law on prevention and punishment of cybercrime in Rwanda in its article 5 obliges any concerned person *to*:

> *"Cooperate with the organ in charge of investigations or prosecution where this person has to respond to any inquiry about the investigation, comply with any lawful directions including disclosing access code to a computer system and also to disclose all data required for the purposes of investigation and of prosecution of an offence."*[23]

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22 James Andrew Lewis, Zhanna L Malekos Smith and Eugenia Lostri, 'The Hidden Costs of Cybercrime' available at <https://www.csis.org/analysis/hidden-costs-cybercrime> [Accessed on 23 April 2023].

23 Article 5 of the Law on Prevention and Punishment of Cybercrime in Rwanda

This article does not mention a level of cooperation, whether it is at national or international. However, given the transnational nature of cybercrime restricting this cooperation national level without seeking an expended collaboration beyond the territorial boundaries would definitely constitute a mistake.

International cooperation in the field of cybercrime is of crucial importance because the fight against this type of internationalized crime meets a common need of States. However, the development of mutual assistance remains conditional. Moreover, with regard to the specificity of this crime, international cooperation also includes technical service providers who play a major role. However, cooperation between public authorities and technical service providers is inconsistent.

The fight against cybercrime is specific in terms of digital evidence, which is fragile. Therefore, the prosecution of cybercriminals leads public authorities to deal with economic actors. On this point, the regulatory mechanisms are multifaceted: first, the judicial authorities can take injunction measures, either to provide information, or to block sites from technical service providers. It is a forced cooperation with ineffective results; then, a form of self-regulation is put in place through the development of charters and codes of conduct.

This is a contractualised cooperation suffering from a lack of supervision and revealing the absence of a global policy to fight against cybercrime. Firstly, with regard to injunction measures, the judicial authorities can contact Internet service providers (ISP) and hosts in order to obtain information on the offences committed and the perpetrators thereof. ISPs and hosts benefit from the principle of civil and criminal liability.

They are also not subject to a general obligation to monitor the information they store and transmit, or even to seek out violations. However, judicial injunction measures with these service providers are possible. These may be computer

requisitions provided for during investigations and instructions: service providers are then required, under penalty of a fine, to provide the information requested.[24]

This leads to the question of data retention by technical service providers. However, the retention of data does not obey an unequivocal regime allowing cooperation at the international level. The obligation to preserving data is the means of obtaining evidence**.** The law on prevention and punishment of cybercrime in Rwanda obliges Internet service Providers to retain:

> *"Any information which may be of assistance in investigating the offence including particularly information which shows the communication's origin, destination, route, time, date, size, duration and the type of the underlying services".*[25]

There is no mention of how long this information should be kept by the service providers anywhere in this law. In the same direction, the Rwandan Law relating the protection of personal data and privacy, provides that an electronic personal data can be retained *until the purposes of the processing of personal data are fulfilled or even longer when there is investigation or prosecution.*[26]The same provision also proposes other grounds for a longer retention of personal data depending on the regulation of such grounds under the direction of the supervisory authority.[27]

As a comparative matter, Directive 2006/24/EC of March 15, 2006 requires Member States to provide for this storage obligation to be borne by fixed and mobile telephone operators and Internet access providers for a period between 6 and 24 months from the communication.[28] French law provides for a duration

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24 Article 5 of the Law on the prevention and punishment of cybercrimes in Rwanda.
25 Article 5 (2).
26 Article 52 of the Law no 058/2021 of 13/10/2021 Relating to the Protection of Personal Data and Privacy.
27 Ibid. Art.3 (23º) defines a supervisory authority as a public authority in charge of cyber security. In this sense, NCSA (National Cyber Security Agency) is in charge.
28 Directive 2006/24/EC of March 15, 2006.

of one year.[29] However, if, in Europe, the duration of data retention does not pose great difficulties, it is different for American commercial companies: the latter have diversified practices. For example, the Google search engine erases data from accounts that have become inactive after an indefinite period;[30]
Twitter refers to a maximum duration of 18 months[31], while practice has revealed a retention period of 2-3 months. Moreover, this heterogeneity is aggravated by refusals to submit to requisitions. The will to cooperate then has varying degrees depending on the companies and their locations. Thus, Google and Facebook only partially respond to information requisitions on the condition that the users are European and if the communication of information is limited to the criterion of the IP address.[32]

Some service providers refuse any transmission of information, but notify the authorities of the country concerned (Facebook); Twitter limits the transmission of information to serious crimes, eliminating any cooperation in matters of press offences.[33] The result is a greatly slowed cooperation in terms of cybercrime. These refusals to cooperate by the major operators denote the extended cooperation of these same service providers with the services of the Federal Bureau Investigation (FBI) and the National Security Agency (NSA).[34]

The problem is the same in terms of injunctions to block illegal sites, cooperation causing difficulties in implementation and revealing the inconsistent nature of

29 'Légifrance - Publications Officielles - Journal Officiel - JORF N° 0242 Du 18/10/2022' <https://www.legifrance.gouv.fr> [Accessed on 23 April 2023]

30 'How Google Retains Data We Collect – Privacy & Terms – Google' available at <https://policies.google.com/technologies> [Accessed on 23 April 2023]

31 Twitter Privacy policy available at <https://twitter.com/en/privacy/previous/version_15> [Accessed on 23 April 2023]

32 Regulation (Eu) 2016/679 of the European Parliament and of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

33 M. Robert (ed.), Report on cybercrime, Protecting Internet users, 2014, p. 179.

34 Indeed, Google, Yahoo, Microsoft, Skype, YouTube, Apple, AOL, Facebook, Paltalk have allowed access to their users' data through the Prism system.

practices. It is therefore clear that the fight against cybercrime is under construction. This construction is not due to the lack or absence of the norm, but to its abundance without a global international policy being determined. While this is decisive as cybercrime covers a global dimension, cooperation remains limited.

Therefore, if the repressive tool is dense, its effectiveness is tempered by multifaceted interstate cooperation. The extension of this cooperation must bring Rwanda to team up with other countries in forms of mutual understanding with other nations and join available cooperation initiatives.[35] In this context, Rwanda is ready to join the *Budapest Convention on Cybercrime and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer and computer system.*[36]

This means that once the presidential order acceding to this convention is published in the official gazette,[37] the country will join cooperation in investigation with other 50 signatories and will be obliged to amend the law on protection and punishment of cybercrime to the international standards available in the Convention.[38]

b. SEARCH AND SEIZURE

In the practice of searches, the seizure of computer data at the home of the person likely to hold information relating to the incriminated facts now constitutes one of the essential probative tools of the criminal investigation. Indeed, the systematization of the use of digital tools has led all subjects of law;

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35 It is evident that the country is involved in many platforms against cybercrime, but nothing beats bilateral and multilateral agreements. e.g. the working group against cybercrime available at <https://www.coe.int/en/web/cybercrime/-/interpol-and-glacy> [Accessed on 22 February 2023].

36 Cabinet Meeting Resolutions of 24th March 2023 available at <https://www.primature.gov.rw/index.php?> [Accessed on 25th March 2023]

37 Council of Europe, Convention on Cybercrime, Budapest 2001. Art. 23-36 European Treaty Series - No. 185.

38 Ibid, Article 2-22.

natural and legal persons, to register a considerable amount of personal information, about themselves and third parties, in digital files which are themselves materially stored on one or more computer media.[39] The evolution of digital technologies has led, in terms of territoriality, to make a distinction between the material medium for storing information and the one from which this same information is accessible. For example, it has become common practice in companies for this data to be stored on servers located in a dedicated room, or even in another building or at a third party's, the user only having a screen and a keyboard, making it possible to modify this data, without however having material access to the storage medium itself.

In practice, accessibility takes precedence over the physical storage of data. For the investigator, it is more important to have access to the screen enabling the document to be read than to the server on which it is stored: having access to a server room does not usually allow the investigator to read the e-mails nor to have access to the accounts of a company. On the other hand, this informative content can be delivered to anyone who is at the location of the screen delivering the information, that is to say the screen connected to the server in question. It shows that in the criminal investigation, it is not the server, but the access to the server, which is fundamental.

In the same way, the user of an electronic mailbox consults, via his or her computer, content which may be stored thousands of kilometres away, on servers possibly located abroad. It is even possible that this content is simultaneously stored on several servers and that, materially, and often without the user even being aware of it, the storage is split over several different countries.

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39 The informative content is not limited to the information contained in each file, since the reading of the mass of files themselves is information (one will think in particular of the metadata).

Whether it is the personal computer of a natural person, in the context of common law offences, terrorism or organized crime, or the computer system of a company or association in the context of repression of economic, financial and fiscal offences, access to dematerialized data storage media constitutes an essential phase of the criminal investigation, and this during the flagrance investigation, the preliminary investigation and judicial information.

In Rwandan law, particularly in the provisions of article 9 of the Law on prevention and punishment of cybercrime, the organ in charge of prosecution may issue an order to enter into any area premise and search or seize a computer or a computer system; secure the computer or computer system data accessed; extend the search and access a computer or any another computer system where the data being sought is stored. This legal extension of the scope of the search thus allows investigators to access a computer system located outside the premises searched, in order to collect data relevant to the investigation.

Additionally, during an investigation a computer or a computer system may be preserved for a period not exceeding thirty (30) days as per the order of the prosecution with fear that the data in question may be modified or lost.[40] However, the question of the legal basis for the search for data arises specifically for dematerialized data, which may be accessible from the premises of the person searched, while being stored in a separate place.

Likewise, the Rwandan law, is silent about investigation of data which may be stored abroad. Indeed, it would therefore be sufficient for any person searched to mention to the investigators, from the start of the operations, the storage of their data outside the national territory, for the investigation officer to find rely to the international commitments in force to continue the search. The reason for the absence of prior information from the investigation officer on the location of

40 Article 12 of the Law on the Prevention and Punishment of Cybercrime.

the servers abroad lies in the attack on the sovereignty of the foreign State that would constitute the recognition of a power to access and copy data stored outside the national territory by Rwandan investigators and prosecutors.

This provision subjects them to the principle of national jurisdiction and does not seem to adversely affect the person searched. Thus, when the investigation officer begins the search, an alternative is possible: either he or she ignores or unaware of the situation of the servers abroad, and in this case the search will be legal, or he or she is aware of it, and in this case he or she must comply with Rwanda's international commitments in force. The problem is that such kind of international commitments are likely to face political wills of other countries, because it is not under the obligation they have to comply with according to international law.

In France for example, access to and copying of data on servers located abroad could be analysed, even without prior knowledge of the location of the servers abroad. This is in a violation of the rules of territorial jurisdiction of the judicial police provided for in Article 18 of the Code of Criminal Procedure, which considers the national territory as the maximum extent of territorial jurisdiction. Admittedly, the fifth paragraph of Article 18 of the Code of Criminal Procedure provides that judicial police officers may conduct hearings on the territory of a foreign State, but only with the agreement of the competent authorities of that State, on express rogatory commission or on requisitions, the extension of this competence being limited to this single act and not concerning either searches or seizures.

In a ruling of November 6, 2013, the Criminal Chamber of the Court of Cassation had to consider the compliance, with regard to article 57-1 of the code of criminal procedure,[41] of the consultation carried out by investigators on the occasion a

[41] Crim. 6 Nov. 2013, n° 12-87.130, D. 2013. 2826.

search of password-protected data stored on a website, itself hosted on a server located in the United States. The judgment of the investigating chamber, validating the search, based the territorial jurisdiction of the investigators on article 32 of the Convention of November 23, 2001 on cybercrime, which provides that a party may access stored computer data accessible to the public, regardless of the geographical location of the data.

The IT tool now allows these same individuals to access this data, manipulate it and commit the offense without storing it, as it is stored on servers located abroad. The computer tool has therefore made it possible to be in possession of the instrument and the proceeds of the crime or offence, without this evidence being materially present on Rwandan territory. The legislators therefore should allow investigators, by adopting the same provisions as they are in Article 57-1 of the French Code of Criminal Procedure, to correct this asymmetry.

c. DISCLOSURE OF DATA AND COLLECTION OF ELECTRONIC TRAFFIC DATA

Most institutions across the globe are prohibited by their laws from disclosing any information collected that could reveal the identity of any person, business or organization without their permission or without being authorized by law. Various confidentiality rules apply to all data disseminated or published in order to prevent the publication or disclosure of any information deemed confidential. Where necessary, data is removed to prevent direct disclosure or cross-referencing of recognizable data. This is an international practice. However, this practice is not immune to exceptions. The authorisation to collect data about a person without that person's knowledge is granted only in exceptional circumstances. In relation to cybercrime investigation in Rwanda, a person may be compelled to disclose the data or facilitate the investigating officer to enter a

computer that is storing the data in question.[42] In case the holder of such information is not willing to disclose the data or allowing the officer in charge of investigation to record the data, the prosecutor applies for a court order which in return compel him or her to comply.[43]

In case an investigating officer is given a pass to enter someone's computer, he or she must only look for the data which is in the limits of his or her investigation, otherwise there is a possibility of oversharing even for the most sensitive information which has no link with the suspected cybercrimes. The Rwandan legislators should think of the risks of abuse of such authority and possibility of reporting in case of abuse and other judicial remedies.

d. AUTHORIZATION TO USE A FORENSIC METHOD

The expansion of the use of sophisticated ICTs in the commission of criminal offenses represents an ongoing challenge for law enforcement and prosecution, which must keep abreast of all technological innovations, not only to detect new forms of cybercrime, but also to be able to collect evidence for their prosecution. Within the framework of the Council of Europe for example, The Recommendation No. R (95), of the Committee of Ministers to member states has already underlined that "*the creation of specialized units for the repression of offenses whose prosecution requires information technology should be considered*".[44]

This triggered countries under this council to consider two things, on the one hand, the creation of institutions which are responsible in general for the computerization of the procedure, the automation of the legal system and the technical equipment of the courts which in general depends on the Ministry of

42 Article 11 of the law on the prevention and punishment of Cybercrime in Rwanda.
43 Ibid. Article 14.
44 Rec. No. R (95) 13, of the Committee of Ministers to member states on problems of criminal procedure related to information technology, adopted on 11 September 1995.

Justice (e.g. Austria, Belgium, Brazil, Croatia, Spain, Turkey); on the other hand, the establishment of specialized units within law enforcement agencies that deal with cybercrime, computer forensics and Internet surveillance.

Article 15 of the Law on the prevention and punishment of cybercrime in Rwanda provides the possibility to use forensic methods if the prosecution cannot be accomplished without relying on digital forensic. This article does not mention which unit should provide forensic evidence but establishes that using such method must be ordered by the court after the application by the prosecution authority. It also proposes that the court may order any service provider to provide a forensic tool in that procedure.

Although this law is silent about the unit that conduct such method, the practice shows that the Rwanda Forensic Laboratory which generally helps in other evidence seeking related scientific methods, provides also digital forensic.[45] Whether this Laboratory is well equipped and has sufficient human and technical resources in terms of cyber criminality is a question not covered by this work.

Many countries have several specialized units, one in each of the institutions involved in the criminal justice system. Sometimes there is also another central unit to coordinate different law enforcement units or agencies (e.g., Belgium, Federal Computer Crime Unit, Japan, Netherlands, Spain, Turkey, or the United States). Taking the example of The United States,[46] the existence in of working groups, at least for law enforcement, involved in the implementation of ICT in the criminal justice system: the Internet Crimes Complaint Centre which is a clearinghouse for the investigation of Internet crime; the Resource Fusion Unit and the Cyber Initiative that analyse internet crime trends, but also filter out

45 RFL, 'Digital forensic service' (rfl.gov.rw) available at <https://www.rfl.gov.rw/index.php?id=164> [Accessed on 27 February 2023]

46 UNODC, *Comprehensive Study on Cybercrime*, (UN New York, 2013), pp. 152-156.

false leads before information on cybercrime reaches the prosecution service;[47] the United States Computer Emergency Preparedness Team, which does not investigate, but provides support, coordinates and conducts research projects; and finally InfraGard, part of the Department of Homeland Security, in which private and public actors share information, promote dialogue between the ICT community and law enforcement agencies.

The creation of special centres for research and training in ICT seems to be very useful. The Belgian report mentions the "Cybercrime Centre of Excellence" for training, education and research in the public sector, where universities, private ICT companies, the police, the prosecution and the judicial system work together. However, in Rwanda like in other countries, it seems that specialization has been achieved at the police and investigative level, while the judiciary seems to remain largely unspecialised.[48]

In most cases, states must use commercial intermediaries such as social media platforms to monitor and regulate online behaviour.[49] The transnational nature of information disseminated on the Internet presents another challenge because this data may be stored on one or more servers located in different States. State authorities must therefore rely on a new form of cooperation with other States to be able to investigate, prosecute and convict cybercriminals. Cyberspace thus undermines good governance practices as it not only involves actors within the jurisdiction of a single state but also impacts a range of actors at the international level. Rwanda, a country which is aspiring to be one of the African tech hubs[50], should develop even cyber diplomacy than others.

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47 Ibid. In this unit what is interesting is the support obtained from different private companies, such as Microsoft or eBay.

48 Ibid. pp. 172-177.

49 Niva Elkin-Koren; Eldar Haber, "Governance by Proxy: Cyber Challenges to Civil Liberties," Brooklyn Law Review, 82 no. 1, p. 105.

50 Mwangi Karanja, Leveraging Rwanda's position as a tech hub, 02 August, 2021 available at <https://www.pwc.com/rw/en/publications/> [Accessed on 20 March 2023]

3.0 CYBERCRIME SITUATION IN RWANDAN COURTS

According to the data collected through the Rwanda Integrated Electronic Case Management System Rwanda (IECMS) from the National Public Prosecution Authority in the Research Division, the number of claims rose since 2018.

TABLE 1. CYBER CRIMES CASES IN RWANDA (2018-2022)[51]

Year	Received claims	Parties			Filed to Courts	Classified	Total reviewed	Under review	%
		Females	Males	Total					
2018-2019	125	25	128	153	75	50	125	0	100
2019-2020	158	33	153	186	86	71	157	1	99.4
2020-2021	286	86	253	339	168	118	286	0	100
2021-2022	535	141	486	627	230	294	524	11	97.9

Among all cyber-crimes committed from 2018-2022 in Rwanda, four crimes; Access to a computer or computer system data,[52] unauthorized access to a computer or a computer system data,[53] Cyber-stalking,[54] and access to data with intent to commit an offence seem to be the most committed crimes in this country.[55] Other common cybercrimes such as phishing,[56] spamming,[57]publication of rumours, and impersonation were also among the committed crimes.[58]

51 This is first-hand information retrieved from the National Public Prosecution Authority by the authors.
52 Article 24 of the Law on protection and Punishment of Cybercrimes.
53 Ibid. Art. 18.
54 Ibid. Art. 35.
55 Ibid. Art. 17.
56 Ibid. Art. 36.
57 Ibid. Art. 37.
58 Ibid. Art. 39,40.

4.0. CONCLUSION

Despite the efforts by the Rwandan legislators to cover all the points related to the topic of computer crimes, there are still some legal gaps that are good to address. Crimes such as piracy, propagation of child pornography and the disproportionate diversion of data at a general level,[59]make cybercriminals occupy an important space to commit crimes. Computer crimes cannot be eliminated peremptorily, but current Laws can be upgraded effectively, even supported by the same technology, in order to fight these illegal acts on the web.

Rwanda needs to establish a security system, which allows the protection of information, especially when the information that is handled is first-line. To understand computer crimes, requires to take a multidisciplinary approach let alone leaving the matter to legal practitioners alone. Although Rwanda like some other states has adopted policies and frameworks in terms of cybersecurity and cyberspace governance, the general lack of knowledge in this area is a barrier to the proper investigation and collection of evidences in cyberspace.

[59] Beside prohibiting publication of child pornography and provision of punishment by Article 34 of the law on the prevention and punishment of Cybercrime in Rwanda, Child pornography itself and related circumstances have never been determined by Rwandan Laws.

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THE RIGHT TO FAMILY LIFE IN ARMED CONFLICTS SITUATIONS

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THE RIGHT TO FAMILY LIFE IN ARMED CONFLICTS SITUATIONS

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ABSTRACT

Armed conflicts signify anarchy, chaos and confusion with various effects on all parts of the society, including the family. The Universal Declaration of Human Rights in Article 16(3) recognises the family as the fundamental unit of the society. Families are disrupted in periods of war and conflict, which affects the social, economic and emotional support provided to individuals going through difficult times. This paper discusses war and conflict, the extent of damage done to the family and the implications for nations. The legal framework which seeks to protect the family and steps which should be taken in preserving the family in war and conflict are also discussed. It concludes by recommending measures that should be adopted to preserve families during conflicts such as re-establishment of family links upon the cessation of conflicts, family reunification, marriage counselling and provision of basic needs of families. This way, the value of families will be preserved and sustained in society.

1.0 INTRODUCTION

The word "family" does not have an internationally agreed definition and has been classified by different approaches depending on States, regions, cultures and religions.[1] Indeed, families have moved away from the traditional structure and are increasingly becoming unconventional, multicultural and

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1 Human Rights Committee, 'General Comment on Article 23', paragraph 2 (39th Session, 1990),<https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2019.pdf> [Accessed 21 June 2022]

transnational.[2] However, it has been recognised that "a family is[,] in its broadest sense, [objectively] considered to be a group of people living together, and subjectively, a group of people wanting to live together".[3]

Precisely, the Commentary to the Additional Protocols of the Geneva Conventions of 1949, while stating that the definition of the family must not be rigid, gives a more precise definition covering *"…persons related by blood and living together as one household. In a wider sense it covers all persons with the same ancestry."*[4] The Commentary adds that the word family includes persons who are "*relatives in a direct line, whether their relationship is legal or natural…*" The concept of family also connotes a different type of understanding based on the rights and responsibilities of parties. For example, arrangements may be made for a family to provide care to orphans, whether they are related to them or not.

The African Charter on Human and People's Rights (ACHPR) recognises the family as a fundamental unit of the society, which States must protect and assist when the need arises.[5] State responsibility to the family enables the unit to efficiently perform its functions for the benefit of its members and the society.[6]

The protection of the family unit is essential since the family plays an important role in the lives of individuals, societies and nations, as recognised by

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2 Oreste Foppiani, 'Introduction' in Oreste Foppiani and Oana A. Scarlatescu (Eds.) Family, Separation, and Migration: An Evolution-Involution of the Global Refugee Crisis (International Academic Publishers, Bern 2018) 23.

3 Background Note for the Agenda Item: Family Reunification in the Context of Resettlement and Integration, Annual Tripartite Consultations on Resettlement Geneva, (20-21 June 2001), <https://www.unhcr.org/3b30baa04.pdf> [Accessed 21 June 2022]

4 The Commentary to the Additional Protocols of the Geneva Conventions of 1949, Paragraph 2997 (1987) <https://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf> [Accessed 21 June 2022]

5 See The African Charter on Human and Peoples' Rights, 1981, Article 18(1, 2), Universal Declaration of Human Rights, 1948, Article 16(3), The International Covenant on Civil and Political Rights, 1966, Article 23(1), International Covenant on Economic, Social and Cultural Rights, 1966, Article 10(1) and the African Charter on the Rights and Welfare of the Child, 1990, Article 18(1).

6 Human Rights Council, Protection of the Family: Contribution of the Family to the Realization of the Right to an Adequate Standard of Living for Its Members, Particularly Through its Role in Poverty Eradication and Achieving Sustainable Development' A/HRC/31/37, (2016) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/163/18/PDF/G1516318.pdf> [Accessed 2 July 2022]

international human rights instruments. Similarly, preserving the family unit is especially important for children due to the care, attention, support and protection they receive, without which, they would encounter difficulties and challenges in their development.[7] The 2030 Agenda for Sustainable Development indicates that the family also contributes significantly to the development of the nation. The Agenda identifies the family as important in providing a 'nurturing environment' for children and youths, thereby resulting in the fulfilment of their rights and capabilities. The realization of these rights enables them contribute to the development of the nation.

The right to family life includes the right of the members to live together and not to be forcefully separated. This violation has been recognised in situations where a forceful separation was directly perpetrated, as well as in cases where the State fails to protect this right.[8] There are, however, some cases where the State interferes with family life for legitimate purposes where such interference is essential, permitted by law, and "proportional to the pursued goal".[9]

When conflicts occur, there is a high risk of families getting separated, which affects them in diverse ways and changes their lives temporarily or permanently. The more vulnerable members like the aged, children, disabled and women, are subjected to higher forms of hardship due to lack of care.

Separation may occur as a result of the conscription or enlistment of a parent or child, either by the armed forces of a State or a non-state armed group. Family members may also disappear or get lost while fleeing from attacks.[10] Sick, injured and aged persons may find it difficult to escape with other members of

7 Charlotte Lindsey, Women Facing War (ICRC, Geneva, Switzerland 2001) 124, 125.

8 Luis Lopez Guerra, 'European Convention on Human Rights and Family Issues: Primary Issues' in Maribel González Pascual and Aida Torres Pérez (Eds) The Right to Family Life in the European Union (Routledge New York, 2017) 12, 13.

9 These Cases Include Forcefully Separating a Child from Parents Due to The Mental, Physical and Financial Incapacity, Granting Divorce Orders to Couples to Save a Spouse from Domestic Violence and Separation Orders Granted to Couples of the Parents; Id, 13.

10 Alliance For Child Protection in Humanitarian Action, Field Handbook on Unaccompanied and Separated Children (2017) <https://Www.Iom.Int/Sites/Default/Files/Handbook-Web-2017-0322.Pdf> [Accessed 3 July 2022]

their families and are therefore left behind.[11] Some persons may also be abducted for the purpose of being sold or receiving ransom from relatives.

Children and women are abducted to be used for various roles like wives, sex slaves, cooking, cleaning, human shields and suicide bombing. Others may also be killed, detained or imprisoned.[12] Enforced disappearances – where people are forcibly torn away from their families by the State or with the authority of the State – also occur in armed conflicts. The State or non-state actors thereafter cut off all forms of communication between them (abducted members) and their families and deny being responsible for their disappearance.[13]

Additionally, some families separate voluntarily in a bid to survive and ease their burdens. Children are, for example, sent to live temporarily with relatives or friends who reside in non-affected areas to avoid their exposure to harm.[14] Aid-induced separation also occurs in some cases when humanitarian organisations make efforts to assist displaced persons – through the provision of accommodation, food, evacuation and medical assistance – without considering the importance of family togetherness. For example, providing separate accommodation for families and evacuating children who seem to be by themselves without making enquiries about their parents or keeping records of their new location.[15]

The Universal Declaration of Human Rights (UDHR) establishes that the family life of persons should not be arbitrarily interfered with.[16] Persons have a higher tendency of coping with armed conflicts when they are together with their families.[17] While attention has been devoted to various impacts of armed

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11 British Red Cross Et Al, Humanitarian Consequences of Family Separation and People Going Missing (2019) <https://Humanitarian-Consequences-Of-Family-Separation-And-People-Going-Missing.Pdf> [Accessed 3 July 2022]

12 Save The Children, 'Training Manual on Child Rights and Child Protection for Unifil Peacekeepers' (2011) <https://Resourcecentre.Savethechildren.Net/Node/4397/Pdf/4397.Pdf> [Accessed 3 July 2022]

13 Dalia Vitkauskaite-Meurice and Justinas Zilinskas, 'The Concept of Enforced Disappearances in International Law' (2010) 2 Jurisprudence, 197, 198.

14 ICRC, Children in War (ICRC Geneva 2009) 1.

15 Alliance for Child Protection in Humanitarian Action, supra (n 10).

16 The Universal Declaration of Human Rights, Article 12.

17 British Red Cross et al, supra (n 11).

conflicts on individuals such as health, conscription into armed groups, poverty and education, less emphasis is placed on the impact of armed conflicts on families.

This article, therefore, discusses the effects of armed conflict on families. It points out the legal framework which seeks to protect the family unit and explains measures that could be employed to reduce the incidences of separation of families in armed conflict situations.

2.0 SEPARATION OF FAMILIES IN ARMED CONFLICT AND REPERCUSSIONS

Armed conflicts have caused disruption and damage to individuals and cities.[18] Families are not left out and members of this important unit have been exposed to various forms of distress and trauma, which has various consequences.[19] These consequences are discussed below.

2.1 CHILDREN AND WOMEN HEADED HOUSEHOLDS

When parents and relatives lose their lives or disappear in situations of armed conflicts, children have to take charge of their households, by caring for themselves and their siblings in addition to providing the basic needs of the home. These children face significant challenges because they are responsible for earning money in addition to performing household chores like cooking, cleaning and fetching water. This leaves them stressed with little means or time to engage in other activities essential to children such as rest, leisure and play.[20]

The right to rest and play is established by Article 31 of the Convention of the Rights of the Child (CRC) – a right which States are expected to promote and encourage. Children are often unable to attend school because of their responsibilities in the home, which hinders their enjoyment of the right to

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18 Michelle Stone and Anat Shoshani, 'Children Affected by War and Armed Conflict: Parental Protective Factors and Resistance to Mental Health Outcomes', (2017) 8 Frontiers Psychology 1397.

19 Theresa S. Betancourt and Kashif T. Khan, The Mental Health of Children Affected by Armed Conflict: Protective Processes and Pathways to Resilience, 20 Int. Rev. Psychiatry 317, 317.

20 Kendra E. Dupuy and Krijn Peters, War and Children: A Reference Handbook (ABC-CLIO 2010) 42.

education under Article 28 of the CRC. Some activities like farming, fetching water, and searching for firewood expose them to physical injury by landmine explosions or attacks by armed groups, while others like hawking and prostitution expose them to sexual abuse which may result in diseases and unwanted pregnancies. They also do not receive the vital care, love, and guidance required for their development.

Situations of armed conflict also lead to single parent households. In most cases, women head their households in the absence of men which usually increases insecurity and interrupts the support system they receive in the family. This changes their roles and lives since they become breadwinners through diverse means and struggle to provide for themselves and their children.[21] These women have to ensure that their children survive the harsh conditions of armed conflict, receive an education, and enjoy access to other basic needs vital to their development. Women who have children with special healthcare needs are fully in charge of ensuring that these children receive the needed care.

The situation is harder for women who are pregnant since they have to cater for their own needs and those of the unborn, and also avoid engaging in strenuous activities that can cause harm to them and the growing foetus.

Women who are closer to cities or communities where hostilities are taking place are at a higher risk of attacks and have little or no means of defending themselves and their children which puts them in fear and affects their well-being. This is because armed conflicts in contemporary times no longer take place on battlefields, but within cities and communities with people.[22]

In displaced camps, men are usually at the forefront of arranging for humanitarian assistance on behalf of their families. Compared to other households run by men, children and women headed households face the risk of not benefiting from adequate humanitarian assistance and may find it

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21 Damilola Taiye Agbalajobi, 'The Role of Women in Conflict Resolution and Peacebuilding', In Richard Bowd and Annie Barbara Chikwanha (Eds) Understanding Africa's Contemporary Conflicts: Origins, Challenges and Peacebuilding (Institute for Security Studies 2010) 234.

22 Medina Haeri and Nadine Puechguirbal, 'From Helplessness to Agency: Examining the Plurality of Women's Experiences in Armed Conflict' (2010) 92 IRRC 112.

difficult to survive.[23] They therefore have to source for these resources outside the camp which puts them at the risk of being attacked, raped, or abducted.[24]

In some countries, the eligibility of women in receiving inheritance or social assistance is dependent on the fate of their relatives.[25] Women whose husbands are missing as a result of armed conflicts do not have an official status and cannot be referred to as widows.[26] This is because it is not clear whether these men are dead or alive. Their capacity to inherit property and obtain assistance is thus restricted.[27] In some countries, a remedy would be to obtain death certificates, but most of them are reluctant to give up hope that their husbands would return, so, they would not choose this option. The processes for obtaining these documents and the costs also discourage them.[28]

2.2 PSYCHOLOGICAL PROBLEMS

Families who experience difficult situations together tend to survive better due to the emotional support usually received from one another. This is different for disintegrated families. The disintegration of the family unit in armed conflicts often causes psychological distress for members of the family.[29] Persons whose family members are missing are thrown into a state of uncertainty and find it difficult to move on because they cannot mourn their missing relatives or stop their search.[30] They are, therefore, stressed and anxious while awaiting news of their loved ones.

This is amidst other challenges that are experienced in trying to adjust to the new life caused by the armed conflict.[31] Some children lose both parents without dependable relatives or the extended family to support them and provide

23 Lindsey, supra n (7) 79.
24 Haeri and Puechguirbal, supra, n (22) 113.
25 Ibid at 31
26 Ibid
27 Ibid. at 115.
28 ICRC, Addressing the Needs of Women Affected by Armed Conflict (2004), <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf> [Accessed 10 July 2022]
29 Stone and Shoshani, supra, n (18) 1397.
30 Haeri and Puechguirbal, supra, n (22) 115.
31 British Red Cross et al, supra, n (11).

emotional care.[32] According to Dixit, the United Nations Educational Scientific and Cultural Organisation (UNESCO) in a study stated that:

> *"When we study the nature of the psychological suffering of the child who is a victim of the war, we discover that it is not the facts of war itself such as bombings, military operations which have affected him emotionally… it is the repercussion of events on the family affective ties and the separation with his customary framework of life which affect the child, and more than anything [,] the abrupt separation from his mother".*[33]

A study conducted in Liberia upon the cessation of armed conflicts revealed that children suffered from psychosocial and emotional health issues due to the loss of their parents. The fact that these participants understood the cause of death did not improve their health, however, having access to a substitute caregiver – who they had a strong connection with – helped in their recovery processes.[34]

The separation of children from their family members makes them more vulnerable to abuse and exploitation which causes fear and anxiety. Fear and anxiety, according to the British Red Cross, affects physical health, causes weight loss, and reduces the ability to execute daily activities.[35] It also reduces their level of concentration in school and their ability to develop skills in regulating their emotions.[36] The fear experienced by children is worsened by the graphic and disturbing events shown in the media, which includes bombings, shootings, and the aftermath of these incidents.[37]

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32 Elizabeth J. Levey et al, 'A Qualitative Analysis of Parental Loss and Family Separation among Youth in Post-Conflict Liberia', (2017) 12 Vulnerable Children and Youth Studies 1, 9.

33 Dixit, R. K. 'Special Protection of Children During Armed Conflicts Under the Geneva Conventions Regime' ISIL Yb Int'l Human. & Refugee L. 1 (2001): 17, 18.

34 Ibid. at 7.

35 British Red Cross et al, supra, n (11).

36 Sharon Pexton et al, 'The Impact of Fathers: Military Deployment on Child Adjustment. The Support Needs of Primary School Children and their Families Separated during Active Military Service: A Pilot Study', (2018) 23 Clinical Child Psychology and Psychiatry 110, 111.

37 See Aminu Abubakar, CNN News: Boko Haram Posts Video Purporting to Show Beheadings of Two Men (3 March 2015), <https://boko-haram-beheadings-video/index.html> [Accessed 10 July 2022]; Jonathan S. Comer, et al, 'Children and Terrorism-related News: Training Parents in Coping and Media Literacy' (2008) 76 Journal of Consulting and Clinical Psychology, 568-569.

The extent to which parental separation affects a child depends on the child's age, level of development, resilience, length of separation, the relationship the children had with the separated family member and the availability of other support systems.[38]

Military officers are usually deployed to other countries to engage in operations, mostly through regional peacekeeping organisations like the African Union (AU) and the Economic Community of West African States (ECOWAS).[39] In cases where a parent or spouse who is a military officer is deployed to a conflict zone, the absence of such person is stressful on family members who worry about the wellbeing of that soldier and the risk of being killed or injured.[40]

When deployed personnel return with injuries, it affects the children.[41] A study was conducted on the mental health of over 300,000 children between the ages of 5 and 17, whose parents were US army personnel and had been deployed for operations in Iraq and Afghanistan. It reported that mental health issues related to depression and behavioural disorders were found in these children. The issues increased with a prolonged length of deployment.[42]

Children are not the only persons affected. The absence of companionship affects the health of spouses especially if they had a close relationship. Men also experience psychological issues after they have been wounded in conflicts.[43] Furthermore, men who have been deployed on military assignments are not as emotionally sound as before deployment. In a study conducted on veterans, the report indicated that those who were not deployed away from their families

38 Alliance for Child Protection in Humanitarian Action, supra, n (10).
39 Rebecca Schiel, Jonathan Powell, and Ursula Daxecker. 'Peacekeeping Deployments and Mutinies in African Sending States' (2020) 16 Foreign Policy Analysis 251, 252.
40 Pexton et al, supra, n (34).
41 Dawne Vogt, Alexandra Macdonald, and Tabatha Blount, 'Family-Related Experiences During Deployment and Their Role in The Post-Deployment Mental Health of Oef/Oif Veterans' in Shelley Macdermid Wadsworth and David S. Riggs (eds), War and Family Life: Risk and Resilience in Military and Veteran Families (Springer International Publishing Switzerland 2016) 18.
42 Alyssa J. Mansfield et al, Deployment and Mental Health Diagnoses Among Children of US Army Personnel (2011) 165 Arch Pediatr Adolesc Med 999.
43 Pexton et al, supra, n (36) 112.

during active service fared better due to the support they received emotionally.[44] Service members who were deployed also had a higher risk of mental health issues compared to those with their families.[45]

2.3 AFFECTS MARRIAGES AND RELATIONSHIPS

The separation of couples in armed conflicts affects their relationships. Apart from lack of communication, the spouse alone at home may face challenges such as financial difficulties and child care which increase the chances of a strained relationship. This may lead to separation or divorce.[46] Ruined marriages, in turn, affect the care and attention given to children due to emotional distress, anger, insomnia and irritation.[47]

According to Karney and Crown, even though the media has focused more on the marriages of male military officers, it has been discovered that the marriages of deployed female military personnel, are more vulnerable to dissolution than those of their male counterparts.[48]

The psychological trauma experienced by a spouse due to the loss or absence of a family member may also lead to abuse, neglect, bitterness, and anger in the home which may affect relationships between parents and children or between spouses.[49] In addition, children whose parent(s) remarry are sometimes subjected to neglect, sexual, emotional and physical abuse.[50] The relationship and attachment between parents and children, as well as between siblings, can also be affected when they are separated from for long periods either due to voluntary separations or forced separations.[51]

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44 Maria J. O'Connell and Robert Rosenheck, 'The Family Ties That Bind: Tangible, Instrumental, and Emotional Support Among Homeless Veterans', in Shelley Macdermid Wadsworth and David S. Riggs (eds), War and Family Life: Risk and Resilience in Military and Veteran Families (Springer International Publishing Switzerland 2016) 282.

45 Vogt, Macdonald, and Blount, supra n (41) 18.

46 Benjamin R. Karney and John S. Crown, 'Families Under Stress: An Assessment of Data, Theory, and Research on Marriage and Divorce in the Military' (2009), <https://www.rand.org/content/dam/rand/pubs/monographs/2007/RANMG599.pdf> [Accessed 22 June 2022]

47 Pexton et al, supra, n (36) 112.

48 Karney and Crown, supra n (46).

49 Ibid.

50 Ibid.

51 Ibid.

Furthermore, racial, ethnic and religious conflicts affect marriages which are inter-racial, inter-ethnic and inter-faith in nature. Sometimes, a spouse may have to flee from home to avoid attacks by opponents who belong to the spouse's tribe or religion.[52] This might cause resentment between couples – which may extend to the children – forcing them to take sides and detest the other parent. For example, the 1994 genocide which took place in Rwanda between two ethnic groups, the Tutsis and Hutus, generated a lot of hatred and inhumanity, leaving several persons dead.[53] It was reported that some Hutus killed their spouses who were Tutsi, while Tutsi men were threatened by the relatives of the Hutu women they were married to and sent out of their communities.[54]

2.4 HIGHER INCIDENCE OF SEXUAL ABUSE

Sexual abuse has been prohibited in international humanitarian and human rights law. It is, however, an incident that continues to occur in armed conflicts.[55] Sexual abuse in armed conflicts occurs in homes, displaced camps, fields, military barracks, armed groups' abode, among other places. It may take place either during armed conflicts or after they have ended.[56] It happens in different forms and those that are particularly common in armed conflicts include: forced marriages, prostitution, and rape.

Rape is often done for the purpose of humiliating and destroying families, which is why it is massively perpetrated on women and girls during armed conflicts as a method of warfare. The aim is to destroy family honour, culture, and identity particularly where the honour of a family or ethnic identity is tied to the virtue of their girls and women. This is the case in several African communities. Families and members of the community are often forced to watch the act being done so that victims can be humiliated and relationships ruined.

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52 Peter Uvin, Reading the Rwandan Genocide, (2001) 3 International Studies Review 75-99.

53 Ibid

54 United States Bureau of Citizenship and Immigration Services, 'Rwanda: Hutu and Tutsi Intermarriage' (2000), <https://www.refworld.org/docid/3ae6a6a310.html> [Accessed 25 July 2022]

55 Haeri and Puechguirbal, supra, n (22) 118.

56 Megan Bastick et al, Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector (2007), available at <https://sexualviolence_conflict_full.pdf.> [Accessed 26 July 2022]

Men are shamed and embarrassed for the inability to protect their families, while some may detest their wives – finding it difficult to come to terms with her rape – especially when it is done in the presence of other persons.[57] Women (together with the husband) whose children result from rape tend to hate the children.[58]

Sexual abuse occurs during armed conflicts whether families are together or separated. Thus, despite the presence of men, women and children can be raped or married off by armed groups to their members. However, women and girls who have been separated from their male family members are usually more vulnerable to being assaulted sexually. This is because men have a higher likelihood of resisting abuse either because of their physical strength or their possession of arms.[59]

Also, many perpetrators are opportunists who offer food, water, or money to deprived women or children who have lost their relatives in return for sex, while others rape unprotected children. Furthermore, some women and children engage in prostitution in a bid to survive.

Under the Rome Statute of the International Criminal Court, all forms of sexual violence constitute a serious violation of the Geneva Conventions and are considered as war crimes.[60] In *Prosecutor v. Akayesu*,[61] the International Criminal tribunal for Rwanda (ICTR) held that sexual violence could be regarded as genocide in some circumstances.

57 Ibid.

58 UNFPA, The Impact of Armed Conflict on Women and Girls (2002), <https://www.unfpa.org/sites/default/files/pub-pdf/impact_conflict_women.pdf> [Accessed 12 July 2022]

59 ICRC, supra, n (14).

60 United Nations, 'Promotion and Protection of the Rights of Children: The Impact of Armed Conflict on Children' <https://promotion-and-protection-rights-children-impact-armed-conflict-children/> [Accessed 25 June 2022]

61 (1998) Case No. ICTR-96-4-T, Trial.

2.5 HUMAN TRAFFICKING

It has been estimated that about 600,000 to 800,000 persons are victims of trafficking every year.[62] The collapse of legal, political, economic and social structures in armed conflicts usually increases the risk of trafficking.[63] Children separated from family members and are struggling to survive alone are at a higher risk of being trafficked, as the challenges they experience force them to grab any opportunity for a better life in other countries.[64] Women who have lost their husbands find it hard to support themselves and their children may be trafficked.

These children and women are abducted, deceived, and coerced into leaving their countries in search of greener pastures by taking up jobs as factory workers, housemaids, nannies, dancers, models and waitresses.[65] However, they are forced into prostitution, marriages, sexual slavery, and recruitment into armed groups upon getting to their destination countries. Victims of human trafficking are at a risk of reproductive health conditions such as sexually transmitted diseases and unwanted pregnancies due to sexual abuse. They may also experience physical abuse by their clients and handlers.[66]

2.6 LOSS OF FAMILY INCOMES

Armed conflicts disrupt livelihoods due to the loss of jobs, inability to conduct businesses, as well as the destruction of resources and farmlands. When families split in these periods, their sources of livelihoods diminish as couples find it more difficult to support themselves and sustain their households.

For families deprived of their breadwinners, the availability of food, as well as the capacity to send children to school and adapt to the circumstances caused by armed conflict is reduced.[67] Persons who did not have jobs before the

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62 National Criminal Justice Reference Service, 'Human Trafficking', <https://www.ncjrs.gov/ovc_archives/ ncvrw/2005/pg5l.html> [Accessed 23 June 2022]

63 ICRC, 'Addressing the Needs of Women Affected by Armed Conflict' <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf> [Accessed 2 November 2022]

64 Lindsey, supra n (7) 56, 57.

65 UNFPA, supra n (58).

66 Ibid.

67 Bruck Tilman et al, 'The Effects of Violent Conflict on Household Resilience and Food Security: Evidence from the 2014 Gaza Conflict' (2019) 119 World Development 203, 211.

commencement of the conflict or who lost their jobs while the conflict was going on are in worse conditions because getting a job in conflict settings is difficult. This is mainly because of injuries, psychological issues, the lack of places to keep children while working, as well as destruction of facilities, organisations, and businesses. Livelihoods like trade are also difficult to start due to lack of capital and the fear of attacks.[68] Elderly and disabled persons may not be able to earn a living when they have been separated from their support systems and may experience difficulties in feeding, shelter, and accessing health care.[69]

Many rural communities in Africa depend on agriculture for consumption in the household as well as for commercial purposes.[70] The fear of attacks as well as destruction of farms deprive some people of harvesting crops especially in conflicts which are protracted in nature and whose end is difficult to ascertain.[71]

A study by Adelaja & George on Boko Haram induced conflict in Nigeria revealed that farms are destroyed due to conflict which affects farms, agricultural output and the livelihood of households.[72]

Land, a major source of livelihood in rural Africa becomes a contentious issue in post conflict settings, especially when members of such communities had been displaced. Widows are often cheated with respect to their husband's land by male relatives and deprived of their rights over such land.[73] Discriminatory cultural practices are the basis for these actions as some communities believe

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68 Haeri and Puechguirbal, supra, n (22) 115.

69 UNHCR, 'Family Unity: Handbook for the Protection of Internally Displaced Persons', <https://www.unh cr.org/4794b4bc2.pdf> [Accessed 22 July 2022]

70 Philip Verwimp, 'Food Security, Violent Conflict and Human Development: Causes and Consequences', <file:///C:/Users/oolus/Downloads/Food%20Security%20Violent%20Conflict.pdf> [Accessed on 25 July 2022]

71 In Sudan, armed conflicts forced farmers to restrict the farms they cultivated to only those closest to their homes while some livestock were lost. Maxwell, D et al, Conflict and Resilience: A Synthesis of Feinstein International Centre Work on Building Resilience and Protecting Livelihoods in Conflict-related Crises <https://www.alnap.org/system/files/content/resource/files/main/FIC-Publication-Q2_web_2.26s.pdf> [Accessed 20 June 2022]; Tilman Bruck and Kati Schindler, 'The Impact of Conflict and Fragility on Households: A Conceptual Framework with Reference to Widows (2008) <https://www.wider.unu.edu/sites/default/files/rp2008-83.pdf> [Accessed 22 July 2022]

72 Adelaja Adesoji, and Justin George, 'Effects of Conflict on Agriculture: Evidence from the Boko Haram Insurgency' (2019) 117 World Development 184-195.

73 Maxwell et al, n (71).

only men have rights to inherit property and assets. Women who do not have children or who lost their children during armed conflict are in dire circumstances.[74]

Women can obtain legal remedies for the deprivation of their entitlements and rights. To adequately have access to justice, they need to be aware of their rights, but many women in rural areas lack this awareness. Other challenges include inadequate funds and threats from family members.[75]

2.7 DECLINE OF MORAL AND CULTURAL VALUES

Article 18(2) of the ACHPR states that the family is the "*custodian of morals and traditional values recognised by the community*". Moral virtues nurture, develop, and shape the perspectives of persons in different phases of life. They help them to determine actions and decisions that are right or wrong.[76] According to Mohammad Chowdhury: "*liberal democracy can only flourish if its citizens hold certain moral and civic values, and manifest certain virtues*".[77]

On the other hand, Cultural values can be defined as *"…a system of inherited conceptions expressed in symbolic forms by means of which men [and women] communicate, perpetuate, and develop their knowledge about and attitudes toward life"*.[78] Customs are prevalent in African countries especially concerning issues related to marriage, divorce, succession and property rights, fashion, food, custody, burial, and inheritance.

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74 Tilman Bruck and Kati Schindler, 'The Impact of Conflict and Fragility on Households: A Conceptual Framework with Reference to Widows' (2008) <https://www.wider.unu.edu/sites/default/files/rp2008-83.pdf> [Accessed 2 August 2022]

75 ICRC, supra, n (58).

76 Campion School, 'Spiritual, Moral, Social & Cultural Values', <http://www.campion.northants.sch.uk/205/spiritual-moral-social-cultural-values> [Accessed 15 July 2022]

77 Mohammad Chowdhury, 'Emphasizing Morals, Values, Ethics, And Character Education in Science Education and Science Teaching', (2016) 4 The Malaysian Online Journal of Educational Science 1.

78 Johanna E. Bond, Gender, Discourse and Customary Law in Africa, (2010) 83 Southern California Law Review 509, 517.

Family life contributes a great deal to moral and cultural values held dear by African communities.[79] Traditionally, the older generation play a huge role in educating and guiding young ones to a path of responsibility and making the right decisions in their journey through life.[80] However, upon the separation of family members during armed conflicts, these values are not appreciated and practiced. The elders left in the home focus upon survival and meeting their basic needs, and values relegated to the background.

In protracted conflicts, children might be deprived of these morals and guidance throughout the whole length of their childhood.[81] Furthermore, cultural practices that are supposed to help children cope with the trauma of armed conflicts, such as birthdays, coming of age celebrations, special foods, musical instruments, and traditional dresses are often unavailable.[82]

3.0 INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW AND PRESERVATION OF THE FAMILY UNIT IN ARMED CONFLICTS

International Humanitarian Law (IHL) is a body of laws, which seek to regulate activities during armed conflicts and ensure that there is minimal dehumanization of human beings.[83] These laws are codified in the fourth 1949 Geneva Conventions and its Protocols.

In addition to IHL, IHRL is applicable in armed conflicts. IHL is among the 'oldest branches of public international law' which is inspired by a feeling for humanity.[84] IHRL, on the other hand, is a much more recent branch, which

79 Maribel González Pascual and Aida Torres Pérez, 'Introduction' In Maribel González Pascual and Aida Torres Pérez (eds) The Right to Family Life in the European Union (Routledge, 2017) 1.

80 Family Policy Social Centre, 'Family Values' <https://www.fpsc.org.uk/family-values/> [Accessed 12 July 2022]

81 Save the Children, Training Manual on Child Rights supra, n (12).

82 United Nations, The Rights and Guarantees of Internally Displaced Children in Armed Conflict (2012) <https://childrenandarmedconflict.un.org/publications/WorkingPaper-2-Rights-GuaranteesIDP-Children.pdf> [Accessed on 12 July 2022]

83 Chris C. Wigwe. International Humanitarian Law (Thompson Press 2010) 1.

84 Katharine Fortin, 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968' (2012) 94/888 International Review of the Red Cross 1435.

highlights the rights of individuals and groups and the responsibilities conferred on States to 'respect, protect and fulfil' these rights.[85]

The conceptual overlap between IHRL and IHL was made prominent at the Tehran human rights conference in 1968, which marked the twentieth anniversary of the Universal Declaration of Human Rights (UDHR). One of the key resolutions that was adopted at the conference was entitled, 'Respect for Human Rights in Armed Conflicts'.[86] The title of the resolution confirms a consensus among States that human rights are applicable in armed conflict situations. The resolution gives a mandate to the Secretary-General of the UN to study 'relevant developments concerning human rights in armed conflicts and report to the General Assembly.[87] This request eventually led to the drafting of the Additional Protocols to the Geneva Conventions in the 1970s which demonstrated the growing connections between IHL and IHRL more than any other treaty before them.[88]

Over the years, the application of human rights to armed conflict situations has been evident in Conventions, resolutions and judicial decisions.[89] IHL and IHRL are both based on the recognition of shared humanity despite the differences in their historical and doctrinal roots. Fundamental principles common to both bodies of law include: non-discrimination and security of the person.[90] It was noted in *Coard* v. *USA* [91] that 'both bodies of law share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity'.[92]

Nevertheless, despite the growing convergence between IHL and IHRL, significant differences remain. Human rights law operates primarily in peace

85 H. Haider, International Legal Frameworks for Humanitarian Action: Topic guide (DFID 2013) 8.
86 See Respect for Human Rights in Armed Conflict, GA Res. 2444 (XXIII) (19 December 1968) <http://www.refworld.org/docid/3b00f1d558.html> [Accessed 27 April 2017]
87 Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 The European Journal of International Law 120.
88 Fortin (n 84)1437.
89 Melanie Jacques, Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law (Cambridge University Press 2012) 11.
90 Haider (n 85) 20.
91 Case No. 10.951; 123 ILR, 156, 169.
92 Malcolm N. Shaw, International Law (Cambridge University Press 2008) 1197.

time and also applies during armed conflict, while IHL gains full force upon the commencement of an armed conflict and seeks to regulate the relationship between adversaries.[93] Therefore, the relationship between IHL and IHRL is that of complementarity, in which both bodies are not identical, but complement each other. They are mutually supportive regimes, where human rights supplement the provisions of the laws of armed conflict in cases where the rules are unclear or only cover certain situations, vice-versa.[94] Their concurrent application has the potential to offer greater individual protection and enhances the other body of law to strengthen areas of relative weakness.[95] Both IHL and IHRL recognise the importance of preserving the unity of families both in armed conflicts (IHL) and in preserving the wellbeing and other rights of persons (IHRL). These two bodies of law have specifically made some provisions to that effect which will be discussed below.

3.1 INTERNATIONAL HUMANITARIAN LAW AND MAINTENANCE OF FAMILY UNITY

3.1.1 CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR, 1949

The Fourth Geneva Convention seeks to protect civilians who, during international armed conflicts, reside in territories occupied by opponents or find themselves in the territory of a party to a conflict where they are not citizens.[96] In such circumstances, it is difficult for people to maintain contact with each other and to preserve family ties. The Fourth Geneva Convention recognises that all persons protected by the Convention shall be allowed to convey personal messages to their family members irrespective of their location and receive news from them without any form of delay.[97]

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93 Wigwe (n 83) 2, 3.

94 Noelle Quenivet, 'The History of the Relationship Between International Humanitarian Law and Human Rights Law' in Roberta Arnold and Noelle Quenivet (eds) International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law (Martinus Nijhoff Publishers 2008) 9.

95 Ibid at 4.

96 See Geneva Convention IV, Article 4.

97 Geneva Convention IV, Article 25.

When hindrances exist with respect to communication with families, the Central Tracing Agency (CTA) of the ICRC, with support from the National Red Cross Societies, is to be consulted by parties to the conflict. The International Committee of the Red Cross (ICRC) adds that this right is only applicable to personal information related to family issues and extends to the right of persons to receive such information. Belligerents are thus not to deliberately hinder such correspondence in anyway.[98]

Circumstances common in armed conflicts situations might require that there is a limit to the messages sent out and, in such cases, standard forms used strictly for family issues and containing 25 words freely picked out by the person sending the news could be used and sent out once a month.[99] Article 26 establishes the right of family members to make enquiries from belligerents concerning their family members who have been separated from them due to armed conflicts.

These enquiries are to be facilitated and encouraged by parties to conflicts. According to the ICRC, this provision helps to preserve family ties by re-establishing contact between dispersed family members.[100] The ICRC further comments that efforts to be made in reunifying separated families should include: "the organization of official information bureaux and centres; notification by postal authorities of changes of address and possible places of evacuation; the arranging of broadcasts; the granting of facilities for forwarding requests for information and the replies; and, as a precautionary measure, the provision of identity discs for children under twelve years of age as provided in Article 24, paragraph 3 of the Convention…".[101]

The ICRC notes, however, that for family reunification to be more effective, information centres are empowered to deal with only enemy nationals, except as otherwise agreed upon by parties to conflict. In addition, postage concerning

98 ICRC, Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 available at <Https://Ihl-Databases.Icrc.Org/Applic/Ihl/Ihl.Nsf/Comment.Xsp?Action=Open> [Accessed on July 25 2023]

99 Geneva Convention IV, Article 25.

100 ICRC, Convention IV Relative to The Protection of Civilian Persons in Time of War.

101 Ibid.

family enquiries should not incur charges.[102] Article 26 adds that organisations who have been tasked with reuniting families should be supported by the State subject to the organisation's acceptability by parties to the conflict and their compliance with security regulations of the country where they work. The ICRC notes that organisations that do not receive such support will experience challenges.[103]

Furthermore, Article 49 of the Convention provides that total or partial evacuation of a particular area by occupying powers must be carried out without the separation of family members to preserve their unity. Evacuated persons are to be returned to their homes upon the cessation of hostilities. The ICRC, in its commentary, notes that this paragraph aims at preventing a reoccurrence of happenings in the Second World War, where persons were torn away from their families and deported mostly to participate in forced labour, and women, children, the ill, and aged persons consequently experiencing traumatic conditions.[104]

States have the right to imprison opposing parties, but there are restrictions to this right which protects families in armed conflict. Article 82 provides that interned persons who are family members, particularly parents and children, should be allowed to reside together for the whole period of internment. However, the interned persons can be temporarily separated in exceptional circumstances which involve their health, hygiene, medical attention, and employment. Children who would otherwise lack parental care, should, upon request, be allowed to stay with their parents.

This provision aims to mitigate the effects of family separation on individuals. According to Article 81, the detaining power is required to support dependents of the internees protected by the Convention who do not have a source of livelihood and form of assistance. Article 89 provides that "pregnant women, nursing mothers, and children below the age of fifteen shall be provided with extra meals in accordance with their 'physiological needs". Articles 81 and 89

102 Ibid.
103 Ibid.
104 Ibid.

are essential in improving the living conditions and nutrition of family members who have been separated from interned persons who they had relied on for survival.

Article 16 provides that parties to a conflict should take measures to search for the killed, wounded, and shipwrecked upon the cessation of a fight. Also, detaining authorities should ensure that those who die while being detained should be identified and the list of their graves forwarded through the National Information Bureau to the authorities in charge of the deceased.[105] These provisions seek to ensure that families know the fate of their loved ones and prevent the uncertainty, psychological distress, and deprivation of rights encountered by families of missing persons.

Furthermore, the Fourth Geneva Convention provides that children below the age of 15 years, who have lost their parents in situations of armed conflicts either permanently or temporarily, are to be provided with their religion and education facilitated by persons of the same culture.[106] Parties shall also make efforts to ensure that children below the age of 12 years who have lost their parents or are separated from them wear identity discs for purpose of identification.[107]

According to Article 50, the occupying power need to identify children and register parentage. However, their personal status must not be changed as this would make it more difficult for them to be found. When local institutions cannot identify these children, arrangements should be made for their maintenance and education by "persons of their own nationality, language and religion".[108]

Children whose identity is in doubt should be properly identified through the establishment of a special Bureau set up for this purpose. Applications made for the special treatment of children below fifteen years of age – as well as pregnant mothers and mothers whose children are below seven years of age – concerning "food, medical care, and protection against the effects of war," which

105 Geneva Convention IV, Article 130.
106 Geneva Convention IV, Article 24.
107 Ibid.
108 Geneva Convention IV, Article 50.

may have been in place before the occupation should not be denied by the occupying power.[109]

The fourth Geneva Convention also protects the family unit by stating that internees who are to be transferred must be formally informed of the relocation and given details of the new postal address. Sufficient time must also be given to them to inform their next of kin.[110] Visitors, especially relatives, shall be allowed to visit internees as regularly as possible. Internees shall also be allowed to visit their homes for pressing matters, especially those dealing with the death or sickness of a relative.[111] The ICRC comments that such visits are beneficial to the internee who is able to receive support from family members.

This buttresses the importance of visits by identifying Kenya where persons without families were allowed visits by friends upon the request of an ICRC delegate. The ICRC adds, however, that the frequency of visits in the Convention was purposely left to the discretion of belligerents, as it is important that they appraise security situations before visits are allowed.[112] The fourth Geneva Convention further provides that at the onset of a conflict, an information bureau shall be established by parties to the conflict, with the role of receiving and transmitting information concerning protected persons kept in their territory.[113]

3.1.2 PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, 1977 (ADDITIONAL PROTOCOL I)

Additional Protocol 1 supplements the 1949 Geneva Conventions and protects victims of international conflicts. Article 74 of the Additional Protocol 1 affirms the principle of family unity by stating that the parties to a conflict shall make all efforts to facilitate the reunion of families dispersed as a result of armed

109 Ibid.
110 Geneva Convention IV, Article 128; see also, Articles 70 and 71, Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (Third Geneva Convention).
111 Geneva Convention IV, Article 116.
112 ICRC, Convention IV Relative to the Protection of Civilian Persons in Time of War, supra n (133).
113 Geneva Convention IV, Article 136.

conflict and shall particularly encourage efforts by humanitarian organisations to achieve this objective.

In addition, families who are detained or interned shall be accommodated in the same place.[114] Article 76 (2) states that pregnant women and those with dependent infants who have been detained or interned for committing offences related to armed conflict should have their cases treated with priority. Upon the conclusion of such cases, the sentence of death should not be imposed against them and if imposed, should not be carried out.[115] This provision will help to prevent mother-child separation and prevent situations where children will suffer from lack of nutrition and care of a mother.

Additional Protocol 1 further states that the consent of parents and legal guardians must be obtained before children are evacuated.[116] According to Article 78(3), to enable the return of these evacuated children, they must be provided with a card and photographs, which shall be sent to the CTA of the ICRC. When non-nationals of a country die as a result of hostilities, occupation, or detention, their relatives shall be allowed to visit their gravesites whenever possible and as soon as circumstances allows, and their bodies shall be sent to their countries upon the application of the deceased country or next of kin.[117]

3.1.3 PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS, 1977 (ADDITIONAL PROTOCOL II)

Additional Protocol II protects civilians from IHL violations in non-international armed conflicts (NIAC). The Protocol addresses family unity in armed conflicts by encouraging continuous access to education for children, despite the outbreak of hostilities. The education made available should include moral and religious education and must receive the approval of parents or their guardians.[118] According to the ICRC, the provision on continuity of education

114 Additional Protocol 1, Article 75(5).
115 Additional Protocol 1, Article 76(3).
116 Additional Protocol 1, Article 78(1).
117 Additional Protocol I, Article 34(2).
118 Additional Protocol II, Article 4 (3)(a).

aims to ensure that children separated from their families are not totally detached from their cultural identity and roots by being initiated into strange cultures not approved by their parents.[119]

Furthermore, Article 4 (3) (b) also provides that separated family members should be reunited; the process should be facilitated by parties to the conflict. The ICRC notes that the above provision was triggered by Article 26 of the fourth Geneva Convention and identifies the CTA as one of the humanitarian organisations rendering excellent services in reuniting separated families. The Agency also transmits messages between families who find it difficult to communicate with each other and register civilians during evacuation processes.[120]

Article 5 also recognises that families detained or incarcerated as a result of armed conflicts, can be accommodated together.[121] The ICRC notes that this provision originates from Article 82 of the Fourth Convention and emphasizes the importance of communication to the mental health of persons deprived of their liberty and their families. Such correspondence also aids peaceful reintegration upon the cessation of hostilities as it reduces the number of individuals cut off from their families due to the inability to locate them. The ICRC also specifies that when challenges arise leading to the collapse of postal services, the CTA's 25 maximum word form could be employed in NIAC.

According to the ICRC, correspondence with relatives "is a legal right" and its deprivation should not be used as a "disciplinary measure or as a means of exerting pressure, even though it may sometimes prove necessary to limit the number of cards and letters".[122] Children can only be removed temporarily from unsafe areas when the approval of their parents or guardians have been obtained. These children must also be accompanied by persons who have a duty

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119 ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 available at <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument> [Accessed on July 25 2023]

120 Ibid.

121 Additional Protocol II, Article 5(2) a.

122 ICRC, Protocol Additional to the Geneva Conventions.

to protect them and ensure they are safe.[123] Also, to further protect the right of children to a family, the Protocol forbids subjecting expectant mothers and those with young children to death sentences.[124]

3.1.4 UNITED NATIONS GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT, 1998

The United Nations Guiding Principles on Internal Displacement is a non-binding document which highlights the rights of displaced persons in addition to the responsibilities of appropriate authorities in charge of IDPs.[125] The Guiding Principles discourage the arbitrary displacement of persons from their homes, except for security purposes or military reasons.[126] In the event that such displacement has to occur, the right of persons to "life, dignity, liberty and security" should be considered.[127]

The Guiding Principles protect the right to family life of displaced persons by stating that families should be allowed to live together if they so request and those who have been separated in the process of displacement should be reunited "as quickly as possible".[128] Internally displaced families who have been interned or confined in displacement camps have the right to live together.[129] Internally displaced minors who are unaccompanied are to be assisted and cared for in accordance with their special needs.[130]

According to the Guiding Principles, persons who are displaced have the right to information about their relatives who are missing, and relevant authorities in cooperation with international organisations should assist in this regard. The next of kin should be notified of updates and when these missing persons are discovered to have died, their bodies should be identified and returned to their next of kin or disposed of respectfully. Respect and adequate protection should

123 Additional Protocol II, Article 4(3) e.
124 Additional Protocol II, Article 6(4).
125 Olusegun, Olaitan and Adedokun Ogunfolu. 'Protecting Internally Displaced Children in Armed Conflicts: Nigeria in Focus' (2019) 9 Notre Dame J. Int'l Comp. L 44
126 UN Guiding Principles, Principle 6 (2) (b).
127 UN Guiding Principles, Principle 8.
128 UN Guiding Principles on Internal Displacement, Principle 17(2, 3).
129 UN Guiding Principles on Internal Displacement, Principle 17(4).
130 UN Guiding Principles on Internal Displacement, Principle 4(2).

be accorded to the gravesites of displaced persons and they should have access to the locations where their relatives are buried.[131]

3.2 HUMAN RIGHTS LAW AND MAINTENANCE OF FAMILY UNITY

3.2.1 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC)1999

The African Charter on the Rights and Welfare of the Child (ACRWC)1999 is a regional human rights treaty which recognises that children occupy a special place in the African society and are to "grow up in a family environment in an atmosphere of happiness, love, and understanding", so as to ensure their proper development.[132] In addition, Article 23 provides that refugees and internally displaced children who have suffered from the effects of NIAC should receive adequate protection and assistance. This assistance should cover those who have lost their parents and need to be cared for.

Also, according to Article 23(2), States shall undertake to assist humanitarian organisations in obtaining sufficient information necessary to reunite these children with their families. Article 23(3) states that "where no parents, legal guardians, or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason". Article 19(1) seeks to ensure that children enjoy care and protection from their parents and emphasise their right to reside with their parents.

Children must not forcefully be disconnected from their parents except where a judicial authority decides that such separation will be in accordance with their best interests. When children are separated from their parent(s) however, they must be allowed to keep in touch regularly.[133]

When the action of a state causes separation, the family must be provided with sufficient details of the location of the absent member, while ensuring that the absent member will not be endangered.[134] When a child is apprehended by a

131 Un Guiding Principles on Internal Displacement, Principle 16 (1-4).
132 Preamble, ACRWC, 1999.
133 ACRWC, Article 19(2).
134 ACRWC, Article 19(3); See also, CRC, Articles 9(1-4).

state party, his or her parents or guardians must be informed.[135] This will help families know the fate of their loved ones and prevent the uncertainty and psychological distress encountered by families of missing persons. According to Article 25(1), "any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance." Alternative family care, including foster placement and institutional care, should be provided for such a child.[136]

3.2.2 CONVENTION ON THE RIGHTS OF THE CHILD, 1990 (CRC)

The CRC is a comprehensive treaty which protects the rights of children. The CRC seeks to preserve the family unit by providing that members stay together instead of being separated. Article 9(1) establishes the right of children not to be separated from their parents against their will, except where it has been judicially determined that such separation is in their best interests. According to Article 9(3), separated children have the right to communicate with their parents except such relations is not in accordance with their best interests. Article 9(4) provides that where parents and children have been separated due to the action of a State, the location of the absent person must be made known to the others.

Children or their parents can apply to a state to leave or enter that state to reunite with a family member. Such applications should be handled positively, compassionately, and quickly by the State while ensuring that the family will not be affected negatively.[137] Article 20 also approves of the provision of alternative care for children temporarily or permanently deprived of their family environment. Unlike the ACRWC, it adds "*kafalah*"[138] of Islamic law and adoption to the options of alternative care, and adds that in considering the best

135 ACRWC, Article 19(4).
136 ACRWC, Article 25(2) a.; See also, the CRC, Article 20.
137 CRC, Article 10.
138 Kafalah is 'an alternative family care option for children outside of parental care practised by Muslims around the world'. See UNICEF, 'An Introduction to Kafalah' available at <https://www.unicef.org/esa/media/12451/file/An-Introduction-to-Kafalah-2023.pdf> [Accessed 11 June 2023]

option, the child's background and the likelihood that he or she will continue to receive an education, must be factored in.[139]

3.2.3 UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, (CRPD) 2007

This CRPD was adopted for the purpose of protecting the rights of persons with disabilities. It provides that persons with disabilities shall not be discriminated against in all circumstances, including issues related to the family.[140] They therefore have the right to get married, start a family, and make appropriate decisions within that unit just like other people.[141] The CRPD provides that persons with disabilities have rights to guardianship, wardship, trusteeship and adoption of children, which must all be in accordance with the best interest of the child.[142]

Children with disabilities are also entitled to family life on an equal basis with others. Preventing the neglect of these children requires States to provide "early and comprehensive information, services, and support" to them and their families.[143] Separation of children from parents is also prohibited except where such separation is in the best interests of the child. Disability should never be the basis of separation between a child and his or her parents.[144] Where a child cannot be cared for by the immediate family, the State shall provide an alternative among extended relatives and if that fails, a family that resides in the same community shall be called upon to assist.[145]

3.2.4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR was adopted in 1966 to promote the civil and political rights of individuals. According to Article 17, the right of persons to enjoy family life

139 CRC, Article 20(3).
140 Convention on the Rights of Persons with Disabilities, Article 23(1).
141 Convention on the Rights of Persons with Disabilities, Article 23(1)A, B.
142 Convention on the Rights of Persons with Disabilities, Article 23(2).
143 Convention on the Rights of Persons with Disabilities, Article 23(3).
144 Convention on the Rights of Persons with Disabilities, Article 23(4).
145 Convention on the Rights of Persons with Disabilities, Article 23(5).

should not be unlawfully interfered with. It adds that States should protect this right through legislation.[146]

The Human Rights Committee while commenting on the above provision, adds that all persons are entitled to enjoy protection from unlawful interference whether they originated from the State or from individuals. The Committee also requires the adoption of national legislation to ensure that families will not be unduly interfered with and persons will be effectively protected from human rights violations.[147] The Committee specifies that interference is arbitrary when the provisions of a Law is unreasonable and contradicts the 'provisions, aims and objectives' of the ICCPR.[148]

Furthermore, the UN General Assembly in its resolution on the rights of the child, also recognises the significance of the family unit in armed conflicts. It thus calls upon States to 'prioritise family tracing and reunification and to continue to monitor the care arrangements for unaccompanied refugees and internally displaced persons'.[149] The Special Rapporteur on the human rights of internally displaced persons, Cecilia Jimenez-Damary, in her report on ways to improve their rights, enjoined States to:

> *"Prioritize the prevention of family separation, notably by helping communities to prepare for any eventual displacement and mitigate the risks associated with it, as well as by raising awareness on the part of authorities of the importance of preserving family unity, and support family tracing and reunification during displacement and in the return and reintegration process".*[150]

The UN Commission on Human Rights recognises that the family is the basic unit of the society and thus enjoins States to ensure that children live with their

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146 ICCPR, Article 17(1-2).

147 UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation, 8 April 1988, <https://www.refworld.org/docid/453883f922.html> [Accessed 20 July 2023]

148 Ibid at 7.

149 UN General Assembly Resolution 53/128, 23 February 1999 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/768/97/PDF/N9976897.pdf?OpenElement> [Accessed 12 July 2023]

150 Seventy-fourth session Item 72 (b) of the Provisional Agenda 31 July 2019, Promotion and Protection Of Human Rights: Human Rights Questions, Including Alternative Approaches For Improving The Effective Enjoyment Of Human Rights And Fundamental Freedoms <file:///C:/Users/DELL/Downloads/A_74_261-EN.pdf> [Accessed 22 July 2022]

parents and are not disconnected from them, except in accordance with the provisions of the UNCRC.[151]

Compliance with the law during armed conflict situations is however low due to the chaotic nature of armed conflicts and the desire of parties to take revenge and inflict harm as much as possible.[152] In some cases, parties, especially non-state actors in non-international armed conflicts, have little or no regard for the law and are mostly not even aware of its contents. The use of unconventional methods during hostilities like nuclear, chemical, biological information operations and terrorism also undermine the observance of IHL as vulnerable persons get harmed in the process.[153]

Other challenges include insufficient funding in some developing countries to implement the provisions of extant law like conducting tracing and reunification programs, providing meals for families whose breadwinners have been interned, providing suitable accommodation to allow displaced and interned families live together, sending messages to family members of opponents and taking care of children in need who lost their parents during armed conflicts. Lack of political will to take extra steps in ensuring that the required resources are made available and to comply with IHL and IHRL laws concerning family preservation is also a challenge in these countries. This is mostly because they do not consider such issues necessary enough for actions to be taken to achieve the desired result.

4.0 CUSTOMARY INTERNATIONAL LAW AND FAMILY UNITY IN ARMED CONFLICT SITUATIONS

The Statute of the ICJ describes customary international law as 'a general practice accepted as law'.[154] A customary international law exists upon the existence of two elements, namely State practice and "*opinio juris*", that is, the

151 UN Commission on Human Rights, Res. 2005/44, 19 April 2005, Preamble and S 16 c.
152 Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims' (2009) 91 International Review of the Red Cross 280.
153 Ajey Lele, 'Asymmetric Warfare: A State vs Non-State Conflict' (2014) 20 Oasis 97, 99.
154 ICJ Statute, Article 38(1)(b).

acceptance of a practice as being 'legally binding' in a state.[155] Most of the Conventions regulating armed conflict situations have been stated by the ICRC to be customary in nature. They include: 'the rules relating to the use of certain means of warfare, relief assistance, the principle of distinction between civilian objects and military objectives and the prohibition of certain methods of warfare'.[156] Respect for the family life of persons is also an customary international law principle applicable in both international and non-international armed conflicts.[157] Customary rules are significant and beneficial because they apply to all parties to an armed conflict, even when they are not signatories to the relevant Convention. It has therefore 'extended and strengthened the rules of IHL applicable in non-international armed conflicts'.[158] On the other hand, provisions that have not been established as customary international law will not be binding on States that are not signatories to those Conventions.

5.0 RECOMMENDATIONS

5.1 STRENGTHENING AND IMPLEMENTATION OF LEGAL FRAMEWORK

Laws and policies within countries which focus on family separation in armed conflicts should be strengthened. These laws should specifically recognise the importance of the family unit and rights to family unity in armed conflicts in accordance with the international legal instruments discussed earlier. Provisions that do not value the family unit and its importance in the lives of individuals and the society during armed conflicts should be amended.

Laws should also explicitly establish government authorities or agencies in charge of tracing and reunification programs, as well as their responsibilities.[159]

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155 Noora Arajarvi, The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals (Routledge 2014) 2.

156 Ibid 60.

157 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law Volume I: Rules, (Cambridge University Press, UK) 379.

158 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' <https://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf> [Accessed 12 November 2018]

159 Rhodri C. Williams, Protecting Internally Displaced Persons: A Manual for Law and Policymakers (Oct 2008), <https://www.refworld.org/pdfid/4900944a2.pdf> [Accessed 23 July 2022]

States that have not adopted relevant international legal instruments should do so and apply its comprehensive provisions in their countries. Implementation of laws is more difficult in situations of armed conflicts due to the breakdown of institutions and the chaos surrounding these periods. More efforts must, therefore, be made to effectively implement relevant laws protecting the family unit.

5.2 TRACING AND REUNIFICATION OF FAMILY MEMBERS

The right to family life established in legal instruments includes the principle that family ties broken in situations of armed conflict are expected to be restored as quickly as possible.[160] Family tracing programs should be established to reunite missing persons with their relatives as these programs help people recover from trauma more quickly and aids their reintegration into the society.[161] To achieve a successful tracing program, an adequate assessment must have been carried out to know the circumstances surrounding the separation and all relevant issues that could arise during tracing.

Also, identification, registration, and documentation must be done to identify those who have lost their families and record all necessary information about them, including their special needs.[162] Mechanisms for tracing include, posting names and photographs in IDP camps and other public places; broadcasting names on radio networks; distributing tracing pamphlets to communities; traveling to the last location where families were together; and urging persons to contact the nearest office of the particular agency in charge.[163] Members of communities should be asked to assist in the tracing process because they have

160 Lindsey, supra, n (7) 125, 126.

161 Neryl Lewis, Women and Children in the Recovery Process in Geoff Harris (Ed) Recovery from Armed Conflict in Developing Countries (Routledge 1999) 18F6.

162 European Commission, Children on the Move, Family Tracing and Needs Assessment: Guidelines for Better Cooperation Between Professionals Dealing with Unaccompanied Foreign Children in Europe (2014), <http://www.oijj.org/sites/default/files/netforu-report-childrenonthemove.pdf> [Accessed 22 August 2022]

163 Marco Sassoli Et Al, How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law (3rd ed, ICRC 2011) 2, 3.

better access to some areas and can provide important information to aid the process.[164]

Tracing programs should take place as early as possible, as it is easier at such periods to find family members.[165] Early tracing also helps to remove the uncertainty in people's future and facilitates the early review of options.[166] When a substantial number of persons need to trace their families, priority should be given to persons who are most at risk such as young children, children in difficult situations, the sick, and the disabled.[167] Co-ordination of relevant stakeholders at all stages of family tracing is important and increases the effectiveness of the process. In cases of unsuccessful tracing, timely information framed delicately should be provided to those who are seeking to be reunited with their families, especially to children who may be more emotional. Psychological support should also be available to those who need it.[168]

Upon a successful tracing, verification and reunification should take place. The purpose of verification is to ensure that the tracing process was correctly done and the right family was found, in addition to ensuring that reunification will be in the best interest of the child. It is also important to confirm that children indeed desire to be reunited with their family members.

Family reunification, on the other hand, consists of all actions taken to bring all family members together and re-establish broken ties.[169] Family reunification is important in sustaining the bond between family members, nurturing children in a family setting and sustaining the connection between parents and children.[170] While making efforts at reunification, the principles of non-

164 Alliance for Child Protection in Humanitarian Action, supra, n (10).
165 UNICEF, Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World (2009) <https://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview_en.pdf> [Accessed 23 July 2022]
166 Lopez Monica, et al, 'Factors Associated with Family Reunification for Children in Foster Care' (2013) 18 Child & Family Social Work 226-236.
167 ICRC, Children in War supra n (14) 4.
168 European Commission, supra, n (131).
169 Ibid.
170 Anthony N. Maluccio and Frank Ainsworth, 'Drug Use by Parents: A Challenge for Family Reunification Practice', 25 Children and Youth Services Review 511, 518 (2003).

discrimination, participation of all relevant stakeholders, and best interests of the child must be adhered to.[171]

The reunification process must protect children and ensure they do not fall into wrong hands. Reuniting them with parents is placed as a priority, but in the event of unsuccessful reunification with parents, other relatives would serve as alternatives. Furthermore, the national laws regulating the reunification of children with their families must not be contrary to international human rights and IHL standards.[172]

Tracing and reunification are the duty of the State. They may, however, be supported by the ICRC through its CTA and with collaborations with National Red Cross and Red Crescent Societies.[173] After reunification involving a child, some form of monitoring and follow-up may be needed especially if they had been apart for a long time or when the child is placed with distant relatives. Follow-up is also necessary when the family is in very difficult circumstances or when children return as mothers.[174]

States are not to establish unreasonable conditions for a valid reunification to take place as this would be discriminatory and contrary to the right to family life. This position was taken in the European Court of Human Rights case of *Haydarie and Others v. the Netherlands*,[175] where a person seeking to be reunited with her children was asked to prove that 'she has sufficient independent and lasting income not being welfare benefits, to provide for the basic costs of subsistence of the family members with whom reunion is sought'. The conditions in this case were found to be reasonable. In the case of *Abdul-Aziz, Cabales and Balkandali v. United Kingdom*,[176] it was decided that

171 UNHCR, supra, n (81).
172 Interagency Guiding Principles on Unaccompanied and Separated Children, <https://www.icrc.org/en/doc/assets/files/other/icrc_002_1011.pdf> [Accessed 25 July 2022]
173 Wigwe, supra n (83) 152.
174 ICRC, supra, n (12) 4.
175 Admissibility decision 8876/04 ECTHRs.
176 15/1983/71/107-109.

reunification conditions should not be discriminatory against persons on grounds of gender.[177]

5.3 ALTERNATIVE CARE ARRANGEMENTS FOR CHILDREN

In cases where reunification could not be achieved or was discovered to be in conflict with the child's wellbeing, alternative arrangements concerning the care of the child is expected to be made to avoid deprivation of care and support.[178] However, these alternatives must be provided in accordance with the best interests of the child and with proper monitoring.[179] It has been suggested that children are placed in institutional care as a last resort, as family and community-based care arrangements are preferable for those who have lost their family members in conflicts than institutional care.[180]

Studies conducted on institutional care in Romania discovered that children raised in foster homes and were attached to their foster families were not diagnosed with anxiety and depression compared with those who were in institutions.[181] According to United Nations Children Education Fund (UNICEF):

> *"Institutionalization hurts children and communities because it tends to constrain children's cognitive and emotional development, ultimately hindering their social and economic performance as adults. This is true in both emergency and non-emergency settings. The length of stay and a child's age are key factors: The longer children spend in orphanages, the more likely their development will be compromised".*[182]

Institutional care could be especially detrimental to children below the ages of five, as they tend to develop "physical, psychological, and social skills" in these

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177 International Commission of Jurists, Access to Justice in the Protection of their Right to Private and Family Life Training Materials on Access to Justice, <https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-4-Training-modules-2018-ENG.pdf> [Accessed 22 May 2022]

178 Save the Children, Alternative Care in Emergencies (Ace) Toolkit (2013), <https://resourcecentre.savethe children.net/node/7672/pdf/ace_toolkit_0.pdf> [Accessed 12 August 2022]

179 ICRC, 'Guiding Principles for The Domestic Implementation of a Comprehensive System of Protection For Children Associated with Armed Forces or Armed Groups' <File:///C:/Users/User/Downloads/Guiding-PrinciplesChildren-Icrc%20(2).Pdf> [Accessed 16 August 2022]

180 Save the Children, Training Manual on Child Rights supra, n (12).

181 Katie A McLaughlin et al, Attachment Security as a Mechanism Linking Foster Care Placement to Improved Mental Health Outcomes in Previously Institutional d Children, (2012) 53 Journal of Child Psychology and Psychiatry, and Allied Disciplines 46, 48.

182 UNICEF, Machel Study 10-Year Strategic Review, supra n (165).

periods, which will be vital to their future. Children do not also experience the benefits of growing up in a family setting and are also at a high risk of experiencing abuse, particularly when they have a disability.[183]

To ensure adequate protection for children placed in alternative arrangements, support should be provided by governments and humanitarian agencies to vulnerable families who have taken them in. Policies should be adopted by governments on how resources will be earmarked for this purpose.[184] Adequate and regular monitoring of the well-being of these children is therefore required by relevant authorities to ensure that they are safe in their new homes.[185]

Children should be given the opportunity and provided with the mechanisms to make complaints as regards abuse, exploitation, and neglect. Response plans and processes must be included in policies.[186]

5.4 PROVISION OF ASSISTANCE TO FAMILIES

States should assist families in situations of armed conflict and this can be done in several ways. It is more important to assist them by taking early actions in preventing and minimising their risk of separation and its effects on members and the society. The risk of separation can be reduced through the sensitisation of communities on giving their children necessary details about themselves, their parents, home, and the actions to take when they find themselves lost.

Parents should be told to keep their children with them or with other adult relatives for as much as they can in periods of armed conflict so that they can flee from attacks together when necessary. Community members should be informed of their role in supporting children, disabled persons, or the aged when they have lost family members.[187]

In displacement camps, arrangements should be made for families to live together so that the more vulnerable members of the family can enjoy better

183 UNICEF, supra, n (124).
184 Save the Children, Alternative Care in Emergencies (ACE) Toolkit, supra, n (178).
185 UNICEF, Machel Study 10-Year Strategic Review, supra n (165).
186 Ibid.
187 Save the Children, Training Manual on Child Rights supra, n (12).

protection. Furthermore, displacement camps should be adequately fenced, flooded with lights, and guarded by security officers.[188] Women headed households should be registered and monitored to ensure they are provided with basic resources, so as to prevent their vulnerability to sexual abuse and trafficking.[189]

Governments should explore alternative education methods outside of formal school buildings such as establishing classes in safe and undisclosed community spaces where children will be supervised by adults and would not have to walk long distances to school.[190] Psychological support should be provided for individuals and families who have lost loved ones or whose family members are missing. Legal support is also required for women who have been deprived of their homes, property or assets due to the loss of their husbands.

Arrangements should be made for resources donated by humanitarian organisations to reach women and children without abuse or harassment. Women whose houses were destroyed should also be assisted with accommodation after armed conflicts have ended.[191]

The assistance of humanitarian organisations must not affect family unity and actions that will hinder efforts to trace family members should be discouraged. For example, humanitarian evacuation of children without other family members and without obtaining the consent of the children and parents, changing a child's name and disposing the items found in his or her possession as well as placing a child far away from his or her community.[192]

In addition, international organisations have in the past launched programs after armed conflicts have ended such as "food-for-work projects, small enterprise development, and credit schemes" which have been beneficial for

188 Lindsey, supra, n (7) 73.
189 ICRC, supra, n (58).
190 Human Rights Watch, 'Schools and Armed Conflict: A Global Survey of Domestic Laws and State Practice Protecting Schools from Attack and Military Use' <https://reliefweb.int/sites/reliefweb.int/files/resource s/Full_report_145.pdf> [Accessed 5 July 2022]
191 Lindsey, supra n (7) 102, 103.
192 Save the Children, Alternative Care in Emergencies (Ace) Toolkit, supra, n (178).

women in starting their own small businesses.[193] Lessons should be learnt from these previous activities to establish more effective programs, so as to prevent the intentional separation of parents and children due to poverty.

National institutions established to find missing persons and transmit messages should be well-funded to increase the effectiveness of their services. Their response level and coordination with the ICRC should be strengthened, so that individuals who have missing families will quickly find respite.

6.0 CONCLUSION

The family has a significant role to play in the development of nations, as recognised by the 2030 Agenda for Sustainable Development, which identified the family as important in providing a "nurturing environment" for children and youths. A suitable environment to grow, develop, and learn will aid the fulfilment of rights and capabilities. The realization of these rights will help in contributing to the development of the nation.

Armed conflicts have caused the separation of several families due to deaths, conscription, abduction, detainment, internment, and voluntary separation. To avoid the detrimental effects of family separation due to armed conflicts, parties to both international and NIAC must comply with the IHL rules and human rights treaties established for this purpose. Other efforts targeted at assisting individuals recover lost contact with their families must be taken by all relevant stakeholders, including States, agencies, individuals, communities, and international organisations.

193 Lindsey, supra n (7) 99, 100.

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EMPOWERING DIGITAL CITIZENS: NAVIGATING DATA PRIVACY AND ARTIFICIAL INTELLIGENCE THROUGH DIGITAL LITERACY IN UGANDA

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EMPOWERING DIGITAL CITIZENS: NAVIGATING DATA PRIVACY AND ARTIFICIAL INTELLIGENCE THROUGH DIGITAL LITERACY IN UGANDA

Calvin Kahiigi*

ABSTRACT

As the world steadily advances into the digital age, and as attitudes of the masses leap towards artificial intelligence, Uganda as a whole, lags several steps behind. This paper provides a comprehensive exploration of the intersection between digital literacy, data privacy, and artificial intelligence. Exploring the components of digital literacy and its implications in an ever-evolving digital landscape, the paper discusses the importance of data privacy, and the measures necessary to safeguard information in the digital age. It further explores the significance of AI education, the ethical considerations that should underpin its implementation, and their impact on equipping individuals with the skills necessary to navigate the digital scenery. This holistic examination sheds light on the crucial journey towards empowering Ugandan digital citizens.

1.0 INTRODUCTION

1.1 BACKGROUND.

In the digital age, the ability to use office software such as word processors, email and presentation software, the ability to edit and create images, audio and video, and the ability to use a web browser and internet search engines are the skills

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that, according to the *UK Royal Society,* teachers of other subjects at secondary school should be able to assume that their pupils have, as analogue of being able to read and write.[1] In Uganda's contemporary economy, the importance of digital literacy cannot be inflated. The modern workforce relies heavily on technology for communication, collaboration, and information sharing.[2] Job roles across various sectors now require familiarity with digital tools and platforms.[3] However, the reality remains that a large fraction of Uganda's population is digitally illiterate. Not all individuals have equal access to digital devices and the internet, leading to disparities in digital literacy. A 2019 study of ICT in Uganda revealed that 36% of non-internet users are digitally illiterate with 23% stating that they do not know how to use the internet and 13% giving a negative assessment about their need for the internet.[4] Nevertheless, without adequate digital literacy, individuals may find themselves at a disadvantage in terms of employability and professional growth.

1.2 UNDERSTANDING DIGITAL LITERACY IN THE DIGITAL ECONOMY.

Digital literacy has become an indispensable skill in today's digital economy. Today, the term "digital literacy" encompasses more than just the ability to use a computer or access the internet. It refers to the competence to navigate, evaluate, and communicate effectively on a variety of digital platforms. The *University of Western Sydney* has defined digital literacy as having the skills you need to live, learn, and work in a society where communication and access to information is increasingly through digital technologies like internet platforms,

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1 UK, The Royal Society (2012), Shut down or Restart? The Way Forward for Computing in UK Schools available at <https://royalsociety.org/~/media/education/computing-in-schools/2012-01-12-computing-in-schools.pdf> [Accessed 04th January, 2023]

2 Alex Christian, BBC (2022), Why 'digital literacy' is now a workplace non-negotiable. available at <https://www.bbc.com/worklife/article/20220923-why-digital-literacy-is-now-a-workplace-non-negotiable> [Accessed 31st January, 2024]

3 Alex Gay, Adobe Blog (2019), How Digital Literacy Affects the Modern Workforce. Available at <https://blog.adobe.com/en/publish/2019/03/14/how-digital-literacy-affects-the-modern-workforce> [Accessed 31st January, 2024]

4 Alison Gillwald et al (2019), The State of ICT in Uganda available at <https://researchictafrica.net/wp/wp-content/> [Accessed 23rd August, 2023]

social media and mobile devices.[5] According to the *UNESCO Institute for Statistics,* Digital Literacy refers to the ability to access, manage, understand, integrate, communicate, evaluate and create information safely and appropriately through digital technologies for employment, decent jobs and entrepreneurship.[6] It includes competencies that are variously referred to as computer literacy, ICT literacy, information literacy and media literacy.[7] This proficiency extends beyond technical skills, encompassing critical thinking, information evaluation, and the ability to discern credible sources.

The components of digital literacy include technical skills, such as operating digital devices and software, as well as the ability to interact with various digital media. According to the *World Telecommunication/ICT Report***,** the related concept of information literacy consists of providing people with concepts and training in order to process data and transform them into information, knowledge and decisions.[8] It includes methods to search and evaluate information, elements of information culture and its ethical aspects, as well as methodological and ethical aspects for communication in the digital world. As the *European Commission* observes, digital literacy lays out five digital competence areas that include information and data literacy, communication and collaboration, digital content creation, safety and problem-solving.[9]

Additionally, a digitally literate individual should possess information literacy – the capacity to assess the credibility and relevance of online information. Business, travel, education, and finance among other sectors have now been

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5 Western Sydney University Library Study Smart (2020), What is Digital Literacy <https://www.westernsydney.edu.au/studysmart/> [Accessed 23rd August, 2023]

6 UNESCO Institute for Statistics (2018), A Global Framework of Reference on Digital Literacy Skills for Indicator 4.4.2 <https://uis.unesco.org/sites/default/files/documents/> [Accessed 23rd August, 2023]

7 ibid

8 International Telecommunication Union, World Telecommunication/ICT Development Report 2010: Monitoring the WSIS Targets <https://www.itu.int/pub/D-IND-WTDR-2010> [Accessed 24th August, 2023]

9 European Commission, Educating and Training Glossary <https://www.cedefop.europa.eu/en/tools/vet-glossary/glossary> [Accessed 24th August, 2023]

largely digitized through platforms such as Jumia, Glovo, Safeboda, Uber, Duolingo and Wattpad. Additionally, digital literacy is particularly crucial given the prevalence of fake news and misleading content in the digital sphere. For instance, in December 2022, X (formerly known as Twitter), introduced the Community Notes feature to create a better-informed world by empowering people on "X" to collaboratively add context to potentially misleading posts.[10] Furthermore, digital literacy plays a pivotal role in fostering entrepreneurship and innovation.

The digital economy provides countless opportunities for individuals to create, market, and sell products and services online. Those who are digitally literate are better equipped to navigate e-commerce platforms, digital marketing strategies, and data analytics tools, thus enhancing their chances of success in the competitive digital marketplace. In the context of education, digital literacy is transforming the way knowledge is accessed and shared. Online learning platforms, digital libraries, and open educational resources are redefining traditional educational paradigms. Students equipped with digital literacy skills are more adept at engaging with these resources, conducting research, and collaborating with peers in virtual environments.

2.0 DATA PRIVACY AWARENESS AND PROTECTION FOR DIGITAL CITIZENS.

Data privacy awareness and protection have become paramount in an increasingly digital world. This is because the advent of technology and the proliferation of online platforms have revolutionized how individuals interact, work, and conduct everyday activities. However, this digital transformation has also brought about concerns regarding the collection, storage, and processing of personal data.

[10] About Community Notes on X – Twitter Help Centre available at <https://help.twitter.com/en/using-x/community-notes> [Accessed 25th August, 2023]

2.1 WHAT IS DATA PRIVACY?

Data privacy generally refers to the right individuals have to control their personal information and determine how it is used by organizations and entities. *Bigelow* defines data privacy as an aspect of data protection that addresses the proper storage, access, retention, immutability and security of sensitive data.[11] As personal data becomes more valuable and vulnerable, understanding the implications of data sharing and taking proactive measures to safeguard information is vital. According to *Buckbee,* data privacy or information privacy is a branch of data security concerned with the proper handling of data – consent, notice, and regulatory obligations. More specifically, practical data privacy concerns often revolve around the following;

a) Whether or how data is shared with third parties.
b) How data is legally stored or collected.
c) Regulatory restrictions.

For digital citizens, understanding and advocating for data privacy is crucial for several reasons. First and foremost, personal data has become a valuable commodity in the digital economy. According to *Mediavision Interactive,* every time you visit a website, use social media, accept T&Cs, sign up for a form or approve cookies, your data is collected – and companies are willing to pay enormous amounts of money to own it.[12] According to *Costa-Cabral,* companies compete to acquire and process personal data although the rivalry is subject to the application of competition law.[13] Such companies gather user information to tailor advertisements, offer personalized experiences, and even make strategic

11 Stephen J. Bigelow (2022), Data Privacy (Information Privacy) <https://www.techtarget.com/searchcio/definition/data-privacy-information-privacy> [Accessed 24th August, 2023]

12 Media vision Interactive (2021), In Less than Two Decades, the Value of Personal Data Has Increased by 1800% |Data Discoveries <https://www.wearemiq.com/blog/value-of-personal-data/> [Accessed 25th August, 2023]

13 Francisco Costa-Cabral and Orla Lynskey (2017), Family Ties: The Intersection Between Data Protection and Competition in EU Law |available at <https://core.ac.uk/download/pdf/77615074.pdf> [Accessed 25th August, 2023]

decisions. Without proper safeguards, this data could be exploited for financial gain or to manipulate individuals' choices.

2.2 HOW TO SAFEGUARD DATA PRIVACY.

Data breaches and cyber-attacks have become pervasive threats, leading to the exposure of sensitive personal information. These breaches can result in identity theft, financial fraud, and irreparable damage to an individual's reputation. Therefore, data privacy awareness is essential to protect oneself from potential harm. To ensure data privacy protection, several measures can be taken.

(a) First, individuals must be educated about the types of data collected, the purposes for which it is used, and their rights regarding its handling. As *McAfee* observes, technology has made it easy for data to be breached and get into the wrong hands.[14] For instance, in the first quarter of 2023, 6.41 million data records were leaked in worldwide data breaches.[15] Knowing one's rights is key to understanding how one's data can be protected, but there are simple practices to protect one's privacy to avoid becoming a victim of identity theft.[16] It is imperative to note that privacy protections are guaranteed under inter alia, *Article 27 of the Constitution.*[17] Therefore, As *Deighton* observes, failing to protect sensitive data can lead to serious financial and legal troubles and it can also damage one's reputation and put one's ethics into question.[18] Before one starts creating strategies to ensure data protection, one needs to know what kinds of data one is collecting and how sensitive it is. This knowledge empowers individuals to

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14 McAfee (2022), What is Data Privacy and How Can I Safeguard it |available at <https://www.mcafee.com/learn/what-is-data-privacy-and-how-can-i-safeguard-it/> [Accessed 24th August, 2023]

15 Unlike popular opinion, data breaches happen not only via the internet but also through Bluetooth and text messages; Ani Petrosyan (2023), Data Breaches Worldwide - Statistics & Facts available at <https://www.statista.com/topics/11610/data-breaches-worldwide/#topicOverview> [Accessed 29th January, 2024]

16 ibid

17 Article 27 of the Constitution of the Republic of Uganda, 1995.

18 Oliver Deighton (2021), Remote Learning Best Practices: The Importance of Protecting Data Privacy |available at <https://elearningindustry.com/remote-learning-best-practices-importance-of-protecting-data-privacy/amp> [Accessed 24th August, 2023]

make informed decisions about sharing their personal information and engaging with digital services.

(b) Second, robust data protection regulations and laws are necessary to hold organizations accountable for mishandling data. In Uganda, Regulations like the *Data Protection and Privacy Act, 2019* and the *Data Protection and Privacy Regulations, 2021* set standards for data privacy, granting individuals greater control over their personal data and imposing penalties for non-compliance.[19] The Act which mirrors the *European Union General Data Protection Regulation (GDPR),* revolves around several principles concerning data protection and collection.[20] For example, *Section 9 of the Act* prohibits the collection and processing of special personal data and inter alia, provides that a person shall not collect or process personal data which relates to religious or philosophical beliefs, political opinion, sexual life, financial information, health status or medical records of an individual.[21] The Regulator of Data Protection and Privacy in Uganda is the *Personal Data Protection Office* which is an independent Office under *National Information Technology Authority (NITA-U).*[22] The office is established under *Section 4 of the Act* and *Regulation 3 of the Regulations* as inter alia, the body responsible for implementation and enforcement of the Act.[23]

(c) Furthermore, digital citizens should adopt secure online practices, such as using strong and unique passwords, enabling two-factor authentication, and being cautious about sharing personal information online. This is because no matter how sophisticated the platform one is

19 Preamble to the Data Protection and Privacy Act, 2019.
20 The GDPR is a European Union Regulation, a very important component of EU privacy law and human rights law. it governs the way people can use, process and store personal data.
21 Section 9 of the Data Protection and Privacy Act, 2019.
22 Regulation 3, 13 and 14 of the Data Protection and Privacy Regulations, 2021.
23 Section 4 of the Data Protection and Privacy Act, 2019.

using is, it contains a reasonable amount of sensitive data.[24] Thus, a strong data protection policy is no longer a nice-to-have, it's a necessity.[25] Regularly updating software and applications is also crucial, as it helps protect against known vulnerabilities that can be exploited by malicious actors.[26] According to *Norton,* software updates help patch security flaws which would have otherwise paved way for hackers.[27] Personally identifiable information such as emails and bank account information is valuable to cyber criminals since they can use it to commit crimes in one's name or sell it to the dark web to enable others commit crimes.[28] Updates not only reinforce security but also add new features that advance the current ones.

Data privacy awareness and protection are paramount for digital citizens in today's digital landscape. Governments, organizations, and individuals must collaborate to create an environment where data privacy is respected and protected, ensuring a safer and more secure digital experience for all.

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24 Oliver Deighton (2021), Remote Learning Best Practices: The Importance of Protecting Data Privacy available at <https://elearningindustry.com/remote-learning-best-practices-importance-of-protecting-data-privacy> [Accessed 25th August, 2023]

25 ibid

26 Threat actors usually try to target the most sensitive information. In 2023, more than 52 percent of all data breach incidents in global organizations involved customer personal identifiable information (PII), thus making it the most frequently breached type of data. Roughly four in ten data breaches involved employee personal identifiable information. Furthermore, 76 percent of social engineering attacks resulted in the loss of credentials, with financial and insurance companies encountering the highest share of breached credentials; Ani Petrosyan (2023), Data Breaches Worldwide - Statistics & Facts available at <https://www.statista.com/topics/11610/data-breaches-worldwide/#topicOverview> [Accessed 29th January, 2024]

27 Elliotd (2019), 5 Reasons Why General Software Updates and Patches are Important. |available at <https://tekmanagement.com/5-reasons-why-general-software-updates-and-patches-are-important/> [Accessed 25th August 2023]

28 Norton (2021), The Importance of General Software Updates and Patches <https://asia.norton.com/blog/how-to/the-importance-of-general-software-updates-and-patches> [Accessed 25th August 2023]

3.0 ARTIFICIAL INTELLIGENCE (AI)

Artificial Intelligence is rapidly transforming various aspects of society, from healthcare to finance, education, and beyond. However, along with its potential benefits, AI brings forth a range of ethical considerations that demand thoughtful examination. This chapter delves into the ethical dimensions of AI, highlighting key concerns and the importance of responsible AI development.

3.1 TO WHAT DOES THE TERM 'ARTIFICIAL INTELLIGENCE' REFER?

Abbreviated as "AI", it generally refers to the intellect of machines or software, as opposed to the intelligence of humans or animals. The *Oxford Languages Dictionary* defines 'AI' as the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages. According to *TechTarget,* AI refers to the simulation of human intelligence processes by machines, especially computer systems.[29] According to *Copeland,* AI is the ability of a digital computer or computer-controlled robot to perform tasks with intelligent beings.[30] The term is frequently applied to the project of developing systems endowed with intellectual processes, and characteristics of humans such as the ability to reason, discover meaning, generalize, or learn from past experience.[31] Examples of applications or systems with artificial intelligence include speech recognition gears like Siri and Alexa, creative tools such as ChatGPT and AI Art, conversation simulators like Chatbot, recommendation systems as applied by Netflix, Amazon and YouTube to suggest movies or products, computer vision which includes self-driving cars, robotics, virtual assistants, language translation and smart home systems among others.

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29 Nick Barney, Sarah Lewis (2023), Artificial Intelligence (AI) Governance <https://www.techtarget.com/searchenterpriseai/definition/AI-governance > [Accessed 06th September 2023]

30 B.J. Copeland (2023), Artificial Intelligence <https://www.britannica.com/contributor/BJ-Copeland/4511> [Accessed 06th September 2023]

31 ibid

3.2 AI EDUCATION AND ETHICAL CONSIDERATIONS

The rise of AI has brought about a paradigm shift in the way societies operate, from business and industry to healthcare, education, and beyond. According to *Culican***,** as AI technologies continue to advance and become integral to various sectors, it is imperative that individuals are equipped with the knowledge and skills to navigate this AI-driven landscape.[32] In this respect, AI education is becoming increasingly essential in preparing individuals for a future deeply intertwined with AI. Promoting AI education with a strong emphasis on ethics is vital. Furthermore, learning about AI is no longer an optional interest – it is a necessity.[33] Courses and discussions on AI ethics can help individuals understand the ethical challenges posed by AI technologies and encourage them to consider the societal impact of AI development.

AI education offers several benefits. Firstly, it empowers individuals to understand the capabilities and limitations of AI systems. Importantly, AI education should be extended to all categories of people. For example, according to *Bojorquez & Martinez,* excluding students from AI Education contributes to the digital divide, increases the skills gap, brings about economic inequality and leads to loss of creativity and innovation among others.[34] To mitigate these dangers, it is essential to promote equitable access to AI Education for all students, regardless of their background or socioeconomic status.[35] This understanding is crucial for making informed decisions about AI adoption and for critically evaluating AI-generated outcomes.

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32 Jamie Culican (2023), Navigating the Future: The Imperative of AI Learning |available at <https://www.linkedin.com/pulse/navigating-future-imperative-ai-learning-jamie-culican> [Accessed 6th September, 2023]

33 Ibid

34 Hector Bojorquez, Michelle Martinez (2023), The Importance of Artificial Intelligence in Education for All Students available at <https://www.languagemagazine.com/2023/05/31/the-importance-of-artificial-intelligence-in-education-for-all-students/> [Accessed 21st October, 2023]

35 Ibid

Secondly, AI education nurtures a pool of professionals capable of developing, implementing, and maintaining AI technologies. As *Mohan* observes, AI in Education has become a hot topic because it changes how we learn quickly.[36] Technology has always played an important role in education, but its current use is more prevalent than ever, thanks to the increased availability of smart devices and web-based curriculum.[37] Additionally, AI Education is essential for driving innovation and ensuring the responsible development of AI applications. According to *Modi,* by embracing AI, educators can create dynamic and personalized learning environments, nurturing the next generation of innovative thinkers and problem solvers.[38] There is thus need to harness the full potential of Generative AI in education, empowering learners to embrace knowledge, curiosity, and creativity in their pursuit of excellence.[39]

However, AI education must be approached with a strong emphasis on ethical considerations. Ethical awareness and reasoning are crucial for individuals engaging with AI technologies to ensure that their applications are aligned with human values and societal well-being. Key ethical considerations in AI education include the following.

3.2.1 TRANSPARENCY AND ACCOUNTABILITY

One of the primary ethical considerations in AI revolves around transparency and accountability. As AI systems become more complex and sophisticated, they often operate as "black boxes," making it challenging to understand the reasoning behind their decisions. According to *Blackman & Ammanath,* transparency is an essential element of earning the trust of consumers and

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36 Prem Mohan (2021), Artificial Intelligence in Education available at <https://timesofindia.indiatimes.com/readersblog/newtech/artificial-intelligence-in-education-39512/> [Accessed 06th September, 2023]

37 Ibid

38 Dipen Modi (2023), Transforming Education: The Power of Generative AI in Fostering Innovative Learning <https://www.linkedin.com/pulse/transforming-education-power-generative-ai-fostering-innovative-modi> [Accessed 21st October, 2023]

39 Ibid

clients in any domain.[40] And when it comes to AI, transparency is not only about informing people when they are interacting with it, but also communicating with relevant stakeholders about why an AI solution was chosen, how it was designed and developed, on what grounds it was deployed, how it's monitored and updated, and the conditions under which it may be retired.[41] But most times, this is not done. According to *Deloitte,* this lack of transparency can have profound consequences, especially in critical domains like healthcare and criminal justice.[42] Ethical AI necessitates developers to create systems with explainable algorithms, enabling users and stakeholders to comprehend the basis for AI-generated outcomes. In this regard, AI education should emphasize the importance of transparency in AI systems. Individuals must understand the reasoning behind AI decisions and the implications of automated actions.[43] Moreover, ethical AI education should underscore the need for developers to be accountable for the outcomes of their creations.

3.2.2 HUMAN-MACHINE COLLABORATION.

Automation and job displacement pose ethical challenges as well. While AI has the potential to streamline processes and enhance productivity, it could also lead to job loss in certain sectors. Several people have expressed the constant fear and concern of losing jobs to AI. For example, according to the *OECD Employment Outlook,* AI is likely to significantly impact jobs.[44] Occupations in finance,

40 Reid Blackman and Beena Ammanath (2022), Building Transparency into AI Projects available at <https://hbr.org/2022/06/building-transparency-into-ai-projects> [Accessed 07th September, 2023]

41 Ibid

42 Deloitte (2019), Transparency and Responsibility in Artificial Intelligence: A call for Explainable AI available at <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/innovatie/deloitte-nl-innovation-bringing-transparency-and-ethics-into-ai.pdf> [Accessed 07th September, 2023]

43 Reid Blackman and Beena Ammanath (2022), Building Transparency into AI Projects available at <https://hbr.org/2022/06/building-transparency-into-ai-projects> [Accessed 07th September, 2023]

44 OECD Employment Outlook 2023: AI and Jobs, an Urgent Need to Act available at <https://www.sharing4good.org/article/oecd-employment-outlook-2023-artificial-intelligence-and-jobs-urgent-need-act> [Accessed on 17th October, 2023]

medicine and legal activities which often require many years of education, and whose core functions rely on accumulated experience to reach decisions, may suddenly find themselves at risk of automation from AI.[45] As of 2022, it was forecasted that 2.3 million jobs will be created and 1.8 million eliminated by AI.[46] In regards to the legal profession, *Patrice* denotes that attorneys won't lose their jobs to AI, they'll lose their jobs to other attorneys who use AI.[47] Ethical AI development involves ensuring that the benefits of automation are coupled with re-skilling and up-skilling initiatives to mitigate the negative impact on the workforce. AI does not only impact the professional fields but other sectors as well. For example, musicians like Nicki Minaj, while commenting on……, have expressed their concern towards the same, thus-

"*if they can add your [favourite] artist on a song [without] paying that artist, without publishing, then that's what they'll do."*[48]

Ethical AI education should highlight the concept of human-machine collaboration rather than replacement. Because, as *Wilson & Daugherty* observe, while AI will radically alter how work gets done and who does it, the technology's larger impact will be in complementing and augmenting human capabilities, not replacing them.[49] Human-machine collaboration brings human and artificial

45 Ibid

46 Bergur Thormundsson (2022), The number of jobs created and eliminated due to artificial intelligence (AI) worldwide in 2022 available at <https://www.statista.com/statistics/791992/worldwide-jobs-creation-elimination> [Accessed on 31st January, 2024]

47 Joe Patrice (2023), Lawyers at High Risk of Losing Jobs to Artificial Intelligence Concludes OECD Based On… Nothing But Vibes |available at <https://abovethelaw.com/2023/07/lawyers-high-risk-losing-jobs-artificial-intelligence/> [Accessed on 17th October, 2023]

48 Ivan Korrs (2023), Nicki Minaj Discourages Barbz to Share AI-Generated Songs on social media available at <https://www.musictimes.com/amp/articles/95596/20230828/nicki-minaj-discourages-barbz-share-ai-generated-songs-social-media.htm> Also, <https://x.com/nickiminaj/status/1695945715711942980?s=48&t=acbHMKoThd4JkyhGM20CXw> [Accessed 10th September 2023]

49 H. James Wilson and Paul R. Daugherty (2018), Collaborative Intelligence: Humas and AI Are Joining Forces available at <https://hbsp.harvard.edu/product/R1804J-PDF-ENG> [Accessed 10th September, 2023]

intelligence together to deliver more valuable insights than either could alone.[50] Emphasizing the strengths of both human and AI systems and exploring their synergies encourages responsible and ethical AI adoption.

3.2.3 SAFETY AND GOVERNANCE.

Generally, AI Governance aims to close the gap that exists between accountability and ethics in technological advancement. According to *Barney & Lewis,* artificial intelligence governance refers to the legal framework for ensuring AI and machine learning technologies are researched and developed with the goal of helping humanity navigate the adoption and use of these systems in ethical and responsible ways.[51] But then again, safety and the potential for AI to cause harm are paramount ethical concerns. Autonomous systems, like self-driving cars and drones, raise questions about their decision-making in scenarios where human lives are at stake. According to *Kompella***,** safety managers and teams can benefit from AI-driven digital transformation, much like their counterparts in finance and marketing departments.[52] Ethical AI requires careful consideration of risk management and the establishment of fail-safe mechanisms to prevent catastrophic outcomes. The companies developing these pioneering technologies have a profound obligation to behave responsibly and ensure their products are safe before introducing them to the public, a duty to build systems that put safety first and to do right by the public and earn people's trust.[53] According to *D'Agostin***,** when it comes to providing a safe, supportive workplace for everyone, AI is an increasingly capable tool that

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50 Decoder: Human-machine Collaboration available at <https://www.thoughtworks.com/insights/decoder/h/human-machine-collaboration> [Accessed 10th September, 2023]

51 Nick Barney, Sarah Lewis (2023), Artificial Intelligence (AI) Governance available at <https://www.techtarget.com/searchenterpriseai/definition/AI-governance> [Accessed 10th September, 2023]

52 Kashyap Kompella (2023), How AI can Transform Industrial Safety available at <https://www.techtarget.com/searchenterpriseai/tip/How-AI-can-transform-industrial-safety> [Accessed 19th October, 2023]

53 Ensuring Safe, Secure, and Trustworthy AI available at <https://www.whitehouse.gov/wp-content/uploads/2023/07/Ensuring-Safe-Secure-and-Trustworthy-AI.pdf> [Accessed 10th October, 2023]

enhances physical safety at a critical time.[54] This is because when AI takes on repetitive or dangerous tasks, it frees up human labour to carry out work that we are better equipped for – tasks involving aspects of creativity and empathy. Educating individuals about the safety of AI systems and the need for regulatory frameworks is essential. Ethical AI education should emphasize the importance of designing AI systems with built-in safety measures and adhering to ethical guidelines and regulations.

3.2.4 BIAS AND FAIRNESS.

Bias and fairness are also crucial ethical facets of AI. Machine learning algorithms learn from historical data, which may carry biases present in society. As *Pagano et al* observe, when these biases are encoded into AI systems, they can perpetuate discrimination and reinforce existing inequalities.[55] Ethical AI demands that developers actively identify and mitigate bias in training data and algorithms, ensuring that AI systems provide fair and equitable outcomes for all users, regardless of their background.[56] According to *Manyika et al,* the problem of bias associated with AI is not entirely new.[57] Back in 1988, the *UK Commission for Racial Equality* found a British medical school guilty of discrimination as the computer program they used to determine which of its applicants would be invited for interviews was found to be biased against women and those with European names.[58] Thirty years later, algorithms have grown considerably more

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54 Tina D'Agostin (2021), Four Ways Artificial Intelligence Is Enhancing Physical Safety in the Workplace available at <https://www.forbes.com/sites/forbestechcouncil/2021/10/28/four-ways-artificial-intelligence-is-enhancing-physical-safety-in-the-workplace/amp/> [Accessed 18th September, 2023]

55 T.P. Pagano (2023), Bias and Unfairness in Machine Learning Models: A Systematic Review on Datasets, Tools, Fairness Metrics, and Identification and Mitigation Methods. <https://www.mdpi.com/2504-2289/7/1/15> [Accessed 18th September, 2023]

56 ibid

57 James Manyika, Jake Silberg, and Brittany Presten (2019), What Do We Do About the Biases in AI? available at <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in> [Accessed 18th September, 2023]

58 Government of the UK, Independent Report (2020), Review into Bias in Algorithmic Decision Making. available at <https://assets.publishing.service.gov.uk/media/5fbfbd0de90e077ee2eadc53/Summary

complex, but we continue to face the same challenge.[59] Addressing bias in AI algorithms is an ethical imperative. AI education should educate learners about the potential for bias in AI systems and the measures to identify, mitigate, and prevent biased outcomes because understanding fairness and its significance in AI is essential for promoting equitable solutions.

3.2.5 PRIVACY AND DATA ETHICS

Privacy is another significant concern in the era of AI. The extensive collection and analysis of personal data to train AI models can infringe upon individuals' privacy rights. As *Kerry* observes, the evolution of artificial intelligence magnifies the ability to use personal information in ways that can intrude on privacy interests by raising the analysis of personal information to new levels of power and speed.[60] The challenge for the state is to pass privacy legislation that protects individuals against any adverse effects from the use of personal information in AI, but without unduly restricting AI development or ensnaring privacy legislation in complex social and political thickets.[61] Striking a balance between data utilization for AI advancements and preserving individuals' privacy rights is an ethical imperative. According to *Zia***,** this means finding ways to utilize data while respecting privacy rights, obtaining consent, and implementing measures to protect personal information. Clear data usage policies, robust encryption methods, and the principle of data minimization must guide the ethical deployment of AI technologies. As *Khan* opines, although the reliance on large amounts of data can compromise individuals' privacy, looking back at the history of AI, we see its potential to shape our future and enhance intelligence

_Slide_Deck_-_CDEI_review_into_bias_in_algorithmic_decision-making.pdf> [Accessed 18th September, 2023]

59 James Manyika, Jake Silberg, and Brittany Presten (2019), What Do We Do About the Biases in AI? available at <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-> [Accessed 18th September, 2023]

60 Cameron F. Kerry (2020), Protecting Privacy in an AI-Driven World available at <https://www.brookings.edu/articles/protecting-privacy-in-an-ai-driven-world/> [Accessed 18th September, 2023]

61 ibid

in machines.[62] AI education must educate individuals about the ethical use of personal data. Learners should understand the implications of data collection, storage, and sharing by AI systems, and the importance of respecting individuals' privacy rights.

3.2.6 ACCOUNTING FOR SOCIAL IMPACT.

Ethical AI also encompasses the broader impact of AI on society. This includes issues related to unemployment, the concentration of power among AI developers and corporations, and the potential erosion of human agency as AI systems influence decision-making processes. As *Sen* observes, AI has become one of the most transformative technologies of the 21st century, impacting every aspect of our lives, from the way we work and learn to the way we communicate and interact with one another.[63] However as *Cheng-Tek Tai* denotes, despite the many benefits of AI, there are also concerns about its impact on society.[64] With regard to whether AI will become a menace to society, *Duggal* points out that it is important to remember that AI is only as good as the person who uses it, it is not a job killer but a job transformer.[65] In reality, most of us encounter AI in one way or another, almost every single day of our lives.[66] From the moment one wakes up to check one's smartphone to watching another Netflix recommended

62 Minhas Majeed Khan (2023), Striking a Balance: Navigating the Advantages and Disadvantages of AI in Academia <https://www.linkedin.com/pulse/striking-balance-navigating-advantages-disadvantages-ai-phd> [Accessed 19th October, 2023]

63 Amarjit Sen (2023), The Impact of Artificial Intelligence on Society: Opportunities, Challenges, and Ethical Considerations available at <https://www.linkedin.com/pulse/impact-artificial-intelligence-society-opportunities-challenges-sen> [Accessed 19th October, 2023]

64 Michael Cheng-Tek Tai (2020), The Impact of Artificial Intelligence on Human Society and Bioethics <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7605294/> [Accessed 16th September, 2023]

65 Nikita Duggal (2023), Advantages and Disadvantages of Artificial Intelligence [AI] available at <https://www.simplilearn.com/advantages-and-disadvantages-of-artificial-intelligence-article> [Accessed 19th October, 2023]

66 ibid

movie, AI has quickly made its way into our daily lives.[67] Thus, as *Sen* further observes, the impact of AI on society is both exciting and challenging. It has the potential to transform the way we work, communicate, and interact with technology, but it also raises concerns about the displacement of jobs, bias and discrimination and the potential for misuse or abuse. AI education should encourage learners to consider the broader societal impact of AI applications. This involves critically evaluating the potential consequences of AI on employment, economic inequality, and human rights.

As AI continues to reshape the world, ethical considerations must remain at the forefront of its development and deployment. Transparency, fairness, privacy protection, and accountability are foundational principles that must guide AI innovation. Striking a balance between technological advancement and ethical responsibility ensures that AI systems contribute positively to society while upholding fundamental human values.

4.0 DIGITAL LITERACY AND BUILDING A PRIVACY-CONSCIOUS AI CULTURE: ROLE OF STAKEHOLDERS.

Promoting digital literacy, data privacy awareness, and AI education requires a collaborative effort involving government agencies, education institutions, and civil society organizations. There are distinct roles that each of these stakeholders plays in equipping individuals with the skills and knowledge necessary to navigate the complexities of the digital age.

4.1 GOVERNMENT AGENCIES.

Government agencies play a crucial role in setting the regulatory framework and policies that shape digital literacy, data privacy, and AI education. They establish

[67] Nikita Duggal (2023), Advantages and Disadvantages of Artificial Intelligence [AI] available at <https://www.simplilearn.com/advantages-and-disadvantages-of-artificial-intelligence-article> [Accessed 19th October, 2023]

guidelines for data protection, define ethical standards for AI development, and allocate resources for educational initiatives. Government intervention ensures a consistent and standardized approach to digital education and privacy protection. By creating laws such as the Data Protection and Privacy Act (2019)[68] and the Data Protection and Privacy Regulations (2021),[69] governments promote a culture of privacy and accountability.[70] The main regulator for data protection in Uganda is the Personal Data Protection Office ('the PDPO') under the National Information Technology Authority (NITA-U) which is responsible for overseeing the implementation and enforcement of the Act.[71] These government agencies can provide funding for educational programs, establish certification standards for AI professionals, and facilitate partnerships between different stakeholders to enhance digital literacy efforts.

4.2 EDUCATION INSTITUTIONS.

Education institutions are at the forefront of imparting digital literacy, data privacy awareness, and AI education to learners of all ages. As *Angoda* observes, universities and schools, together with local governments, and NGOs must be able to uphold and adhere to requirements specified in the *Data Protection and Privacy Act, 2019.*[72] Furthermore, learning institutions should design curricula that integrate these essential topics into various subjects, preparing students to engage responsibly in the digital world. According to *Akgun and Greenhow*, education institutions teach students how to use technology safely, evaluate

68 The Data Protection and Privacy Act (2019) mirrors the European Union GDPR of 2016.

69 The Data Protection and Privacy Regulations (2021) were published by the Minister of Information Communication and Technology (ICT) and National Guidance on March 12, 2021.

70 The Act and the Regulations are intended to support the implementation of the right to privacy guaranteed to every person under Article 27 of the 1995 Constitution of the Republic of Uganda and further, to complement sectoral laws for regulated activities that had previously incorporated data provisions.

71 Section 4 of the Data Protection and Privacy Act (2019); Regulation 3 of the Data Protection and Privacy Regulations (2021).

72 Emmanuel Angonda (2022), Universities, Schools Should Always Ensure Data Privacy. | available at <https://www.monitor.co.ug/uganda/oped/letters/universities-schools-should-always-ensure-data-privacy--3747548> [Accessed 16th September, 2023]

online information critically, and navigate AI technologies ethically.[73] They can offer specialized courses on data privacy, cybersecurity, and AI ethics to provide in-depth knowledge to interested learners.[74] By incorporating hands-on projects and real-world scenarios, education institutions ensure that learners can apply their knowledge practically,[75] and contribute to research that advances AI understanding and addresses ethical concerns.

4.3 CIVIL SOCIETY ORGANIZATIONS.

Civil society organizations play a pivotal role in raising awareness, advocating for policy changes, and mobilizing communities to participate in digital literacy, data privacy, and AI education initiatives. As *Espey* observes, they often bridge the gap between government policies and public understanding by providing accessible resources, workshops, and awareness campaigns.[76] They serve a range of very diverse functions for example; they may act as watchdogs holding governments and other public and private actors accountable,[77] for instance The Unwanted Witness released the Privacy Scorecard Report in 2022 which evaluated 32 companies in Uganda to determine their compliance with Uganda's Data Protection and Privacy Act of 2019.[78] Civil society organizations raise awareness about the importance of digital literacy and the risks associated with

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73 Selin Akgun and Christine Greenhow (2022), Artificial Intelligence in Education: Addressing Ethical Challenges in K-12 Settings available at <https://pubmed.ncbi.nlm.nih.gov/34790956/> [Accessed 16th September, 2023]

74 ibid

75 UNESCO (2022), Minding the Data: Protecting Learners' Privacy and Security available at <https://unesdoc.unesco.org/ark:/48223/pf0000381494> [Accessed 16th September,2023]

76 Jessica Espey (2018), The Role and Impact of Civil Society in Supporting Sustainable Development and Tackling Humanitarian Challenges available at <https://globalperspectives.org/en/publications/gp-policy-paper-aurora-dialogues-berlin-2018/> [Accessed 16th September, 2023]

77 Ibid

78 The Unwanted Witness is a civil society organization aimed at raising awareness about the risks associated with the processing of personal data online and offline. It has released the Privacy Scorecard Reports as a tool to assess privacy practices of companies and organizations available at <https://www.unwantedwitness.org/privacy-scorecard-2/> [Accessed 16th September, 2023]

inadequate data protection. As *Davies* opines, they also promote the ethical development and deployment of AI technologies by organizing forums, discussions, and debates on AI ethics.[79] Conversely, governments and the tech industry need to recognize that engaging with civil society when it comes to the AI debate is not merely a nice added extra, but an absolute necessity.[80] Lastly, through collaboration with schools, community centres, and online platforms, these organizations ensure that digital literacy reaches underserved populations and vulnerable groups.

In a harmonious collaboration, these stakeholders strengthen the impact of their efforts, which is to say;

- Government agencies establish legal frameworks that guide education institutions and civil society organizations in promoting digital literacy, data privacy, and AI education.
- Education institutions implement government guidelines by integrating digital literacy, data privacy, and AI education into their curricula.
- Civil society organizations act as intermediaries, disseminating knowledge, advocating for ethical practices, and mobilizing individuals to engage with digital literacy and privacy initiatives.

Together, these stakeholders create a comprehensive ecosystem that empowers individuals with the skills and understanding needed to navigate the digital landscape responsibly. As technology continues to evolve, their collaborative efforts will be essential in ensuring that individuals can thrive in a digital world while safeguarding their privacy and ethical principles.

79 Rhodri Davies (2018), Sorting Algorithms: Civil Society's Role in Ensuring AI is Fair, Accountable, and Transparent available at <https://digitalimpact.io/sorting-algorithms-the-role-of-civil-society/> [Accessed 16th September, 2023]

80 Ibid

5.0 CHALLENGES AND POTENTIAL FUTURE OUTLOOK FOR DIGITAL LITERACY IN UGANDA.

Implementing comprehensive digital literacy programs that cover data privacy and AI understanding in Uganda presents a unique set of challenges and holds promising future prospects. This chapter examines these challenges and the potential outlook for digital literacy initiatives in the Ugandan context.

5.1 CHALLENGES

5.1.1 ACCESS TO TECHNOLOGY AND INTERNET CONNECTIVITY

One of the primary challenges in Uganda is the digital divide, where access to technology and reliable internet connectivity is unevenly distributed. It is thus not surprising that digital connectivity is one of the four pillars of the recently launched G7 *Partnership for Global Infrastructure and Investment (PGII).*[81] In 2020, a UN Report revealed that 87% of the populations in developed countries have access to the internet whereas only 19% of the populations in developing countries had access.[82] In 2021, the *GSMA*[83] estimated Uganda's smartphone adoption at 16% and the mobile phone penetration at 49%.[84] The National IT Survey 2022 Report revealed that the proportion of households in rural areas using smartphones is 13%, much less than that of urban households at 31%.[85]

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81 Danielle Nelson (2022), Digital Connectivity: The Benefits of Inclusive Internet Access available at <https://www.usglc.org/blog/digital-connectivity-the-benefits-of-inclusive-internet-access/> [Accessed 16th September, 2023]

82 United Nations Department of Economic and Social Affairs, World Social Report 2020: Inequality in a Rapidly Changing World available at <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/02/World-Social-Report2020-FullReport.pdf> [Accessed 14th September, 2023]

83 GSMA, also known as the GSM Association, Global System for Mobile Communications is a non-profit industry organization that represents the interests of mobile network operators available at <https://www.gsma.com> [Accessed 14th September, 2023]

84 Frankline Kibuacha (2021), Mobile Penetration in Uganda, <https://www.geopoll.com/blog/mobile-penetration-uganda/> [Accessed 15th September, 2023]

85 National IT Survey 2022 Report available at <https://www.nita.go.ug/sites/default/files/2022.pdf> [Accessed 15th September, 2023]

Digital infrastructure, including reliable internet connectivity and telecommunication networks, therefore, serves as the backbone of modern economies. According to *Rossotto & Nedayvoda,* new technologies are transforming infrastructure sectors such as transport, energy and mining.[86] Technological innovations have impacted every aspect of life, from the global economy to humanitarian assistance. As *Nelson* observes, a lack of digital inclusion exacerbates existing inequities in already-marginalized groups of people such as the poor, women, youth, and people with disabilities.[87] Without internet connectivity and access to the internet in today's world, people are essentially handicapped for they can only lag behind in everything they do.

5.1.2 LIMITED RESOURCES AND INFRASTRUCTURE.

Uganda's educational system faces resource constraints that affect the availability of up-to-date technology, software, and learning materials required for comprehensive digital literacy initiatives. As a developing country, Uganda obviously faces several financial constraints which impact digital development negatively for instance, insufficient funding and inadequate infrastructure, as prone in most of Uganda's rural areas hinders the effective implementation of digital literacy programs. In the 2022/2023 Financial Year, the Uganda National Budget allocated only 83.1b shillings to digital transformation, and 20.73b shillings to innovation technology, out of the 48.1 trillion shillings total national budget.[88] According to *Franklin Templeton***,** digital transformation is at an unprecedented point as global consumers continue to embrace new commerce tools and to increasingly prefer digitally augmented experiences even post

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86 Carlo Maria Rossotto & Anastasia Nedayvoda (2021), Digitizing Infrastructure: Technologies and Models to foster transformation available at <https://blogs.worldbank.org/digital-development/digitizing-infrastructure-technologies-and-models-foster-transformation> [Accessed 17th September, 2023]

87 Danielle Nelson (2022), Digital Connectivity: The Benefits of Inclusive Internet Access available at <https://www.usglc.org/blog/digital-connectivity-the-benefits-of-inclusive-internet-access/> [Accessed 17th September, 2023]

88 Finance Minister to read Sh. 48.1 trillion Budget available at <https://www.newvision.co.ug/category/news/finance-minister-to-read-sh481-trillion-budge-NV_136165> [Accessed 18th September, 2023]

COVID.[89] Thus, limited resources and infrastructure pose a significant danger to digital literacy, hindering access to vital online information and education. This is because without adequate tools, internet connectivity, and training, individuals and communities can become marginalized in an increasingly digital world.

5.1.3 AWARENESS AND UNDERSTANDING.

A significant portion of the population may lack awareness of the importance of digital literacy, data privacy, and AI understanding. Creating awareness and conveying the benefits of these programs to individuals in urban and rural areas is a challenge that requires tailored communication strategies. A 2021 survey by the *Uganda Bureau of Statistics (UBOS)* indicates that a staggering 88% of Ugandans have never used the internet, and for those that use the internet, only 7% use it on a daily basis.[90] When it comes to mobile phone usage, 49% of Ugandans use their own phone while 39% rely on other mediums as their source of communication and acquiring information.[91] According to *Reynolds*, the understanding of the concept of digital literacy has to go through long-term development and its current appearance is characterized by complexity and technology skills but also cognitive and attitudinal components of behaviour.[92] Bridging this digital divide is essential for equitable access to information, education, and economic empowerment.

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89 Franklin Templeton (2023), Why Technology available at <https://www.franklintempleton.com.sg/campaigns/investing-in-technology-and-innovation> [Accessed 18th September, 2023]

90 Uganda Bureau of Statistics (UBOS) National Labour Force Survey 2021 available at <https://www.ubos.org/wpcontent/uploads/publications/11_2022NLFS_2021_main_report.pdf> [Accessed 24th September, 2023]

91 UNDP (2022) The Challenges of Digital Public Infrastructure in Uganda available at <https://www.undp.org/uganda/blog/challenges-digital-public-infrastructure-uganda> [Accessed 24th September, 2023]

92 Reynolds, R. (2016), Defining, designing for, and measuring "social constructivist digital literacy" development in learners: a proposed framework. *Education Tech Research Dev.* Doi:10.1007/s11423-015-9423-4 available at <https://link.springer.com/article/10.1007/s11423-015-9423-4> [Accessed 25th September, 2023]

5.1.4 LANGUAGE AND CULTURAL DIVERSITY.

Uganda's linguistic and cultural diversity poses a challenge for designing digital literacy content that is accessible and relevant to various regions and communities. There are over 56 tribes in Uganda.[93] Almost all these tribes speak different languages and have different cultural practices. As *Button* observes, among the most noticeable disadvantages of cultural diversity include language barriers, social tension, and civic disengagement. Language barriers can hinder the effectiveness of educational materials and initiatives whereas social tension hinders awareness and community engagement. Language barriers also hinder communication, comprehension, and adaptation of new technologies. *Grazzi* denotes that the fact that 80% of online content is in English constitutes an important barrier to ICT diffusion in developing countries for several reasons.[94] First, the use of indigenous languages may be widely spread among the population; second, the information content on the Web and in software are not readily available in local languages. However, these are not reasons to avoid diversity but rather, factors to keep in mind as society heads towards a more diverse future.

5.1.5 TEACHER TRAINING AND CAPACITY BUILDING.

To implement digital literacy programs effectively, educators need adequate training to teach data privacy and AI concepts. Capacity building is the process by which individuals and organizations obtain, improve, and retain the skills, knowledge, tools, equipment and other resources needed to do their jobs

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93 The People, Settlements and Tribes in Uganda available at <https://www.gorillatrips.net/people-settlements-tribes-uganda/> [Accessed 25th September, 2023]

94 Matteo Grazzi (2012), ICT in Developing Countries: Are Language Barriers Relevant? Evidence from Paraguay. Available at <https://www.sciencedirect.com/science/article/abs/pii/S0167624511000448> [Accessed 25th September, 2023]

competently or to a greater capacity.[95] According to *OECD***,** as education systems increasingly respond to new societal, economic and digital needs, implementation of policies takes on new importance.[96] A key element of successful implementation of policy reform is ensuring that local stakeholders have sufficient capacity to meet this challenge and in particular, they need adequate knowledge of educational policy goals and consequences, the ownership and willingness to make change, and the tools to implement the reform as planned.[97] Thus, the lack of teacher training and capacity building in Uganda greatly hinders the promotion of digital literacy as educators struggle to integrate technology into their teaching methods since they are not equipped to teach critical digital literacy skills.

5.2 FUTURE OUTLOOK: MEASURES FOR EMPOWERING DIGITAL CITIZENS IN UGANDA.

Promoting digital literacy, data privacy awareness, and AI education requires a multifaceted approach involving education institutions, government agencies, civil society organizations, and industries. Nevertheless, several measures can be implemented through which individuals can become empowered digital citizens who can navigate the digital world responsibly, protect their data, and engage with AI technologies ethically.

5.2.1 GOVERNMENT SUPPORT AND POLICY INITIATIVES.

The Ugandan government's commitment to digital transformation can pave the way for comprehensive digital literacy programs. Government regulations and

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95 Kumari, Sujata. (2022). Teacher's Views on Training and Capacity Building in Education. International Journal of Advanced Research in Science, Communication and Technology. 279-285. 10.48175/IJARSCT-2545 available at <https://www.researchgate.net/publication/358628143_Teacher%27s_Views_on_Training_and_Capacity_Building_in_Education> [Accessed 10th January, 2023]

96 Burns, T and F. Gottschalk (2019), Educating 21st Century Children: Emotional Wellbeing in the Digital Age, Educational Research and Innovation, OECD Publishing, available at <https://doi.org/10.1787/b7f33425-en> [Accessed 25th September, 2023]

97 Ibid.

policies play a significant role in promoting digital literacy, data privacy, and AI education. Authorities can establish standards for data protection, mandate the inclusion of these subjects in education curricula, allocate resources for infrastructure development, and support initiatives that enhance public awareness. In principle, Uganda is well grounded when it comes to the enabling regulatory framework to allow digitization to thrive however, the challenge is implementation.[98] These include the *Electronic Transactions Act, 2011*; the *National Information Technology Authority, Uganda Act, 2009*; the *Data Protection and Privacy Act, 2019* and the *Data Protection and Privacy Regulations, 2021*.

Additionally, the Ministry of ICT and National Guidance has designed the Digital Uganda Vision, a National Policy and Strategic Framework that reviews, integrates and improves existing ICT strategies, policies and plans into one overarching vision for Uganda.[99] This policy is aligned with the country's *National Development Plan (NDP III)* as well as the Uganda Vision 2040.[100] This goes to show that there are a number of regulations and policies in place however, there is thus dire need to promote implementation and adherence to the existing data protection regulations because their enforcement is paramount in building a privacy-conscious AI culture.

5.2.2 PARTNERSHIPS AND COLLABORATIONS.

Fostering a digital-literate Uganda requires collaboration between government agencies, non-profit organizations, private sector entities, and international organizations which can pool resources and expertise to address the challenges of digital literacy programs. As *Birch* observes, during the pandemic,

98 UNDP (2022) The Challenges of Digital Public Infrastructure in Uganda available at <https://www.undp.org/uganda/blog/challenges-digital-public-infrastructure-uganda> [Accessed 28th September, 2023]

99 Ministry of ICT and National Guidance, Digital Uganda Vision available at <https://ict.go.ug/initiatives/digital-uganda-vision/> [Accessed 28th September, 2023]

100 UNDP (2022) The Challenges of Digital Public Infrastructure in Uganda available at <https://www.undp.org/uganda/blog/challenges-digital-public-infrastructure-uganda> [Accessed 28th September, 2023]

collaboration became centre stage as companies scrambled to communicate and get work done fully in a remote environment.[101] According to *Follin,* in this era, every business is a digital business and, every function and role within the business is now touched by varying levels of digital technology, which is why collaborative partnerships between technology and business teams need to become the norm.[102] Such partnerships can lead to the development of localized content, technology solutions, and capacity-building initiatives and additionally, result in the development of educational materials, workshops, seminars, and community outreach programs. Through collaboration, best practices can be shared, innovative approaches developed, and a broader range of beneficiaries reached. By working together, stakeholders can create more comprehensive, accessible, and sustainable digital literacy programs that empower individuals with the skills and knowledge needed to thrive in the digital age.

5.2.3 MOBILE TECHNOLOGY AND INNOVATION.

The increased use of mobile phones in Uganda offers an avenue for delivering digital literacy content and educational resources. As *Cohen* observes, mobile technology has transformed the way communication and collaboration happen in different fields and sectors.[103] A survey by the Uganda Communications Commission has revealed that as of March 2022, there were 30.6 million mobile phone subscriptions and over 4300 base station sites in the country.[104] The

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101 Martin Birch (2021), The Importance of Considering Collaboration During Digital Transformation available at <https://www.forbes.com/sites/forbesbusinesscouncil/2023/02/10/the-importance-of-considering-collaboration-during-digital-transformation/> [Accessed 03rd October, 2023]

102 Sandy Follin (2022), Transformation Requires Collaborative Partnerships between IT and Business available at <https://www.linkedin.com/pulse/transformation-requires-collaborative> [Accessed 03rd October, 2023]

103 Derek Cohen (2023), The Societal and Business Importance of Mobile Technology Today available at <https://www.topdevelopers.co/blog/importance-of-mobile-technology/> [Accessed 04th October, 2023]

104 The National Survey on Conformity of Telecommunications Base Stations in Uganda to ICNIRP Guidelines and ITU Standards available at <https://www.ucc.co.ug/wp-content/uploads/2022/09/National-EMF-survey-August-2022.pdf> [Accessed 04th October, 2023]

technology enables quicker and more accurate communication beyond geographical boundaries, in all time zones, and organizational hierarchies.[105] Mobile technology also facilitates access to crucial information, potential services, and enormous opportunities to improve the quality and productivity of various domains and sectors including healthcare, learning and education, finance and banking, and governance.

According to *Macwan*, mobile technology was a mystery two decades ago but now, it has become something of a necessity in both rural and urban areas.[106] On the other hand, innovation creates new ideas that lead to the discovery of new ways to get things done in society. According to *Kylliainen*, the ability to resolve critical problems depends on new innovations and developing countries need it more than ever.[107] Without innovation, there is nothing new and without anything new, there is no progress. Leveraging mobile technology and innovation for learning platforms and applications can help reach a broader audience, including those with limited access to traditional computers, thereby promoting digital literacy.

5.2.4 COMMUNITY ENGAGEMENT AND AWARENESS CAMPAIGNS.

Community engagement and awareness campaigns play a significant role in educating individuals about the importance of digital literacy, data privacy, and AI ethics. These campaigns can be run by government agencies, civil society organizations, and educational institutions, for example, by engaging community leaders, local influencers, organizations, and using a variety of media

105 Derek Cohen (2023), The Societal and Business Importance of Mobile Technology Today available at <https://www.topdevelopers.co/blog/importance-of-mobile-technology/> [Accessed 04th October, 2023]

106 Urvish Macwan (2017), Mobile Technology, Its Importance, Present and Future Trends available at <https://www.finextra.com/blogposting/14000/mobile-technology-its-importance-present-and-future-trends> [Accessed 04th October, 2023]

107 Julia Kylliainen (2019), The Importance of Innovation – What Does it Mean for Businesses and our Society? available at <https://www.viima.com/blog/importance-of-innovation?hs_amp=true> [Accessed 04th October, 2023]

channels to reach a wide audience. As *Babani* observes, due to the influence of COVID, people are more digitally active around the country and this makes it all the more crucial to see how literate they are digitally and helps them evaluate the information online with the help of these resources.[108] According to *Tanner*, the past decade has seen huge technological leaps for mankind, which we have adapted at an incredible pace.[109] Many of the digital tools we now consider standard were only invented in the past 20 years, and the progressions seem to be unending.[110] Imperatively, encouraging participants to spread awareness within their communities may cause a ripple effect thereby extending the impact of the digital literacy initiatives.

5.2.5 ADAPTATION OF CONTENT.

Creating culturally relevant content in multiple languages can address language and cultural diversity challenges. Uganda appears on the *UN List of Least Developed Countries (LDCs),*[111] and still faces a large digital divide gap. Localizing educational materials ensures that they resonate with the diverse population in Uganda. As *Tanner* denotes, if the sheer pace of digital evolution wasn't enough for us to frequently refine our technological skills, the fact that the world now essentially relies on digital platforms to keep spinning should be.[112]

The speed at which technology is currently progressing forces us to regularly learn new digital skills and techniques however, an awareness of the digital world

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108 Vinay Babani (2021), Avoid an Infodemic available at <https://www.thehindu.com/education/why-awareness-of-digital> [Accessed 07th October, 2023]

109 Charli Tanner (2022), Digital Awareness – An Essential of Today's Increasingly Interconnected World available at <https://www.ranky.co/growth-hacking-and-inbound-marketing-blog/digital-awareness-an-essential-of-todays-increasingly-interconnected> [Accessed 07th October, 2023]

110 Ibid.

111 UNCDP, List of LDCs, Reviewed every three years. <https://unctad.org/topic/least-developed-countries/list> [Accessed 07th October, 2023]

112 Charli Tanner (2022), Digital Awareness – An Essential of Today's Increasingly Interconnected World <https://www.ranky.co/growth-hacking-and-inbound-marketing-blog/digital-awareness-an-essential-of-todays-increasingly-interconnected-world> [Accessed 07th October, 2023]

can provide much more than just a sense of keeping up.[113] According to *Nzomo & Mambo***,** adaptation of technology has received a significant attention in various international dialogues on economic development issues largely due to the gradual understanding of the vital role of industry in economic growth and the recognition of the role of technology in the process of industrial development.[114] As technology continually evolves, individuals must adapt to new digital environments, tools, and trends to stay informed and engaged. Being efficient in adapting to new digital tools and platforms empowers individuals to navigate the digital landscape with confidence and keep up with the ever-changing digital world.

5.2.6 LIFELONG LEARNING APPROACH.

The rapidly evolving nature of technology requires that education on digital literacy, data privacy, and AI is an ongoing process. Offering continuous learning opportunities, such as webinars, conferences, and online courses, ensures that individuals stay updated with the latest developments and best practices. Adopting a lifelong learning approach can accommodate individuals of all ages and backgrounds, recognizing that digital literacy is an ongoing process, thereby bridging the digital-divide gap. According to *Baharuddin,* dealing with the rise of technology requires people to be encouraged and ready to obtain lifelong knowledge and skills in the learning environment.[115] This is because, as *Babani* observes, digital literacy is becoming increasingly significant to distinguish between fact and fiction however, it cannot be taught through traditional means

113 Ibid.

114 Nzomo, M.M. Mambo, Shadrack Maina (2013) Adaptation of technology available at <https://ir-library.ku.ac.ke/handle/123456789/12536?locale-attribute=en> [Accessed 11th October, 2023]

115 Mohammed Fazli Baharuddin (2016), Digital Literacy Awareness among Students available at <https://www.researchgate.net/publication/309506225_Digital_Literacy_Awareness_among_Students> [Accessed 11th October, 2023]

of learning and thus, people should carry on self-learning.[116] Exploring content by them will promote finding the authentic content that is lost behind misinformation. As already discussed, digital literacy is not just about mastering how to use existing literacy, Ugandans must learn the ability to adapt and adjust as technology advances by embracing and effectively utilizing technology tools and platforms so as to develop digital literacy skills.

5.2.7 ADOPTING A TAILORED CURRICULUM.

One of the most effective measures for promoting digital literacy, data privacy, and AI education is integrating these topics into formal education curricula in a tailored manner. This simply means that these are customized to meet the specific needs, interests, and goals of an individual student considering their individual strengths, weaknesses, and learning preferences. By doing so, students can develop essential skills early on, enabling them to become informed and responsible digital citizens. According to the *Lcom Team,* to build a digital literacy program that is both equitable and effective requires developing a comprehensive scope and sequence for the curriculum.[117]

A digital literacy curriculum must be vertically aligned to reflect when skills will be introduced and how they will expand and develop so that students are prepared to meet expectations in relevant grade levels.[118] As *Kleem* observes, digital initiatives allow learning to be more easily tailored to the specific needs and learning paths of students and thus allow students greater freedom to learn at a pace suited for them.[119] As more technology becomes integrated into our

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116 Vinay Babani (2021), Avoid an Infodemic available at <https://www.thehindu.com/education/why-awareness-of-digital-literacy-is-becoming-increasingly-important/article35599195.ece/amp/> [Accessed 11th October, 2023]

117 Lcom Team (2023), How to Map the Scope & Sequence for your Digital Literacy Curriculum available at <https://www.learning.com/blog/mapping-digital-literacy-curriculum-scope-sequence/> [Accessed 11th October, 2023]

118 Ibid

119 Jason Kleem (2020), The Benefits of a Digital Curriculum (Even after the Pandemic) available at <https://vinsonedu.com/blog/benefits-of-digital-curriculum-after-pandemic/> [Accessed 11th October, 2023]

workspaces and homes, the long-term success of our students will be dependent on preparing them properly for their lives post-graduation. There is thus need to develop comprehensive curricula that cater to diverse age groups and backgrounds, ensuring that the content is relevant and engaging for various learners.

5.2.8 COLLABORATIVE LEARNING.

Generally, collaborative learning is an educational approach that encompasses active participation, discussion and cooperation among students. According to *Herrity,* it involves working as a group to solve a problem or understand an idea and ensures that students remain engaged in content while thinking critically and sharing ideas with their peers.[120] As *Laal* denotes, there are benefits associated with the concept of collaborative learning and by understanding the benefits, we can truly use this learning style to our benefit.[121] The premise of collaborative learning is basically through cooperation by group members in contrast to competition which individuals often apply in most aspects of their lives.[122]

Additionally, offering specialized courses and workshops focused on digital literacy, data privacy, and AI education can provide in-depth knowledge to individuals who want to delve deeper into these subjects. These courses should cover topics such as understanding algorithms, recognizing phishing attempts, and exploring the ethical implications of emerging technologies.[123] The authorities thus need to promote collaborative learning environments where

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120 Jennifer Herrity (2023), 11 Benefits of Collaborative Learning (Plus Tips to Use it) available at <https://www.indeed.com/career-advice/career-development/benefits-of-collaborative-learning> [Accessed 18th October, 2023]

121 Morjan Laal (2012), Benefits of Collaborative Learning available at <https://www.sciencedirect.com/science/article/pii/S1877042811030205> [Accessed 18th October, 2023]

122 Ibid

123 Bri Stauffer (2022), How to Teach Digital Literacy Skills available at <https://www.aeseducation.com/blog/teach-digital-literacy-skills> [Accessed 18th October, 2023]

participants can share experiences, exchange ideas, and collectively develop strategies for responsible digital engagement. Collaborative learning should also incorporate practical exercises that allow participants to interact with data privacy tools and AI applications, enabling them to apply their knowledge in real-world scenarios.

5.2.9 USER EMPOWERMENT AND CONTINUOUS EVALUATION/AUDITING.

Empowering users to have control over their data and AI interactions, and regularly assessing and auditing AI systems for privacy compliance is integral to a privacy-conscious culture. According to *Davenport,* AI auditing refers the research and practice of assessing, mitigating, and assuring an algorithm's safety, legality and ethics.[124] This involves identifying potential vulnerabilities, addressing privacy concerns, and updating systems to align with changing data protection regulations. Comprehensive audits encompass the entire pipeline of the system's life cycle, addressing areas such as the reporting and justification of the business case, assessment of the developing team, and test datasets.[125]

Additionally, AI applications should allow users to customize privacy settings, provide opt-out mechanisms, and offer transparent data management options. As *Tan* observes, in the realm of Human-Centred AI, three essential elements guide the creation of successful products namely: building trust band transparency, user autonomy and control, and societal value and alignment.[126] By empowering users through user autonomy and control, AI producers can create systems that align with users' needs and preferences. Prioritizing user feedback, enabling customization, and ensuring transparent data privacy and security practices foster trust and enhance the user experience.[127] User

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124 Joe Davenport (2022), What is AI Auditing available at <https://www.holisticai.com/blog/ai-auditing> [Accessed 18th October, 2023]

125 Ibid

126 Sarah Tan (2023), How to Empower User Autonomy and Control in Your AI Products available at <https://medium.com/@sarahtan.twh/how-user-autonomy-and-control-drive-human-centered-ai-innovation-be39aeea68ee> [Accessed 18th October,2023]

127 Ibid

empowerment in AI is very vital for it ensures that individuals have control and understanding over AI systems whereas continuous evaluation of the same is crucial to maintain accuracy and fairness. Together, these practices help build trust and ensure responsible AI deployment.

5.2.10 INDUSTRY AND EXPERT INVOLVEMENT.

In any field or sector in society, to make a reasonable change and have a sensible impact, one must seek the participation of experts and major industries. The influence of such drivers in digital literacy cannot be undermined. As *Anderson & Rainie* observe, experts in education, technology, and the labour market agree that digital literacy is crucial for people's personal and professional lives.[128] To this end, companies and industries that are at the forefront of technology can contribute by providing resources, expertise, and real-world insights to educational initiatives for example data protection by design. Integrating data protection principles into the design phase of AI projects is also a fundamental step. According to *Spurava & Kotilainen,* findings show that the ability to engage effectively and wisely with information is crucial in decision-making situations and should be developed together with comprehension of the operational and business logic of algorithm-driven digital media platforms as information infrastructure.[129] Developers should thus prioritize privacy by design where the creation and development of systems integrates privacy protection measures from the onset. This proactive approach minimizes the chances of privacy breaches later in the development process.

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128 Anderson, J., & Rainie, L. (2021). The future of digital spaces and their role in democracy. Pew Research Center available at <https://www.pewresearch.org/internet/2021/11/22/the-future-of-digital-spaces-and-their-role-in-democracy/> [Accessed 18th October, 2023]

129 Guna Spurava & Sirkku Kotilainen (2023), Digital Literacy as a Pathway to Professional Development in the Algorithm-Driven World available at <https://www.idunn.no/doi/10.18261/njdl.18.1.5> [Accessed 21st October, 2023]

5.3 COMPARISON TO OTHER JURISDICTIONS.

In navigating data privacy and artificial intelligence through digital literacy, it is imperative to compare the situation at hand to other jurisdictions. In the realm of data privacy, Uganda has established robust laws such as the *Data Protection and Privacy Act, 2019* and the *Data Protection and Privacy Regulations, 2021* which mirror the *European Union General Data Protection Regulation (GDPR)* as earlier discussed. The GDPR is said to be the toughest privacy and security law in the world.[130] Since its coming into force on May 25th 2018, trading blocs, governments, and privacy organizations took note, and over the years, it has inspired new data privacy legislation worldwide.[131] For instance, other African countries like Kenya, Mauritius, Nigeria, and South Africa have also enacted GDPR-like laws.[132] These measures demonstrate a commitment to safeguarding privacy rights in our increasingly digital world, thereby setting a commendable standard for responsible data governance.

However, the case is very different when it comes to AI. There are no comprehensive laws governing AI and so, people use AI as they please. It is thus not surprising that in March 2023, 'Balenciaga Pope' went viral.[133] Similarly, in December 2023, fans of Nicki Minaj broke the internet as they used AI to create 'Gag City' that captured the attention of several brands and celebrities worldwide.[134] Urgent attention is required to establish frameworks ensuring

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130 Ben Wolford (2019), What is GDPR, The EU's New Data Protection Law? <https://gdpr.eu/what-is-gdpr/> [Accessed 31st January, 2024]

131 Mike Woodward (2021), 16 Countries with GDPR-Like Data Privacy Laws available at <https://securityscorecard.com/blog/countries-with-gdpr-like-data-privacy-laws/> [Accessed 31st January, 2024]

132 Ibid.

133 Dan Di Placido (2023), Why Did 'Balenciaga Pope' Go Viral? <https://www.forbes.com/sites/danidiplacido/2023/03/27/why-did-balenciaga-pope-go-viral/?sh=4ab7898f4972> [Accessed 31st January, 2024]; Kalley Huang (2023), Why Pope Francis Is the Star of A.I.-Generated Photos <https://www.nytimes.com/2023/04/08/technology/ai-photos-pope-francis.html> [Accessed 10th January, 2024].

134 Conor Murray (2023), Nicki Minaj Fans Are Using AI to Create 'Gag City' – A Vibrant Pink World Inspired by Her New Album available at <https://www.forbes.com/sites/conormurray/2023/12/07/nicki-minaj-fans-are-using-ai-to-create-gag-city-a-vibrant-pink-world-inspired-by-her-new-album/amp/> [Accessed 31st January, 2024]

responsible development and use of AI, safeguarding ethical considerations and privacy concerns. Therefore, notes should be taken from countries that have somewhat progressed in this regard. For example, at the end of 2022, the United Kingdom Ministry of Justice opined that sharing deep-fakes without a person's consent could result in imprisonment.[135] Taiwan has also implemented a similar bill.[136] In the United States, several states including California, Texas, and Virginia have made non-consensual deep-fakes a criminal offense.[137] These initiatives are commendable for they safeguard the integrity of personal images and videos.

In regulating the use and development of AI, focus should lay on persons that are likely to be marginalized. For instance, it is not uncommon for women to be particularly targeted by deep-fake pornography which is often broadcast without consent.[138] In one of the most recent cases, teenage girls as young as 11 were targeted and the pictures were shared with their high school classmates via social media.[139] In January, 2024, AI-generated pornographic pictures of Taylor Swift widely circulated on the social media platform X (formerly Twitter), and

135 A deepfake is an image, or a video or audio recording, that has been edited using an algorithm to replace the person in the original with someone else (especially a public figure) in a way that makes it look authentic [Mirriam Webster Dictionary]; Oliver Lock (2023), The Legal Issues Surrounding Deepfakes and AI Content available at <https://www.farrer.co.uk/news-and-insights/the-legal-issues-surrounding-deepfakes-and-ai-content/> [Accessed 31st January, 2024]

136 Jason Pan (2023), Bill to Curb Deepfake Pornography Clears Legislature available at <https://www.taipeitimes.com/News/front/archives/2023/01/08/2003792190> [Accessed 31st January, 2024]

137 Oceane Duboust (2023), 'Violating and dehumanising': How AI deepfakes are being used to target women available at <https://www.euronews.com/next/2023/12/11/violating-and-dehumanising-how-ai-deepfakes-are-being-used-to-target-women> [Accessed 31st January, 2024]

138 Sophie Compton & Reuben Hamlyn (2023), The Rise of Deepfake Pornography is Devastating Women available at <https://amp.cnn.com/cnn/2023/10/29/opinions/deepfake-pornography-thriving-business-compton-hamlyn/index.html> [Accessed 31st January, 2024]

139 Oceane Duboust (2023), 'Violating and dehumanising': How AI deepfakes are being used to target women available at <https://www.euronews.com/next/2023/12/11/violating-and-dehumanising-how-ai-deepfakes-are-being-used-to-target-women> [Accessed 31st January, 2024]

eventually made their way to other platforms.[140] Researchers have said that the number of explicit deep-fakes have grown in the past few years, as the technology used to produce such images has become more accessible and easier to use. Therefore, Uganda needs to take a stand against this form of technological abuse.

6.0 CONCLUSION

Implementing comprehensive digital literacy programs covering data privacy and AI understanding in Uganda is a complex endeavour with inherent challenges. To this end, collaboration and concerted efforts with strategic planning, government support, and innovative approaches, are essential. This paper has highlighted the significance of digital literacy in a rapidly evolving technological landscape and the crucial role of education and awareness in safeguarding data privacy and effectively engaging with artificial intelligence. In an age where digital technologies are integral to our daily lives, being a digitally literate citizen is not a luxury but a necessity. Moreover, the ethical considerations surrounding artificial intelligence demand careful scrutiny and thoughtful policymaking. The engagement of various stakeholders is pivotal in fostering a privacy-conscious AI culture.

Looking ahead, Uganda stands on the precipice of an exciting digital future. This article has advocated for a concerted effort to equip its citizens with the knowledge and skills needed to navigate this evolving landscape. In doing so, Ugandans are urged to preserve their privacy so as to effectively harness the benefits of technology and understand the nuances of data privacy and AI. Ultimately, empowering digital citizens through digital literacy is not just a goal; it is a path to a brighter, more informed, and more secure digital future for Uganda.

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140 AP Staff (2024), Taylor Swift AI-generated Explicit Photos Spark Outrage available at <https://www.livenowfox.com/news/taylor-swift-ai-generated-explicit-photos-spark-outrage.amp> [Accessed 29th January, 2024]

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AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: AN APPRAISAL OF THE FREEDOM TO PRACTISE ANY RELIGION IN NIGERIA

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AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: AN APPRAISAL OF THE FREEDOM TO PRACTISE ANY RELIGION IN NIGERIA

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ABSTRACT

On 5 April 2022, a Kano State High Court sentenced Mubarak Bala, to twenty-four years' imprisonment for blasphemy. Nigeria is a multi-religious society consisting of Christians, Muslims, and the traditionally religious people of Nigeria. This article seeks to examine the relationship existing between society, the law, and religion. It analyses the study of society, the law, and religion putting into consideration the provisions of the African Charter on Human and People's Rights and that of the Nigerian Constitution. The question to be answered in this article is whether there is true freedom of religion in Nigeria considering the provisions of our criminal law on blasphemy. A further question that begs for an answer is who is the victim of the offence of blasphemy in Nigeria and why are there different sets of laws operating in Nigeria? This article observes that provisions of the Nigerian Criminal Code, the Penal Code, and the Northern Nigeria Sharia law on blasphemy negate the provisions of the Nigerian Constitution and the African Charter on Human and People's Rights on the freedom of religion. It concluded that religious tolerance is the major factor needed to ensure true freedom of religion in Nigeria.

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I.0 INTRODUCTION

Nigeria is a multi-religion nation with thirty-six states and the federal capital territory, Abuja. The Nigerian constitution provides that freedom of religion for the citizens is guaranteed. It is a known fact that without society there can never be law or religion. The law gave the members of the society their fundamental human rights which include the right to practice any religion and the right to protection against discrimination on the ground of religion, sex, or tribe.[1] These rights are recognised all over the world as also entrenched in the African Charter on Human and People's Rights which was adopted on 27 June 1981 and came into force on 21 October 1986. The Charter is the brainchild of the Organisation of African Unity (OAU) which is now known as the African Union (AU).[2] The Charter has three parts and 68 sections (known as Articles). The most relevant sections of this work are under Part 1 (Rights and Duties) which consists of Articles 1 to 26.

Article 2 provides that every individual is entitled to enjoy the rights and freedoms which are recognised under the Charter irrespective of any status such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or another status. It means that everyone must be free from any form of discrimination. Article 3 provides that every individual shall be equal before the law and every individual shall be entitled to equal protection of the law. Article 4 provides that every human being shall be entitled to respect for his life and the integrity of his person.[3] Article 6 provides for rights to personal liberty and Article 7 provides for the right to a fair trial.

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1 Section 38 and 42 1999 Constitution as amended in 2018.

2 The African Union (AU) is a continental body consisting of the 55 member states that make up the countries of the African Continent. It was officially launched in 2002 as a successor to the Organisation of African Unity (OAU, 1963-1999).

3 The Article 4 full provision states that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

Article 8 specifically provides for the right to practice religion. It provides that "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms". All these provisions had been codified in the Nigerian 1999 Constitution.

On 5 April 2022, a Kano State High Court sentenced Mubarak Bala, to twenty-four years' imprisonment for blasphemy. Bala, the president of the Humanist Association of Nigeria,[4] became popular in 2020 when he was arrested in Kaduna for blasphemy against Allah and Prophet Muhammad and was locked up in a correctional facility for about two years.[5] During his incarceration, the United Nations rights experts on 28 July 2020 called on the Nigerian authorities to immediately release him. They expressed their shock when they stated that:

> *"We are deeply concerned over the serious lack of due process in Mr. Bala's case. He has reportedly not had access to a lawyer nor been allowed family visits and has been transferred and detained in Kano state, without charge, since his arrest in neighbouring Kaduna on 28 April 2020."* [6]

The call went unanswered. The question begging for an answer is whether there is truly freedom to practise religion of one's choice in Nigeria?

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[4] Humanists Association of Nigeria is registered with the Nigerian Corporate Affairs Commission as an incorporated trustee with registration number IT – 102255 on 27 October 2017. It aims to provide a sense of community to all non-religious persons nationwide and ensure their respectful and dignified treatment. It will strive to give a sense of family and fellowship to all Nigerians who seek to live morally and meaningfully without God or religion, whether they are young or old; rich or poor; artisans or technocrats, whether they live in rural or in urban areas. HAN will campaign to end all forms of discrimination based on religious belief or unbelief. It will work to ensure the abolition of all harmful traditional, religious and cultural practices. In addition, the Humanists Association of Nigeria will also promote critical thinking in society, combat superstitious beliefs, and advocate for STEM (Science, Technology, Engineering, and Mathematics) in schools and other public institutions.

[5] G Olominiran, 'Kano court sentences atheist Mubarak Bala to 24 years for blasphemy' 5 April 2022 <https://punchng.com/kano-court-sentences> [Accessed 6 April 2022]

[6] 'UN Rights Expert Urge Nigeria to Immediately Release Humanist Accused of Blasphemy <https://www.ohchr.org/en/press-releases/2020/07/un-rights-experts> [Accessed 12 January 2023]

The first section of this article is the introduction, the second section discusses society and different theories related to it, the third section discusses the theories of law, the fourth section talks about theories of religion, the fifth section discusses the freedom to practice religion in Nigeria as entrenched in the Nigerian 1999 Constitution, the sixth section discusses the present status of the law in guaranteeing freedom of religion in Nigeria and the seventh section which is the last section is the conclusion and recommendation.

2.0 THE CONCEPT OF 'SOCIETY'

Society can be described as a group of people living in a particular country or region having in common shared customs, laws, and organisations. The study of society is known as sociology. Hoebel describes sociology as it relates to law when he opines that the sociology of law is a "pure theoretical science" concerned with social facts and the relation of law to them. It provides the data and principles that the workmen in the field of sociological jurisprudence are to apply to their practical problems.[7] Oliva, in describing the universality of sociology opines that an interdisciplinary study is crucial. On the one hand, for those engaged in the study and practice of law to understand fully the interaction of law and religion, it is essential to take into account sociological considerations. On the other hand, sociologists of religion cannot be indifferent to legal responses to social change and their impact on the practice of religion.[8]

Rosen, in describing the relationship between sociology and the law opines that sociology has always been linked with the study of Law, he opines that there is a possibility that sociology emerged from the study of Law. He mentioned that some of the 18th century Sociologists were directly involved in the practice or

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7 E A Hoebel, 'Sociology of Law' (1942) 42(7) *Columbia Law Review* 1241.

8 J G Oliva, 'Sociology, Law, and Religion in the United Kingdom' (2004) 152 *Law & Justice - The Christian Law Review* 8.

teaching of Law. These Sociologists were Montesquieu, Adam Smith, Vico, and Herder.[9]

Ansems and Kees van den Bos further corroborate the close relationship between sociology and the law and explain that reflections on social and societal issues about the law have been circulating for decades, if not hundreds of years. These reflections take place within fields including, but not limited to, the sociology of law, the social psychology of law, and other social and behavioural sciences. The relevance of studying the relationship between law and society is evident. After all, the law ultimately is related to what is happening in society, forms the backbone of society's structure, and can play an important role in promoting societal changes (as has been the case in recent climate justice trials, for example).[10] Research on law and society is central to the sociology of law. After all, legal sociologists focus on the relationship between law and society and the law's societal meaning. As such, they study how societal changes affect the law and, vice versa, how the law affects society. In the field of legal sociology, the law is broadly defined as encompassing both official or state law and unofficial or non-state law.[11]

From the works of Hoebel, Oliva, Rosen, Ansems and Kees van den Bos as discussed above, society cannot be studied in isolation. Sociology as a study of the society involves understanding rules and regulations sustaining human endeavours. Society is held by the pillars moulded with law, the law is an instrument of orderliness. It means that the study of society must be done with law and religion to arrive at the right conclusion.

3.0 THE CONCEPT OF 'LAW'

9 M Rosen, 'Classical Sociology and the Law' (1985) 5(1) *Oxford Journal of Legal Studies* 61.

10 Lisa F M Ansems and K van den Bos, 'Empirical Research on Law and Society: Advanced Introduction to Empirical Legal Research; Research Handbook on the Sociology of Law; the Routledge Handbook of Law and Society' (2022) 49(1) *Journal of Law and Society* 218.

11 *Ibid*, 219.

It is difficult to define the word "Law" because law means different things to different people. Robson, in describing how difficult it is to define law state that:

> *"For at least twenty-five centuries, and perhaps for hundreds of years before that, men have discussed the nature of Law. The question "What is Law?" has been asked by all sorts and conditions of men: by priests and poets, by seers and kings, by the masses no less than by the prophets. Many different kinds of answers have been given, yet the question remains one of the most insistent and elusive problems in the entire range of thought. The whole gamut of human life, both in thought and in action, is comprised of the simple word Law."*[12]

Goitein[13] in describing the wide intellectual definition of the law states that the study of jurisprudence came into existence to answer the question of what Law is and there has never been a straight answer to this question. He believes that Law is an encompassing phenomenon that attracts intellectuals who are not only lawyers but social scientists. He went further to say that Law is a many-sided thing with which one can never be sure to exhaust the sources of interest it can have for men.

Pound, in describing the universal nature of the law states that the law is a term of many meanings., the word goes back in all languages to the time of undifferentiated social control, when one word had to cover ethical custom, religious rites, the dictates of morals, the customary modes of adjusting relations in a politically organised society, the enacted rules of a city-state, custom in general, and social control as a whole.[14] Alberca de Castro & Oliva[15] are of the view that the law moves slower than the society, they opine that law is made to accommodate new realities and as soon as it accommodates this new reality,

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12 W A Robson, *Civilisation and the Growth of Law; A Study of the Relations between Men's Ideas about the Universe and the Institutions of Law and Government* (The Macmillan Co., 1935)

13 H Goitein, *Primitive Ordeal and Modern Law* (G. Allen & Unwin., 1923)

14 R Pound, *Task of Law* (Franklin and Marshall College., 1944)37.

15 J A Alberca de Castro & J G Oliva, 'Sociology, Law, and Religion in Italy and Spain' [2004] 152 *Law & Justice - The Christian Law Review* 44.

another issue emerges, making it outdated as soon as it is enacted.[16] This is the true position of our law today, the society is always ahead of the law.

Cuyugan[17] in defining the universality of law opines that law has other dimensions which may excite the sociologist of law. He stated that Common law, judicial decisions, statutory law, the legislative process, and the administrative apparatus, are problem areas of the social order. Often, when they are treated in this light, they leave the domain of technical law and enter sociology properly. Of crucial importance in the future partnership between sociology and legal studies is the growing power and sophistication of sociological research methodology and techniques, but even more important, a realization among legal scholars of the need to come to terms with the problems of a changing society.[18]

Cairns, in describing the importance of law, opines that one of the great passages in the literature on the law is Plato's justification of the law's necessity. Mankind must make laws and follow them, or its life would be no better than that of the wildest of wild beasts. We know this because no man has the natural gift both of being able to see what is good for a nation, and upon seeing it, always be both able and willing to do what is best. It is hard to see that true political art is concerned with the nation and not with the individual.[19]Sandberg in relating law to religion states that law on religion is the study of both secular and religious law. It may be defined as the study of State law on religions and of the internal laws or other regulatory instruments of religious organisations.[20]

16 *Ibid*
17 R S Cuyugan, 'Sociology and Law' (1965) 40 *Philippine Law Journal* 612-617.
18 *Ibid.*
19 H Cairns, 'What is Law' (1970) 27(2) *Washington and Lee Law Review* 193.
20 R Sandberg, 'The Sociology of the Law on Religion' (2017) available at <https://www.researchgate.net/publication/255699003> [Accessed on 2 April 2022]

4.0 CONCEPT OF 'RELIGION'

There is no universal definition of religion. Eisgruber & Sager are of the view that:

> *"The problem goes roughly like this: to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as "religious" while others are not, we are creating a sphere of the orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore."*[21]

They went on further to show the uncertainties in defining what religion is when they wrote that the distinction between religion and non-religion is a significant ethical guidepost in many people's lives.[22]

There are certain ingredients of religion, they are faith and belief, religion operates in such a way that its existence is based on faith and belief from such religious adherents. The question to which an answer must be provided is; what is faith and belief? Rusch opines that a belief is a reference to what a person thinks about a fact and faith is a trust that is based upon a hope that if the beliefs are true and the values are promoted, the world will be a better place.[23]

Herde, in describing faith and belief in the United States of America, opines that belief in God or other universal spirit is a central tenet of most faiths and traditions in the United States of America (USA).[24] She went on to say that another revealing aspect of faith is belief in the Bible or other holy books. In her words; "Perhaps one of the most telling indicators of religiosity is the belief that

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21 C L Eisgruber and L G Sager 'Does It Matter What Religion Is' (2009) 84(2) *Notre Dame Law Review* 807.

22 *Ibid* at p 808

23 L J Rusch 'Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope - Stepping into the Fourth Dimension' (1994) 55(1) *Montana Law Review* 9.

24 G W Herde 'The ABCs of Religiosity: Attitude, Belief, Commitment, and Faith' (2014) 26(1) *Jury Expert* 4.

one's faith is the only path to "salvation" or "eternal life," as opposed to multiple paths"[25]

Some authors attach physical well-being to the practice of religion. According to Ellison & Sherkat, drawing on insights from epidemiology, psychiatry, gerontology, and other fields, sociological research indicates that religious involvement promotes mental and physical well-being in at least four distinct ways: (1) by shaping behaviour patterns and lifestyles in ways that reduce exposure to certain social stressors (e.g., illness and serious accidents, marital disruption); (2) by generating social resources and social support; (3) by enhancing psychological resources, particularly positive self-regard (i.e., self-esteem); and (4) by providing specific cognitive frameworks for coping with stress.[26] They went further that some aspects of religious belief and participation can also undermine well-being by exacerbating social stressors[27] and their effects, by eroding positive self-regard, and by encouraging inappropriate or self-defeating coping strategies.[28]

Martin in connecting religion to health is of the view that religion and health have been connected both positively and negatively. There is evidence that being closely involved with religion and a religious community can have positive health benefits, because of the associated structured lifestyle and regulated lifestyle behaviour, access to social resources, promotion of emotional values such as love, forgiveness, and caregiving, and belief in the ability of a higher power to provide health solutions.[29]

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25 *Ibid*

26 C G Ellison and D E Sherkat 'Is Sociology the Core Discipline for the Scientific Study of Religion' (1995) 73(4) *Social Forces* 1255-1256.

27 Social stressors are defined as behaviours and situations, social in nature, that are related to physical and psychological strain. Examples of social stressors include verbal aggression from customers or superiors. co-worker conflict. negative group environments.

28 Ellison and Sherkat (n 26)

29 R Martin 'Implementing Public Health Policy and Practice within a Legal Framework: Constraints of Culture, Faith and Belief' (2008) 9(4) *Medical Law International* 311.

5.0 FREEDOM TO RELIGION IN NIGERIA

Discussion in this section is around the 1999 Constitution of the Federal Republic of Nigeria[30]which is the *grundnorm.*[31] Section 39(1) provides that every person is entitled to freedom of expression which include freedom to hold opinions and to receive and impart ideas and information without interference, Section 40 guarantees the right of every person to assemble freely and associate with other persons. These are the enabling provisions that give the citizens of Nigeria the constitutional right to engage in religious propagation within the shores of Nigeria among other rights; to associate and to hold opinions or to impart ideas without any hindrance.

The Constitution provides under section 10 that "the Government of the Federation or a State shall not adopt any religion as State Religion." Section 38(1) of the Constitution provides that:

> *"Every person shall be entitled to freedom of thought, conscience, and religion, including the freedom to change his religion or belief, and freedom (either alone or in community with others, and public, or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance."*

The provision is the enabling law that specifically provides for the freedom of persons to practise their religion. This provision further provided that no person

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30 As amended in 2018.

31 The term "grundnorm" is commonly used to describe a country's constitution which simply means that the constitution is the basic and the highest law of the land and no law must be contrary to its provisions. It is a German word and a concept in the Pure Theory of Law created by Hans Kelsen, a jurist, and legal philosopher. Kelsen used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system.
Section 1(1) to (3) of the Constitution provides that:
(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
(2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except by the provisions of this Constitution.
(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

should be forced against his will to practise any religion.[32] The law also allows a religious community or denomination to provide religious instruction for pupils of that community.[33] This freedom of religion does not include joining a secret cult.[34]

The 1999 Constitution also provides for the right from discrimination in sections 42(1) to (3). This right includes the right against discrimination on the ground of religion.

Section 42(1) provides that:

> *A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not, by reason only that he is such a person:*
>
> *(a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or*
> (b) *Be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.*

Section 42(2) further provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely because of the circumstances of his birth. The "circumstance of his birth" can be interpreted as circumstances of birth to a religious group. Section 42(3) provides that the provision in section 42(1) shall not render invalid, any law that restricts the appointment of any person to any

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32 Section 38 (2) provided that no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony, or observance relates to a religion other than his own, or a religion not approved by his parent or guardian

33 Section 38(3) provides that: "No religious community or denomination shall be prevented from providing religious instruction for pupils of that community nor denomination in any place of education maintained wholly by that community or denomination."

34 This can be seen in section 38(4) which provides that: "Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society."

office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria. Section 45(1) to (3) of the 1999 Constitution provides for a situation under which infringement of these fundamental human rights may be justified. It provides as follows:

> *(1). Nothing in sections 37,[35] 38,[36] 39,[37] 40[38] and 41[39] of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society: a. in the interest of defence, public safety, public order, public morality, or public health; or b. to protect the rights and freedom of other persons.*

Section 45(2) further provides that:

> *An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33[40] or 35[41] of this Constitution; but no such measures shall be taken in pursuance of any such activity during any period of emergency save to the extent that those measures are reasonably justifiable to deal with the situation that exists during that period of emergency: Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution,[42] except in respect of death resulting from acts of*

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35 Section 37 provides that "The privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic communications is hereby guaranteed and protected."

36 Section 38 provides for freedom of religion, freedom of opinion, thought, and conscience.

37 Section 39 provides for freedom of expression, and freedom of the press.

38 Section 40 provides that Every person shall be entitled to assemble freely and associate with other persons, and in particular, he may form or belong to any political party, trade union, or any other association for the protection of his interests: Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission concerning political parties to which that Commission does not accord recognition.

39 Section 41 provides for freedom of movement.

40 Section 33 provides for the right to life.

41 Section 35 provides for protection from unjustified restraint.

42 Section 33 provides that Every person has a right to life, and no one shall 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. A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary
a. for the defence of any person from unlawful violence or for the defence of property;
b. to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

> *war or authorise any derogation from the provisions of section 36(8)[43] of this Constitution.*

Section 45(3) defines a "period of emergency" as follows:

> *In this section, a "period of emergency" means any period during which there is in force a Proclamation of a state of emergency declared by the President in the exercise of the powers conferred on him under section 305[44] of this Constitution.*

The period of emergency can only be declared by the President in accordance with the Constitution. The Constitution provides that any person who alleges that any of the provisions of the fundamental human rights has been contravened in any state concerning him has the right to apply to a High Court in that state to seek redress.[45]

6.0 THE CURRENT POSITION OF THE RIGHT TO PRACTISE RELIGION IN NIGERIA

The objectives of the statutes on freedom of religion are to guarantee individual and group freedom to hold and practise their belief and to secure that freedom by preventing the forceful conversion of individuals and groups into dominant beliefs.[46] By creating a different legal system in the northern part of Nigeria, the state has adopted a religion that is contrary to section 10 of the 1999 Constitution and the African Charter on Human and People's Rights.

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c. to suppress a riot, insurrection, or mutiny.

43 Section 36(8) provides that "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed."

44 Section 305 provides for emergency provisions.

45 Section 46 1999 Constitution of the Federal Republic of Nigeria.

46 Through jihad, Muslim leaders forcefully converted most of the Northern part of Nigeria to Muslims and created a legal system known as sharia law rooted in the tenets of the Islamic religion The Arabic term jihad means a "struggle" or "striving."

With the adoption of Sharia law in the northern part of Nigeria, there is an absence of national integration as provided for under section 15 of the 1999 constitution. Section 15(1) and (2) provides that

> *the motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress. Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.*

The issue of separate criminal laws for the northern part of Nigeria is a clear indication that there is no freedom to practice religion in Nigeria. The northern states are governed by the Penal Code Act[47] while southern Nigeria is governed by the Criminal Code Act[48] section 1A of the Criminal Code Act makes the Act subject to the Penal Code Act when it provides that "The provisions of this Act shall take effect subject to the provisions of the Penal Code (Northern States) Federal Provisions Act."

The Penal Code (Northern States) Federal Provisions Act[49] in section 6 repealed the Criminal Code Act when it provides that:

> *The Criminal Code Act, in so far as it has effect as if it were a law enacted by the legislature of the Federation and as it applies in the Northern States is repealed:*
>
> *Provided that such repeal shall not, in respect of proceedings taken outside the Northern States, affect the operation of the Criminal Code solely because some element or elements of the offence are alleged to have occurred within the Northern States.*

By the above provisions of the Penal Code Act, the Criminal Code Act is restricted to Southern Nigeria. In examining the provision of section 2(1) of the 1999 Constitution, it provides that "*Nigeria shall be one indivisible and Indissoluble Sovereign State to be known by the name of the Federal Republic of Nigeria.*" There

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47 Cap P3 Laws of the Federation of Nigeria 2004. The full description of the law is "Penal Code (Northern States) Federal Provisions Act" the preamble describes the law as "An Act to supplement the Penal Code of the Northern States in respect of matters within the exclusive legislative competence of the National Assembly, and for purposes ancillary thereto."

48 Cap C38 Laws of the Federation of Nigeria 2004.

49 Cap P3 Laws of the Federation of Nigeria 2004.

is no doubt that there is a legal divide in the country as it is unthinkable for a sovereign state to run a federal law in the south separate from the federal law in the north on the same subject matter.

As mentioned in the introduction of this article, a Kano State High Court sentenced Mubarak Bala, the president of the Humanist Association of Nigeria to twenty-four years' imprisonment for blasphemy. Bala became popular in 2020 when he was arrested in Kaduna for blasphemy against Allah and Prophet Muhammad. He was locked up in a correctional facility for about two years.[50]

According to the prosecutor, the offence contravened is in the provisions of Sections 114 and 210 of the Penal Code. Section 114 of the Penal Code provides that:

> *Whoever does any act with intent to cause or which is likely to cause a breach of the peace or disturb the public peace shall be punished with imprisonment which may extend to three years or with a fine which may extend to six hundred naira or with both.*

And section 210 of the Penal Code provides that:

> *Whoever by any means publicly insults or seeks to incite contempt of any religion in such a manner as to be likely to lead to a breach of the peace shall be punished with imprisonment for a term which may extend to two years or with a fine or with both.*

However, the Criminal Code Act[51] provides under section 204 that any person who does an act which any class of persons considers as a public insult to their religion, with the intention that they should consider the act such an insult, and any person who does an unlawful act with the knowledge that any class of persons will consider it such an insult, is guilty of a misdemeanour and is liable to imprisonment for two years.

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50 Gbenga Olominiran, ' Kano court sentences atheist Mubarak Bala to 24 years for blasphemy' 5 April 2022 <https://punchng.com/kano-court-sentences-atheist-mubarak-bala-to-24-years-imprisonment> [Accessed 6 April 2022]

51 Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.

With the current situation, there is no total freedom of religion in Nigeria as provided for in the Constitution. This can be seen in the way some states in Nigeria created their religious laws and punishments to apply to any person who is on trial in that state such as was done to Mubarak Bala.

7.0 CONCLUSION

Firstly, religious freedom is not absolute in Nigeria, this means that while some states respect personal religion, some do not. The creation of different legal systems operating in different parts of the country has defeated the rights to the religion of one's choice in Nigeria. Religion is a personal belief that should not be forced on citizens through law. Secondly, as Sharia law is allowed to operate in northern Nigeria, the other part could agitate for the principles of Episcopal Law or Customary Law of the indigenous people to be codified in the Nigerian laws. All pro-religious laws can co-exist in the country where they respect each other's fundamental human rights guaranteed by the Constitution.

Lastly, a sovereign multi-religious country like Nigeria does not have to run two separate criminal law systems, this is a double standard and negates the principle of freedom of religion as entrenched in the African Charter on People and Human Rights and the 1999 constitution of Nigeria. Though, it may be a herculean task to have a unified criminal law devoid of any religious principles in Nigeria, it is possible to operate these laws without infringing on the fundamental rights of the citizens as entrenched in the African Charter on People and Human Rights and the 1999 constitution of Nigeria. Religious tolerance is the major factor needed for co-existence in the country.

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BANKING BEYOND THE BANKING HALL: A REVIEW OF DIGITAL BANKING IN UGANDA

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BANKING BEYOND THE BANKING HALL: A REVIEW OF DIGITAL BANKING IN UGANDA

Nasser Konde*

ABSTRACT

Technology advancement has greatly revolutionized the banking industry in Uganda. This has seen the adoption of digital banking by all financial institutions in the country in order to serve their customers better and to remain relevant in the sector. The COVID-19 pandemic saw a complete shift in the way financial institutions in Uganda offered banking services to customers with many merging and closing down the various bank branches across the country and concentrating their efforts on digital banking. This paper aims at providing an insight on the nature of digital banking, the legal principles that govern digital banking, the legal regime governing digital banking, the risks involved and how to mitigate them.

1.0 INTRODUCTION

Until the early 2000s, Uganda maintained an economy largely based on a cash payment system. The introduction of the Automated Clearing House and Real Time Gross Settlement systems saw the first revolution in the financial market take place. Other payments innovations such as credit cards and agency banking soon followed, sweeping the financial sector into the era of digital financing.

Since 2009 when Mobile Money services were launched in Uganda through a partnership between Stanbic Bank Uganda and MTN Uganda, mobile money

* BIT (MUK), LLB (MUK), CCNA, Dip LP (LDC).

service providers such as MTN Uganda Limited have largely dominated the digital financial services market. The network of mobile money services is comprised of mobile network operators, commercial banks, non-bank financial institutions, Bank of Uganda, third-party operators and technology providers. Mobile network operators in partnership with supervised financial institutions offer the services.[1]

Automation and artificial intelligence is already an important part of consumer banking as more and more repetitive tasks become automated, delivering benefits not only for a bank's cost structure, but for its customers as well. Instead of having to travel to a branch office of the bank, customers can now get instant, efficient automated customer service powered by advanced artificial intelligence. [2] Customers can contact their bank any time through the internet, mobile phone or email channels and receive quick, real-time service. Digitizing money transfers for instance speeds up the process and gives customers the flexibility and freedom to view their bank accounts and transact online or with their mobile app.[3]

The COVID-19 pandemic was an unprecedented catalyst for digital banking across the globe. This so many bank branches temporarily shut down and most physical transactions minimized. In Uganda, retail bank consumers had no choice but to embrace digital banking like never before. Digital banking has made it convenient for customers to check accounts statuses, pay bills, transfer money or withdraw cash.[4]

This paper aims at providing an insight on the nature of digital banking, the legal principles that govern digital banking, the legal regime governing digital banking, the risks involved and how to mitigate them.

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1 Augustine Idoot Obilil , "An Overview of the National Payment Systems Act 2020" available at <www.kaa.co.ug/an-overview-of-the-national-payment-systems-act-2020/ > (accessed on 21 October 2023)

2 Atiku v Centenary Rural Development Bank Limited [2022] UGCommC 146.

3 Ibid.

4 Ibid.

Chapter One offers an introduction to digital banking, Chapter Two discusses the nature of digital banking, Chapter Three discusses the legal principles governing digital banking, Chapter Four discusses the regulatory framework governing digital banking, Chapter Five discusses the risks involved in digital banking, Chapter Six discusses how risks involved can be mitigated, Chapter Seven analyzes the feasibility of the digital banking strategy and Chapter Eight offers a conclusion.

2.0 NATURE OF DIGITAL BANKING IN UGANDA

2.1 DEFINITION OF DIGITAL BANKING

Digital banking, also known as online banking or e-banking, refers to the delivery of financial services through digital channels such as the internet, mobile devices and automated teller machines.[5]

2.2 EVOLUTION OF DIGITAL BANKING

2.2.1 EARLY AUTOMATION

The first forms of digital banking can be traced back to the 1960s, when banks began using mainframe computers to automate various banking functions such as cheque processing and customer account management.[6] During the same time, Bank of America introduced the first Automated Teller Machine, which allowed customers to withdraw cash from their accounts without needing a bank teller.[7] In the 1980s, banks started offering dial up services that allowed customers to access their accounts through their home computers.[8]

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5 Alice Ivey (2023) , "A brief history of digital banking" available at <https://cointelegraph.com/news/a-brief-history-of-digital-banking > [accessed 14 December 2023]

6 Ibid

7 Ibid

8 Ibid

2.2.2 INTRODUCTION OF ONLINE BANKING

Online banking portals were developed due to increased internet use in the 1990s and 2000s. Banks started creating online portals to enable consumers to see account balances, transfer money and pay bills from their home computers. Online banking quickly became a preferred option for many people due to its convenience. [9] In 2007, USA Federal Savings Bank became the first bank to offer mobile banking through its mobile application. Today, virtually every major bank offers a mobile banking application that allows customers to perform a wide range of transactions.[10]

2.2.3 INTEGRATION OF NEW TECHNOLOGIES

Technological advancements like internet of things, block chain and artificial intelligence have had major impact on digital banking today and will do so in the future. Block chain technology is being utilized to increase the security and effectiveness of cross-border payments.[11] Banks are exploring the use of powered chatbots and virtual assistants to improve customer care and service. Biometrics are also being used to enable customers authenticate transactions using fingerprints or facial recognition and providing real-time insights into their financial health through connected devices. [12]

2.3 FORMS OF DIGITAL BANKING IN UGANDA

Digital banking in Uganda takes the form of Internet Banking, Mobile Banking, ATM Banking, Agency Banking[13] and Mobile Money Banking.

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9 Alice Ivey (2023) , "A brief history of digital banking" available at <https://cointelegraph.com/news/a-brief-history-of-digital-banking > (accessed 14 December 2023).

10 Ibid

11 Ibid

12 Ibid

13 Regulation 4 of The Financial Institutions (Agent Banking) Regulations 2017 defines Agency Banking as the conduct by a person of financial institutions business on behalf of a financial institution as may be approved by the central bank.

2.4 STAKEHOLDERS IN DIGITAL BANKING

2.4.1 BANK

A bank is any company licensed to carry on Financial Institutions Business as its principal business and includes all branches and offices of that company in Uganda.[14] Given the nature of digital banking a number of different banks can be involved in the conducting of banking business and these include the following;

a. Issuing Bank

This the bank that originates, issues, initiates or sends the payment on behalf of the sender.[15]

b. Intermediary Bank

This the issuing bank's bank that corresponds with the receiving bank.[16]

c. Receiving Bank

This bank receives the payment on behalf of a beneficiary or the final receipt of the funds.[17]

2.4.2 PAYMENT SYSTEM

A payment system is a system used to effect a transaction through the transfer of monetary value and includes the institutions, payment instruments, persons, rules, procedures, standards and technologies that make such a transfer possible.[18] Examples of payment systems include mobile money, electronic funds transfer and Real Time Gross Settlement Systems.

2.4.3 CUSTOMER

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14 Section 3 of The Financial Institutions Act 2004. In Ham v Daimomd Trust Bank (K) Limited and Another, the Supreme Court observed that banks that are not conducting core business in Uganda are not banks within the meaning of the definition in Section 3 and are not governed by the Financial Institutions Act 2004.

15 Barclays Bank Kenya Limited v Tamima Ibrahim Civil Appeal No. E075 of 2021.

16 Barclays Bank Kenya Limited v Tamima Ibrahim Civil Appeal No. E075 of 2021.

17 Barclays Bank Kenya Limited v Tamima Ibrahim Civil Appeal No. E075 of 2021.

18 Section 1, National Payment Systems Act 2020.

Two parameters determine whether one is a bank customer to wit; having a bank account with the bank and intention or agreement to open an account. In *Great Western Railway Company v London and County Banking Company Limited*[19], the House of Lords stated that one was not a customer of the bank where no account of any sort with the bank was ever kept. In *Woods v Martin's Bank Limited,*[20] the Court observed that the relationship of banker and customer had come into existence when the branch manager agreed to accept the Plaintiff's instruction to open an account in his name.

2.4.4 CONSUMER

A consumer is an individual or a small firm who uses, has used or is or maybe contemplating using, any of the products or services provided by a financial services provider.[21] Given the nature of digital banking, very many individuals use banking services and products without having bank accounts in those specific banks. Case in point is parents who pay their children's' school fees using digital banking products and services like School Pay[22] and agency banking without having bank accounts. These fall under the category of consumers.

2.4.5 AGENT

An agent is a person contracted by a financial institution to provide financial institution business on behalf of the financial institution.[23] In *Ham v Diamond Trust Bank (U) Limited and Another,*[24] the Supreme Court observed that the

19 [1901] AC 414
20 [1959] 1 QB 55.
21 Guideline 3 of The Bank of Uganda Financial Consumer Protection Guidelines 2011.
22 School Pay is a digital school fees payment system that enables parents to pay school fees to schools. How it works is that the schools have an account on School Pay and give students a unique identifying number which is used by parents to pay school fees. The School Pay system is integrated with the banking system of different banks to enable parents to pay school fees through those banks to the respective schools' bank accounts.
23 Regulation 4, Financial Institutions (Agent Banking) Regulations 2017.
24 [2023] UGSC 15.

person envisaged as an agent is a natural person and an artificial person (company) not being a financial institution.

3.0 PRINCIPLES GOVERNING DIGITAL BANKING

3.1 BANKER CUSTOMER CONSUMER RELATIONSHIP

Under digital banking, a unique relationship exists of a banker-customer-consumer relationship. A bank does not only owe a duty to its customers but also consumers who use banking services without necessarily having bank accounts with the bank.[25]

3.2 DUTY OF CARE TO CONSUMERS

Banks at common law owe a duty of care to their customers to execute instructions or mandates from customers diligently bearing in mind the interests of the customers. This duty is commonly referred to as the quincecare duty of care emanating from the case of *Barclays Bank PLC v Quincecare Limited*[26]. This duty has recently been revised and reformulated by the United Kingdom Supreme Court to restrict the Banks to confirmation that the instructions or mandates emanate from a customer and not third parties with banks not having to confirm that the instructions or mandates are in the best interest of the customer or not in the case of *Philipp v Barclays Bank UK PLC*[27].

Banks, because of the Banker Customer Consumer relationship established by Guideline 3 of The Bank of Uganda Financial Consumer Protection Guidelines 2011 under digital banking, now have an expanded duty of care that extends from a bank customer to a consumer of banking services and products who does

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25 This duty is established by Guideline 3 of The Bank of Uganda Financial Consumer Protection Guidelines 2011. Given the unique nature of digital banking, it is not only bank customers that utilize banking services. For example there are parents that pay school fees for their children using the SchoolPay system through banks yet they do not have bank accounts in those banks. A bank cannot claim not to owe a duty to such parents in case for example their school fees payments do not reflect on the school's bank account with the bank on grounds that the parents are not bank customers.

26 [1992] 4 ALLER 363.

27 [2023] UKSC 25.

not necessarily have a bank account with the bank. The bank cannot for example claim to be exempt from liability where it fails to process a payment made by a consumer on account of no existing relationship or duty of care since the consumer does not hold a bank account with the bank.

This specific scenario has played out a lot especially under agency banking where a customer let say a parent goes to a bank agent to pay school fees for their child and as the transaction is being done it fails along the way probably due to network failure and the school fees paid by the parent does not reflect on the school's bank account. The bank cannot claim to be exempt from liability simply because that particular parent does not hold a bank account with the bank.

3.3 DUTY TO RECOVER PAYMENT

A payment system operator or payment service provider must with the approval of the central bank , prescribe the manner of recovering an equivalent amount of transfer arising from a payment instruction/settlement made in the case of fraud , mistake , error or similar vitiating factors.[28]

Financial institutions equally have a common law duty to recover payments made in the case of fraud, mistake, error or similar vitiating factors. This duty has been well expounded by the United Kingdom Supreme Court in the case of *Philipp v Barclays Bank UK PLC*[29] and by the Kenyan High Court in the case of *Barclays Bank Kenya Limited v Tamima Ibrahim*[30] where the Courts observed that the Appellant banks had a common law duty to recover money fraudulently or erroneously transferred to accounts belonging to third parties.

28 Section 25(3), National Payment Systems Act 2020.
29 [2023] UKSC 25.
30 Civil Appeal No. E075 of 2021.

3.4 INTEROPERABILITY

Interoperability means a set of procedures or arrangements that allow participants in different payment systems to conduct and settle payments or securities transactions across those payment systems while continuing to operate only in their own payment systems.[31]

A number of platforms provide interoperability functions that include the following;

a. Visa

Visa enables clients to process credit and debit card payments through a direct interface to Visa's global payment system. Clients need not have physical cash to make or receive payments.[32]

b. MasterCard

MasterCard empowers digital real time payments through a payment infrastructure, bill payment, e-invoicing applications and open banking ecosystems. Its mission is to connect and power an inclusive digital economy that benefits everyone, everywhere by making transactions safe, simple, smart and accessible.[33]

c. Interswitch

Interswitch is a pan African payment ecosystem that enables interoperability of transactions and payments between predominantly African banks.[34] In Uganda, Interswitch is used by indigenous banks to enable interoperability of transactions amongst their clients.

d. Pegasus

Pegasus offers interoperability services that make it easy to transfer mobile money between different telecom companies.[35]

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31 Section 1, National Payment Systems Act 2020.

32 Visa Developer Centre, Visa Payments Processing available at <https://developer.visa.com/capabilities/vpp> [Accessed 30 November 2023]

33 MasterCard Payment Processing available at <www.mastercardpaymentservice.com> [Accessed 30 November 2023]

34 Interswitch Group, The Gateway to Africa's Payment Ecosystem available at <www.interswitchgroup.com/uganda/home> [Accessed 30 November 2023]

35 Pegasus Technologies, "Unified Payment Solutions for your business" available at <www.pegasus.co.ug> [Accessed 30 November 2023]

3.5 IRREVOCABILITY OF PAYMENT

A payment instruction or settlement shall be valid and enforceable by and against a payment system operator and shall be final and irrevocable.[36]

A payment order cannot be made by and Court for the rectification or stay of payment instruction or settlement.[37] The above provisions of the National Payment Systems Act 2020 were retaliated by the High Court in *Translink Limited v Standard Chartered Bank (U) Limited*[38] where it observed that a bank has no duty or obligation to countermand or reverse online payments made by a customer.

4.0 REGULATORY FRAMEWORK FOR DIGITAL BANKING

4.1 NATIONAL PAYMENT SYSTEMS ACT 2020

Payment solutions such as mobile money were previously regulated by guidelines such as the Mobile Money Guidelines, 2013 which provided that Bank of Uganda was in charge of approval and supervision of mobile money services. Bank of Uganda was given the mandate to issue directives regarding mobile money operations whereas, Uganda Communications Commission was responsible for licensing and supervision of mobile network operators; ensuring that telecommunications networks were effective.[39]

Oversight of payment systems entails reporting from the payment system and payment service providers to the authorized authority and monitoring, analysis, on-site inspection and licensing of payment systems by the recognized authority. The absence of a comprehensive payment system law that supports the National

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36 Section 25(1) , National Payment Systems Act 2020.
37 Section 25(2), National Payment Systems Act 2020.
38 Civil Suit Number 415 of 2019.
39 Augustine Idoot Obilil , "An Overview of the National Payment Systems Act 2020" available at <www.kaa.co.ug/an-overview-of-the-national-payment-systems-act-2020/ > [Accessed 21 October 2023]

Payment System had created an environment where there was a significant level of risk associated with the operation of the current systems.[40]

The hitherto inadequate oversight had a major impact on the safety of payment systems in Uganda as there was no definitive legal basis for ensuring that operators and service providers comply with operating norms and regulations. International best practice puts significant emphasis on the need for fulfilment of these functions, as they are the basis for ensuring safety in payment systems. This responsibility is typically given to the central bank of the country.[41] Informed by the above regulatory lacuna, Parliament passed the National Payments Systems (NPS) Act, 2020 in May 2020 and assented to by the President on the 29th day of July 2020. The Act has now been gazetted and is the law effectively regulating payment systems in Uganda.[42]

The Act is aimed at regulating payment systems beyond the traditional systems, providing safety and efficiency of payment systems, providing the functions of the Central Bank in relation to payment systems and providing for the establishment of the national payment systems council, among others.[43] The National Payment Systems Act 2020 regulates payment systems in the following way;

4.1.1 OBJECTIVES OF THE ACT

The objectives of the Act are to provide for the safety and efficiency of payment systems, to prescribe the framework to govern the oversight and protection of payment systems, to provide for financial collateral arrangements, to regulate operators of payment systems, to regulate payment service providers, to regulate

40 Augustine Idoot Obilil , "An Overview of the National Payment Systems Act 2020" available at <www.kaa.co.ug/an-overview-of-the-national-payment-systems-act-2020/ > (accessed on 21 October 2023)
41 Ibid
42 Ibid
43 Ibid

the issuance of electronic money and to provide for the oversight of payment instruments.[44]

4.1.2 CATEGORIES OF PAYMENT SYSTEMS

Payment systems in Uganda are categorized under the Act as payment systems operated by the central bank, [45] payment systems operated by another government entity or in partnership with a government entity in public interest,[46] payment systems operated by private entities[47]and any other payment system approved or licensed by the Central Bank under the Act.[48]

4.1.3 LICENSING

The Act prohibits the operation of a payment services without a licence issued by the Central Bank in accordance with the Act.[49] The only exception provided is payment services offered by the Central Bank. [50] Contravention of the prohibition attracts a punishment of a fine or a term of imprisonment in addition to disqualification from acquiring a licence.[51]

4.1.4 PAYMENT SYSTEMS RULES

An operator of a payment system is required to develop payment system rules to govern the payment system. [52]

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44 Section 3 (a) – (g), National Payment Systems Act 2020.

45 Section 5 (a), National Payment Systems Act 2020. These include the Real Time Gross Settlement System; the Automated Clearing House; the Central Securities Depository for Government debt securities; cross border payment systems and any other payment system established by the Central Bank.

46 Section 5 (b), National Payment Systems Act 2020.

47 Section 5 (c), National Payment Systems Act 2020. These include switches, electronic money systems and aggregators or integrators.

48 Section 5 (d), National Payment Systems Act 2020.

49 Section 6(1), National Payment Systems Act 2020.

50 Section 6(2), National Payment Systems Act 2020.

51 Section 6 (3) (a) and (b) and (4), National Payment Systems Act 2020.

52 Section 11, National Payment Systems Act 2020.

4.1.5 OVERSIGHT OF PAYMENT SYSTEMS

The Central Bank has the oversight duty over payment systems and this duty includes regulation[53] and revocation of payment system licences.[54]

4.1.6 POWERS OF THE CENTRAL BANK

The Central Bank is accorded power to issue directives to licensees from time to time in respect of payment systems or payment instruments,[55] power to appoint an external auditor to examine a payment system service provider, participant or operator[56]and power to inspect operators of payment systems.[57]

4.1.7 OPENING OF SETTLEMENT ACCOUNTS

Every participant in a payment system is mandated to open and maintain a settlement account in the books of the Central Bank or an authorised settlement agent.[58]

4.1.8 PROTECTION OF SETTLEMENT ACCOUNTS

The balance on settlement accounts with a payment systems are immune from attachment, assignment or transfer for purposes of satisfying any debt or claim.[59]

4.1.9 EFFECT OF COMMENCEMENT OF INSOLVENCY PROCEEDINGS

Insolvency proceedings commenced against a licensee or participant have no retrospective effect on the rights and obligations of a licensee or participant arising from the participation in the payment system.[60] Transactions entered

53 Sections 12 (1) and (2), 19 (1) and (2) and 66, National Payment Systems Act 2020.
54 Section 13(1), National Payment Systems Act 2020.
55 Section 20(1), National Payment Systems Act 2020.
56 Section 21, National Payment Systems Act 2020.
57 Section 22, National Payment Systems Act 2020.
58 Section 26(2), National Payment Systems Act 2020.
59 Section 27, National Payment Systems Act 2020.
60 Section 28 (1), National Payment Systems Act 2020.

into before the commencement of insolvency proceedings but not completed prior to the commencement of insolvency proceedings are also deemed valid and enforceable despite the commencement of insolvency proceedings.[61]

4.1.10 CONSUMER PROTECTION

A payment service provider is mandated to comply with the requirements of consumer protection as prescribed by the Central Bank.[62] A payment service provider is prohibited from misleading consumers through advertisement or purporting to offer a service that is not approved in accordance with the Act.[63] Failure to comply amounts to a criminal offence punishable by a fine or imprisonment or both.[64] Payment system operators are mandated to ensure that payment services are available to the users of the payment system throughout the prescribed operational period.[65] An electronic money issuer is mandated to establish and maintain its primary data centre in relation to payment system services in Uganda.[66]

4.1.11 ESTABLISHMENT OF A SUBSIDIARY LEGAL ENTITY

A payment service provider, other than an entity solely established to issue electronic money, a financial institution or microfinance deposit taking institution, that intends to issue electronic money is required to establish a subsidiary legal entity for that purpose.[67]

4.1.12 ESTABLISHMENT OF REGULATORY SAND BOX FRAMEWORK

The Central Bank is mandated with the responsibility of establishing a regulatory sand box framework for purposes of governing the manner in which a person

61 Section 28 (3) (a) and (b), National Payment Systems Act 2020.
62 Section 65(1), National Payment Systems Act 2020.
63 Section 65 (3), National Payment Systems Act 2020.
64 Section 65 (4), National Payment Systems Act 2020.
65 Section 67, National Payment Systems Act 2020.
66 Section 68, National Payment Systems Act 2020.
67 Section 48 (1), National Payment Systems Act 2020.

may obtain limited access to the payment system eco system for purposes of testing an innovative financial product or service without obtaining a license under the Act.[68]

4.1.13 OPENING UP OF TRUST ACCOUNTS

An electronic money issuer is required to open up a trust account in a financial institution to facilitate the issuing of electronic money.[69]

4.1.14 DUTIES OF TRUSTEES

Trustees [70] have the responsibility to manage the trust account and the interest account on behalf of the customer , establish safeguard measures to protect the funds deposited on the trust account from risks that may occasion loss to beneficiaries of the funds , monitor the trust accounts to ensure that the funds in the trust account are equal in value to the electronic money issued , ensure that interest earned on the trust account is distributed for the benefit of the customer and perform any other duty as the issuer of electronic money may prescribe.[71]

4.1.15 OPENING OF SPECIAL ACCOUNT

A payment service provider who is a financial institution and intends to issue electronic money is required to open and maintain a special account in its books of accounts.[72]

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68 Section 16 (1), National Payment Systems Act 2020.
69 Section 49 (1), National Payment Systems Act 2020.
70 A body corporate established under Section 49(5) of the National Payment Systems Act 2020 with responsibility to manage trust accounts.
71 Section 53, National Payment Systems Act 2020.
72 Section 51 (1), National Payment Systems Act 2020.

4.1.16 PROTECTION OF TRUST AND SPECIAL ACCOUNT

Funds on the trust and special are immune from attachment, assignment and transfer for satisfying any debt or claim.[73]

4.1.17 DUTIES OF ELECTRONIC MONEY ISSUER

An electronic money issuer has a number of duties that include inter alia mitigating concentration of risk, ensure that interest that accrues on trust and special accounts is directed to customers, publish audited financial statements, honour withdraws of cash or transfer of funds, monitor the creation electronic money, reconcile the electronic money value and perform any other duty as the Central Bank may prescribe.[74]

4.1.18 PERMISSIBLE TRANSACTIONS

Electronic money may be used for domestic payments , domestic money transfers , bulk transactions , cash-in and cash-out transactions , merchant and utility payments , cross-border payments or transfers , savings products , credit products , insurance products and any other transactions approved by the Central Bank.[75]

4.1.19 PROHIBITED ACTIVITIES

An electronic money issuer which is not a financial institution is prohibited from receiving and taking deposits , conducting over the top transactions unless full identification of depositor is obtained , issuing airtime as electronic money and using airtime for permissible transaction under the Act.[76] Contravention of the prohibition amounts to criminal offence that attracts a fine.[77]

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73 Section 52, National Payment Systems Act 2020.
74 Section 53, National Payment Systems Act 2020.
75 Section 54, National Payment Systems Act 2020.
76 Section 55 (1) and (2), National Payment Systems Act 2020.
77 Section 55 (3), National Payment Systems Act 2020.

4.1.20 DORMANT ACCOUNTS

An electronic account that does not have a registered transaction for nine consecutive months is considered a dormant account.[78] An electronic money issuer is required to issue a notice of one month to a customer that they should carry out a transaction or else their account shall be suspended before the nine-month period reaches.

4.1.21 LIQUID ASSETS REQUIREMENTS

An electronic money issuer is required to keep one hundred percent of the electronic money held in a trust account and special account in liquid assets.[79]

4.1.22 PROHIBITIONS UPON TERMINATION

An electronic money issuer is prohibited from terminating or transferring his or her license to another person or entity without the written approval of the Central Bank.[80] An electronic money issuer is prohibited from terminating their business without prior approval of the Central Bank.[81] An electronic money issuer is prohibited from changing its name, controlling interest or ownership without the approval of the Central Bank.[82]

4.1.23 SUBMISSION OF RETURNS

A licensee is required to submit returns relating to the operation of the payment system or electronic payment service as may be prescribed by the Central Bank.[83]

78 Section 57(1), National Payment Systems Act 2020.
79 Section 60(1), National Payment Systems Act 2020.
80 Section 61(1), National Payment Systems Act 2020.
81 Section 61(2), National Payment Systems Act 2020.
82 Section 61(3), National Payment Systems Act 2020.
83 Section 62 (1), National Payment Systems Act 2020.

4.1.24 RETENTION OF RECORDS

A payment service provider is required to maintain a record of all payment transactions and information.[84]

4.1.25 NOTICE OF CESSATION OF BUSINESS

A licensee that intends to cease to carry on the business for which it was licensed is required to give notice of cessation of business to the Central Bank and publish the notice in a newspaper of wide circulation for at least 30 days before the date of cessation. [85] The notice must be accompanied by a cessation plan indicating that the cessation has been approved by the controlling interest, the procedure for paying all the customers, the mitigation plan for any adverse effects of the cessation of business on the payment systems ecosystem and any other matter as the Central Bank may prescribe.[86]

4.1.26 IMMUNITY OF CENTRAL BANK OFFICIALS

An officer of the Central Bank is not to be held personally liable in respect of any act done in good faith and without negligence in the performance of the functions in the Act.[87]

4.2 THE FINANCIAL INSTITUTIONS (AGENT BANKING) REGULATIONS 2017

Agency banking is governed by The Financial Institutions (Agent Banking) Regulations 2017, which prescribes a number of rules that have to be followed by financial institutions and their agents that include the following;

84 Section 63(1), National Payment Systems Act 2020.
85 Section 70(1), National Payment Systems Act 2020.
86 Section 70(2), National Payment Systems Act 2020.
87 Section 69, National Payment Systems Act 2020.

Conducting agent banking is subject to the written approval from the Central Bank.[88] Financial Institutions are prohibited from conducting agent banking with their employees, affiliates or associates.[89]

Financial institutions have obligations which include assigning agents identification numbers, a parent branch , displaying a list of agents at the respective parent branch , ensuring that technology infrastructure runs effectively , ensuring that agents have appropriate equipment , ensuring that agents receive appropriate training , ensuring appropriate management and supervision of all agents , setting limits and monitoring compliance and compensating agents for services rendered.[90] Financial institutions approved to conduct agent banking must enter into a written agreement with each agent before the agent conducts business on behalf of the financial institutions. [91]

An agent is prohibited from offering financial services on behalf of a financial institution without a valid agency agreement.[92] The contents of the agency are prescribed and include specifications of the scope of liability of any acts or omissions of the agent, services to be provided by the agent, activities the agent is prohibited from engaging in, remuneration arrangement, anti-money laundering and countering the financing of terrorism arrangements, transaction limits of the agent and exclusion of agent's employees from being treated as employees of the financial institution.[93]

Consumer protection safeguards are also provided for including putting in place adequate policies and procedures to address consumer protection , ensuring that agents conduct business in accordance with the consumer protection requirements applicable to financial institutions , transactions are effected in

88 Regulation 5 (1), Financial Institutions (Agent Banking) Regulations 2017.
89 Regulation 6 (2), Financial Institutions (Agent Banking) Regulations 2017.
90 Regulation 9 (2), Financial Institutions (Agent Banking) Regulations 2017.
91 Regulation 10 (1), Financial Institutions (Agent Banking) Regulations 2017.
92 Regulation 10 (3), Financial Institutions (Agent Banking) Regulations 2017.
93 Regulation 10 (3), Financial Institutions (Agent Banking) Regulations 2017.

real time , two factor authentication , generation of financial statements and display in a conspicuous place at premises of agent banking signage including parent branch , agent's unique identification number and a dedicated telephone line.[94]

Permissible activities by an agent include collection and forwarding of information and documents for account opening or applications for payment instruments, cash deposit and cash withdrawal, payment services including bill payments, money transfers, facilitating disbursements and repayment of loans, receipt and forwarding of documents in relation to loans and leases and any other permitted products, payment of retirement and social benefits and account balance inquiry.[95]

Prohibited activities by an agent include offering financial institution business on its own accord , conducting agency banking with a criminal record , conducting banking services not specifically permitted in the agency agreement , carrying out transactions when the system is down or in the customer's absence , carrying out transactions when the system generated receipt or acknowledgment of the transaction cannot be generated , charging fees directly to customers , undertaking cheque deposits or encashment of cheques , distributing cheque books , distributing debit cards or credit cards , conducting foreign exchange transactions , sub-contracting other persons to provide agency banking services , providing agency banking at a location other than the physical address of the agent , opening accounts and granting loans and being a guarantor to the financial institutions clients.[96]

94 Regulation 17(1) and (2), Financial Institutions (Agent Banking) Regulations 2017.
95 Regulation 14, Financial Institutions (Agent Banking) Regulations 2017.
96 Regulation 15, Financial Institutions (Agent Banking) Regulations 2017.

4.3 THE BANK OF UGANDA FINANCIAL CONSUMER PROTECTION GUIDELINES 2011

4.3.1 APPLICATION

The Guidelines apply to all financial services providers regulated by Bank of Uganda in respect of business they transact in Uganda and the agents of all financial services providers regulated by Bank of Uganda in respect of business the agent transacts in Uganda.[97]

4.3.2 OBJECTIVES

The objectives of the guidelines are to promote fair and equitable financial services practices by setting minimum standards for financial service providers in dealing with consumers, increase transparency in order to inform and empower consumers of financial services, foster confidence in the financial services sector and provide efficient and effective mechanisms for handling consumer complaints relating to the provision of financial products and services.[98]

4.3.3 KEY PRINCIPLES

The key principles governing the relationship between a financial services provider and a consumer are three and include fairness, reliability and transparency.

4.3.4 SCOPE OF FAIRNESS

Financial service providers are expected to act fairly and reasonably in all dealings with consumers. [99] However fairness is given multiple facets to further include provision of information and advice to a consumer,[100] suitability of advice,[101] prohibition of conditional sales,[102] explaining the nature and scope of

97 Guideline 2, Bank of Uganda Financial Consumer Protection Guidelines, 2011.
98 Guideline 4, Bank of Uganda Financial Consumer Protection Guidelines 2011.
99 Guideline 6 (1) (a), Bank of Uganda Financial Consumer Protection Guidelines 2011.
100 Guideline 6 (2), Bank of Uganda Financial Consumer Protection Guidelines 2011.
101 Guideline 6 (3), Bank of Uganda Financial Consumer Protection Guidelines 2011.
102 Guideline 6 (4), Bank of Uganda Financial Consumer Protection Guidelines 2011.

guarantorship,[103] providing a cooling off period,[104] provision of statements of deposit and loan accounts,[105] providing a 30 days' notice of changes to terms and conditions,[106] prohibition of claim of unreasonable costs and expenses[107] and prohibition of closure of account without giving a consumer 14 days' notice.[108]

4.3.5 SCOPE OF RELIABILITY

Financial service providers are supposed to update the consumers' data,[109] have reliable self-service banking channels,[110] safeguard consumer information and not disclose it to third parties,[111] protect consumers' accounts and provide relevant information to enable them safeguard their accounts[112] and ensure that staff are competent , well trained and are ably supervised.

4.3.6 SCOPE OF TRANSPARENCY

Financial service providers must ensure that any information that is given to a consumer is transparent[113], the contracts and other documentation relating to the financial products and services they provide are summarized in a key facts document written in plain language,[114] the terms and conditions provided highlight to a consumer the fees , charges , penalties , relevant interest rates and any other consumer liabilities,[115] disclose interest rates,[116] provide a consumer with a schedule of fees and charges for the product the consumer has chosen[117]

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103 Guideline 6 (5), Bank of Uganda Financial Consumer Protection Guidelines 2011.
104 Guideline 6 (6), Bank of Uganda Financial Consumer Protection Guidelines 2011.
105 Guideline 6(7), Bank of Uganda Financial Consumer Protection Guidelines 2011.
106 Guideline 6(8), Bank of Uganda Financial Consumer Protection Guidelines 2011.
107 Guideline 6(9), Bank of Uganda Financial Consumer Protection Guidelines 2011.
108 Guideline 6(10), Bank of Uganda Financial Consumer Protection Guidelines 2011.
109 Guideline 7(1), Bank of Uganda Financial Consumer Protection Guidelines 2011.
110 Guideline 7(2), Bank of Uganda Financial Consumer Protection Guidelines 2011.
111 Guideline 7(3), Bank of Uganda Financial Consumer Protection Guidelines 2011.
112 Guideline 7(4), Bank of Uganda Financial Consumer Protection Guidelines 2011.
113 Guideline 8(1), Bank of Uganda Financial Consumer Protection Guidelines 2011.
114 Guideline 8(2), Bank of Uganda Financial Consumer Protection Guidelines 2011.
115 Guideline 8(3), Bank of Uganda Financial Consumer Protection Guidelines 2011.
116 Guideline 8(4), Bank of Uganda Financial Consumer Protection Guidelines 2011.
117 Guideline 8(5), Bank of Uganda Financial Consumer Protection Guidelines 2011.

and ensure that all advertising and promotional materials are fair , clear and not misleading.[118]

4.3.7 COMPLAINTS HANDLING MECHANISM

A financial services provider shall have in place and operate appropriate and effective complaint procedures,[119] inform consumers about the complaints-handling procedures,[120] investigate and determine complaints,[121] keep the complainant informed of the complaint-handling process,[122] go through the complaint-handling process within 2 weeks,[123] identify and remedy recurring systemic problems[124] and provide Bank of Uganda with a report of its receipt and handling of complaints every six months.[125]

5.0 RISKS INVOLVED IN DIGITAL BANKING

5.1 FRAUD

5.1.1 NATURE OF FRAUD

Fraud in digital banking occurs in various forms but some of the most common forms of fraud in digital banking include the following;

a. Authorized Push Payment fraud

Authorized Push Payment fraud is a form of fraud where a victim is induced by fraudulent means to authorize their bank to send a payment to a bank account controlled by a fraudster.[126]

118 Guideline 8(6), Bank of Uganda Financial Consumer Protection Guidelines 2011.
119 Guideline 9(2), Bank of Uganda Financial Consumer Protection Guidelines 2011.
120 Guideline 9(3), Bank of Uganda Financial Consumer Protection Guidelines 2011.
121 Guideline 9(4), Bank of Uganda Financial Consumer Protection Guidelines 2011.
122 Guideline 9(5), Bank of Uganda Financial Consumer Protection Guidelines 2011.
123 Guideline 9(6), Bank of Uganda Financial Consumer Protection Guidelines 2011.
124 Guideline 9(7), Bank of Uganda Financial Consumer Protection Guidelines 2011.
125 Guideline 9(8), Bank of Uganda Financial Consumer Protection Guidelines 2011.
126 Philipp v Barclays Bank UK PLC [2023] UKSC 25.

b. Pull Payment fraud

Pull Payment fraud is a form of fraud where payments are extracted from a victim's bank account or debited to a card by fraudster without the victim's authority.[127]

c. Business Email Compromise fraud

Business Email Compromise is a form of fraud in which a cyber-criminal compromises email correspondences between by altering the contents of those emails to their advantage without the knowledge of the parties to achieve a fraudulent or criminal objective.[128]

5.2 CYBER ATTACKS

Cyber-attacks in digital banking mainly take the broad form of account take over and automatic transfer systems. Financial Institutions' cyber security departments should be aware of the different types of attacks that these two categories include to manage risk in their systems and set up appropriate security measures to prevent threats.[129]

5.2.1 ACCOUNT TAKE OVER

Account Take Overs happen when cyber criminals acquire account details of a legitimate user and then use the account as their own. Account Take Over often begins with compromised credentials that have been stolen or obtained through trickery.[130] In *Atiku v Centenary Rural Development Bank Limited*[131], someone was able to access the plaintiff's phone and mobile banking password and withdrew funds from her bank account using the mobile banking application on her phone.

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127 Ibid.
128 Hawarden v Edward Nathan Sonnensberg Inc [2023] ZAGPJHC 14.
129 "Online banking fraud: what it is and how to prevent it" available at <www.cleafy.com> [Accessed 8 October 2023]
130 Atiku v Centenary Rural Development Bank Limited [2022] UGCommc 146.
131 [2022] UGCommc 146.

Phishing, smishing, vishing and hacking are the most common examples of Account Take Over attacks. Cyber criminals can spread infectious malware on the victim's device via clickable links contained in an email[132] or an SMS[133] that look genuine. Once the malware is downloaded and installed, it gains complete access to the victim's device, giving the cyber criminals the opportunity to perform Account Take Overs. Cyber criminals can also trick victims directly via voice calls[134] and convince them to perform a straightforward illegal activity without the need to spread any malware.[135] This is what cyber criminals did to Mr. and Mrs. Philipp in *Philipp v Barclays Bank UK PLC*[136] when they convinced them to transfer money from their bank account to another account by convincing them over the phone that they are police officers and that their money is not safe on their bank account.

5.2.2 AUTOMATIC TRANSFER SYSTEMS

Attacks through Automatic Transfer Systems do not require taking over the victim's account. The attack happens while the victim actively operates on the target account by tampering with the account without the victim noticing it.[137]
In *Hawarden, v Edward Nathan Sonnensberg Inc* [138] cyber criminals hacked into the email correspondence between the Plaintiff and Defendant and altered the account number provided by the Defendant to the Plaintiff without the Plaintiff and Defendant noticing causing the Plaintiff to transfer funds to an account belonging to the cyber criminals.

132 Known as phishing.
133 Known as smishing.
134 Known as vishing.
135 Supra (no.6).
136 [2023] UKSC 25.
137 Supra (no.6).
138 [2023] ZAGPJHC 14.

6.0 MITIGATION OF RISKS INVOLVED

6.1 CYBER SECURITY PROTOCOLS

Financial institutions offering digital banking are obliged to provide secure mechanisms for their customers to conduct their banking safely. As such, they have a duty to put in place robust fraud detection solutions to protect their systems and customers. These solutions include cyber security protocols[139], which ensure that digital banking systems are secure and should be regularly reviewed for that purpose.[140]

6.2 SECURE TECHNOLOGY INFRASTRUCTURE

Financial institutions have a duty to take reasonable measures to ensure that their digital banking systems and technology are secure and are regularly reviewed and updated for this purpose. Their systems should be able to detect suspicious transaction or withdraws when they take place. The systems should equally ensure that digital banking transactions can be traced and checked as long as they are received by the system.[141]

6.3 CUSTOMER SENSITIZATION AND SUPPORT

For security measures to be effective, financial institutions should provide the customer with regularly updated information on how to access digital banking services, including details about their customer ID, selection of appropriate passwords and the availability of additional authentication or security options, how to maintain their security and what their liability for unauthorized transactions will be.

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139 Cyber security protocols are cyber security measures put in place to ensure that systems are safe and secure from cyber-attacks. These may include password encryption, setting up of firewalls, routine password resets and routine cyber-attack drills or manoeuvres.

140 Atiku v Centenary Rural Development Bank Limited [2022] UGCommc 146.

141 Ibid.

7.0 FEASIBILITY OF BEYOND THE BANKING HALL STRATEGY

7.1 PROS OF DIGITAL BANKING

7.1.1 COST EFFECTIVE

The cost of opening up and running a physical branch of a bank is so high as opposed to setting up and operating a digital platform to offer digital banking services to customers. The Independent quoted banking officials, who had this to say regarding the cost effectiveness of digital banking;

> *"Indeed, Sentongo (the head of digital banking at Stanbic Uganda) said if Arinaitwe and others can transact using digital tools, there is no need of opening branches everywhere because they are expensive. It costs approximately 2 million US Dollars to put up a fully-fledged commercial bank branch. Investing in centralized IT systems that would ably handle transactions without face-to-face meetings between customers and the bank, would make a good investment."* [142]

7.1.2 FINANCIAL INCLUSIVENESS

Digital banking has disrupted the financial services in Uganda enabling millions of poor people to access banking services, providing them with a digital financial footprint. [143] Many of these poor people, would not have been able to access conventional banking services due to a number of barriers like; illiteracy, poverty and lack of physical access to banks.

7.1.3 CONVENIENCE TO CUSTOMERS

Digital banking enables banks to effectively serve customers and at their convenience. This is because, the banks are able to reach out to the customers easily and faster as opposed to the customers reaching out to the banks. This is

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142 The Independent (2017), "Digital banking: Why it is good for business and jobs" available at <https://www.independent.co.ug/digital-banking-good-business-jobs/> [Accessed 4 February 2024]

143 Daily Monitor (2021), "Digital banking necessary for financial inclusiveness" available at <https://www.monitor.co.ug/uganda/business/prosper/digital-banking-necessary-for-financial-inclusiveness-1686112> [Accessed 5 February 2024]

the case when customers have to physically approach the banking hall at a physical branch of the bank. In an interview with The Independent on 20th February 2017, Mr. William Sekabembe, the then Chief of Business and Executive Director of DFCU Bank Uganda Limited had this to say on the bank's strategy on digital banking;

"We are investing heavily in technology so we can serve our customers without necessarily opening new branches in all parts of the country". [144]

7.2 CONS OF DIGITAL BANKING

7.2.1 SUSCEPTIBLE TO FRAUD

Digital banking is not without risks of fraud. As digital banking channels have multiplied, so have the routes that fraudsters can use. With increased automation, financial institutions have become some of the most targeted by fraudsters, due to their immediate access to funds and their ability to transfer them.[145]

7.2.2 DIFFICULTY TO ADAPT TO DIGITAL BANKING

Some bank customers, especially those of old age, have had a difficulty in adapting to digital banking, due to its heavy reliance on technology. Mubiru J in *Atiku v Centenary Rural Development Bank*[146] noted as follows, "Senior citizens believe that mobile phones are for talking and not conducting banking transactions." This demographic is the most bankable, as compared to that of the youth, who best appreciate digital banking due to their being well vast with technology; yet it is not well vast with technology, thus finds it difficult to adopt and embrace digital banking.

144 The Independent (2017), "Digital banking: Why it is good for business and jobs" available at <https://www.independent.co.ug/digital-banking-good-business-jobs/> (Accessed 4 February 2024).

145 Atiku v Centenary Rural Development Bank Limited [2022] UGCommC 146.

146 [2022] UGCommC 146.

7.2.3 TECHNOLOGICAL HURDLES

The use of digital baking services is faced with a number of technological hurdles. These include lack of technical knowledge, poor technology infrastructure, lack of gadgets and poor internet penetration. These affect the adoption of digital banking by bank customers hence greatly impacting the banks digital banking strategy.

7.3 WEIGHING THE PROS AND CONS

Weighing the pros and cons of digital banking, depends on which side of the spectrum you are on. From a banks point of view, the pros of digital banking which include; cost effectiveness, financial inclusiveness and customer convenience far outweigh the cons. This is so, even when digital fraud has proved to be a very big setback to the banks profit margin, as banks have been made to pay heavy damages to customers that are victims of digital fraud in a number of cases.[147]

From a customer's vantage point, the cons of digital banking which include; fraud, adaptation challenges and technological hurdles far outweigh the pros. This is so, even when customers benefit greatly from the convenience that digital banking offers. There is thus a need for banks to balance their needs and those of their customers in order to be in position to better serve their customers. For example, banks should not completely go digital and only offer digital banking. They should be in position to maintain the physical banking component alongside digital banking. This will enable customers that have challenges with digital banking services to continue accessing banking services. Banks should equally have continuous sensitization and training sessions on digital banking to help customers best adapt to digital banking.

147 Philipp v Barclays Bank UK PLC [2023] UKSC 25 and Barclays Bank v Tamima Ibrahim Civil Appeal Number E075 of 2021

8.0 CONCLUSION

The nature of digital banking and its confluence with technology makes it very necessary in today's modern day and age. It's adaption by financial institutions and their customers is inevitable. Indeed, all financial institutions in Uganda and their customers have either wholly, or partly adopted digital banking for ease of business and service delivery. The principles governing digital banking are very unconventional as they are a mix of principles governing technology and law. This makes digital banking very technical and complicates its appreciation and regulation. It is, however, helpful that digital banking does not depart a lot from conventional banking. Some of the principles governing it are, relatable to those of conventional banking. Case in point, is the banker customer consumer relationship in digital banking that is relatable to the banker customer relationship in conventional banking.

Many jurisdictions, including Uganda, have enacted laws to regulate how digital banking is conducted. Uganda's laws provide clear regulation of digital banking in addition to providing consumer protection. Amendments to the law to respond to technological changes will go along-way in improving regulation of digital banking. With the benefits that accrue to digital banking comes the challenges. This, however, does not take away the said benefits as they far much outweigh the challenges. Financial institutions ought to take steps to ensure the safety of digital banking for their consumers. This includes investing in technological infrastructure, technical capacity building and sensitization of the general public about the risks involved in digital banking.

Digital banking has come to stay as the advancements in technology and the growth of the banking industry do not permit the return to the old banking days and ways; of banking in the banking hall, at the counter and at a bank branch. Banking today ought and I nay say must be done beyond the banking halls, at the convenience of the bank's customer or else banks will not be having any customers. This is much cheaper for the banks as it reduces on operations costs

like paying salaries to employees, renting bank premises and purchasing stationery. It is much convenient for the bank customer as they are able to access banking services 24 hours a day as opposed to the 9am to 5pm banking hours at a bank branch and at their convenience, wherever they are as opposed to travelling to the bank branch carry out a transaction.

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THE IMPERATIVES OF UNFAIR DISMISSAL LEGISLATION AS A HARBINGER FOR LABOUR REFORMS IN NIGERIA.

Oluwaseyi Augustine Leigh*

ABSTRACT

The theory of Paternalism in Nigerian labour relations perceives workers as vulnerable persons. Unemployment and employment insecurity have placed workers at a disadvantaged position compared to employers. The principle imposes an obligation on the government to ensure the improvement of the working conditions. One major way of achieving this goal is through the enactment of laws for the protection of citizens from the common law employment terms and conditions currently encoded in the Labour Act, which, owing to modern employment realities, have become obsolete. This paper discusses the imperativeness of enacting laws to protect employees against unfair labour practices. The author argues that the current law is anti-worker well-being and, recommends creation of gainful employment opportunities and enactment of egalitarian legislation as way of quagmire.

1.0 INTRODUCTION

The term paternalism first appeared in the late 19th century as an implied critique predicated on the inherent value of personal liberty and autonomy, positions elegantly outlined by Immanuel Kant in 1785 and John Stuart Mill in 1859.[1] Davidov extended the principle of paternalism to labour law in order to justify the retention of the principle of *non-waivability* as a basic norm in

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1 Lindsay J Thompson (2013) Paternalism available at <https://britannica.com/topic/paternalism> [Accessed on 13 August 2022].

labour law.[2] Rather than leave the Nigerian workers to the vagaries of uncertainties of tenure of employment and exposure to huge jobs insecurity owing to the unprecedented high level of unemployment and underemployment pervading the country, the government will be fulfilling its constitutional responsibility if it achieves the promulgation of employment protection legislation in the cast of an unfair dismissal law in the body of employment laws in the country.[3] This will ensure the security of tenure of employment of workers in Nigeria as argued by Eyongndi and Onu.[4] How far the Nigerian government has lived up to and or discharged the onus of employing the vehicle of national legislation to ameliorate the mischief of insecurity of tenure of employment contracts in the country has been feebly felt in the tepid and tenuous succour contained in the National Industrial Court Act, 2006 and legislation like the Employees Compensation Act, 2010.[5]

Work has always been central to the existence of man. According to the American psychologist Maslow,[6] work constitutes the only device recommended as a basic solution to the problems man faces in meeting his prevailing needs. The theory of "hierarchy of needs" encapsulated in Maslow's

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2 The principle of *non-waivability* is a theoretical vehicle it needed for protecting employees against coerced waivers. It seeks to explain why *non-waivability* is generally justified even against the wishes of employees (who may genuinely want to waive some labour rights in return for a higher salary for example), for reasons of paternalism available at <https://academic.oup.com/ojils/article/> [Accessed on 1 August 2022]

3 Fapohunda, T. M., "Employment Casualization and Degradation of Work in Nigeria" (2012) 3(9) *International Journal of Business and Social Science,* 257

4 Eyongndi, D.T. & Onu, K.O.N. "A Comparative Legal Appraisal of "Triangular Employment" Practice: Some Lessons for Nigeria" (2022) 9 *Indonesian Journal of International and Comparative Law,* 181-207.

5 The National Industrial Court Act, 2006 was a piece of legislation which provided for the establishment of the National Industrial Court as a superior court of record. The Act contained 55 sections and carved up into 6 parts respectively as follows: The Constitution of the Court (sections 1 – 6); Jurisdiction and Law (sections 7 – 20); Sitting and Distribution of Business (sections 21 – 27); General Provisions as to Trial and Procedure (sections 28 35); Rules of Court (section 36 (1) (a) – (v), (2)); and Miscellaneous (section 37 – 55). The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 which further altered the CFRN, 1999 made various amendments to the CFRN, 1999 in the following sections: 6, 84, 240, 243, 254A – 254F, 287, 289, 292, 294, 295, 316, and 318; as well as to the Third Schedule to the Principal Act and to the Seventh Schedule to the Principal Act.

6 *Maslow, A.H. "The Farther Reaches of Human Nature" (1969) 1(1) Journal of Transpersonal Psychology 1–9.*

seminal work aptly underscores this proposition.[7] Among all the rights that are defined as fundamental, the access to secure employment, and the guarantee of a secured tenure for the employment, make those other fundamental rights both meaningful and pleasurable.[8] The indivisibility and interrelatedness of these rights irrespective of their categorisation cannot be overemphasised. When work therefore becomes fleeting and its tenure unsecure, as it is the case under master-servant employment in Nigeria at present owing to several factors, the guarantee of a meaningful existence in life assumes an existential denial threatening decent life.[9]

The search for security of tenure at the workplace, a *sine qua non* for a better life of an employee is as elusive as the Holy Grail in Nigeria.[10] This unwholesome situation is not unconnected with the fact that the foremost statutory law governing labour and industrial matters in Nigeria constitutes a bulwark against the prospects of a secured tenure of an employee on his job.[11] And work, whether formal or informal, or whether in the formal or informal sector, takes its roots from a contract or agreement for employment, no matter how rudimentary. Prior to the beginning of white-collar jobs in pre-colonial Nigeria, employment had by nature been essentially informal and illustrated in the absence of a rigorous employment entry and exit system of services in exchange for wages.[12]

It has become imperative that the government as regulator, enacts laws to safeguard security of tenure and chide against unfair labour practices which

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7 Atilola B. Recent Developments *in Nigerian Labour and Employment Law* (Lagos, Hybrid Consults, 2017) 39.

8 Worugji INE, Archibong, JE & Alobo, E. "The NIC Act (2006) and the Jurisdictional Conflict in the Adjudicatory Settlement of Labour Disputes in Nigeria: An Unresolved Issue" (2007) 1(2) *Nigerian Journal of Labour Law and Industrial Relations,* 25-42.

9 *Obanye v Union Bank of Nigeria* [2018] 17 NWLR (Pt. 1648) 375.

10 Eyongndi, D.T. & Dawodu-Sipe, O.A. "The National Industrial Court Stemming of Unfair Labour Practice of Forced Resignation in Nigeria" (2022) 12(2) *Nigerian Bar Association Journal,* 183-197.

11 Opera, L. C., Uruchi, O. B. and Igbaekemen, G. O., "The Legal Effect of Collective Bargaining as a Tool for Democratization of Industrial Harmony" (2014) 31(1) *European Journal of Humanities and Social Sciences*, 168.

12 Okene, O. V. C. "*Internationalization of Nigerian Labour Law: Recent Developments in Freedom of Association*" (2016) 13(4) *Port-Harcourt Journal of Business Law* 10.

have become virulent within the Nigeria's employment space particularly in the master-servant sphere. This papers has as its gaol interrogating how laws could be used to engender egalitarian employment relations, restrain unfair dismissal and other unfair labour practices pervading in Nigeria's employment circle by examining the status of employment contracts in Nigeria, x-raying the role of the International Labour Organisation in achieving security of tenure and extinguishment of unfair labour practices (unfair dismissal inclusive), it examines the practice in some selected jurisdictions with a view to drawing lessons for Nigeria.

1.1 STATUS OF EMPLOYMENT CONTRACTS IN NIGERIA

Work satisfies many needs. For the individual, it satisfies the need to exercise his faculties while participating in the collective work of the society.[13] Work also affords a claim by the individual upon the social product enabling him to support himself and his family. From the standpoint of the community, work is necessary both for the survival and civilisation. So fundamental is work to human existence that man, throughout most of history – had had to wrest a living from the soil for the longest period with little more than his bare hands for tools.[14] Prior to the latter half of the nineteenth century, the relationship between the employer and the employee was considered as one which arose out of the status of being a servant, hence the description of the contract of employment as a master-servant relationship.[15] The prevalence of this view was underscored by the thesis of Lord Blackstone in naming the master-

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13 The aggregate of the total work output carried out by individual workers within the borders of a country is measured in economic terms as the gross domestic product – GDP – of such country and is defined as the monetary value of final goods and services, that is, those that are bought by the final user produced in a country in a given period of time (say a quarter or a year). It counts for all the output generated within the borders of a country. It is a term which has become widely used as a reference point for the health of national and global economies available at <https://imf.org/external/pubs/ff/fandd/basics/gdp.htm> [Accessed on 28 August 2022].

14 Leigh, O. A. *The right to work and the physically challenged: searching for appropriate legal regime in Nigeria.* Nigerian Journal of Labour Law and Industrial Relations) NJILR vol.2 No. 4 (2008) p. 36 cited in "Prospects and Challenges of Developing the Legal and Institutional Regimes of Unfair Dismissal in Nigeria", a PhD thesis by O. A. Leigh in the Faculty of Law and submitted to the Postgraduate College, Obafemi Awolowo University, Ile-Ife, Nigeria.

15 Emiola, A, *Nigerian Labour Law,* 4th Ed. (Ogbomoso, Emiola Publishers, 2008) 23.

servant relationship among the three great relationships of private concern, the other two being that of the husband and wife; and that of the parent and child.[16]

The antiquated origin of the relationship was also exemplified in the fact that the comprehensive legislation which was enacted to govern employment relationship since the fourteenth century, that is, the Statute of Labourers of 1351, was only abolished in 1875 and the movement from status towards contract, proceeded through the nineteenth and twentieth centuries, becoming established more concretely in the latter century. Also, in the case of *Laws v London Chronicle*[17] Lord Evershed M.R. said that a contract of service is just but an example of the general law of contract as a result of which the principles of the general law of contract will be applicable, even to the contract of employment.[18]

The contract of employment continued to exist in the environment of the common law principles and therefore left largely unaffected by statutory law until 1963 and particularly with the introduction of the concept of unfair dismissal in 1971. During this period, employment relationships became increasingly impacted with statutory colouration in the areas of rights and duties of the parties in their relationship, to the extent that it became doubtful to still lay claim to the fact of retention of the common law principles over contract of employment.[19] This is because the statutory influence has so much impacted the contract of employment that what we have can now be safely referred to as a modern 'status' relationship of a kind or at least of a

16 O. A. Leigh, "Prospects and Challenges of Developing the Legal and Institutional Regimes of Unfair Dismissal in Nigeria", a PhD thesis written in the Faculty of Law and submitted to the Postgraduate College, Obafemi Awolowo University, Ile-Ife, Nigeria, p. 17 and see the case of Smith and Wood, *Industrial Law*, 5th ed. (1993) Butterworths, London, p. 64

17 [1959] 2 All E.R. 285.

18 Smith and Wood, *op. cit.* p. 64.

19 Amucheazi, O. D. & Oji, E. A., "Reinstatement of a Dismissed Employee in a Contract of Employment: A Case Review of Longe v. First Bank of Nigeria Plc." (2010) 4(2) *Nigerian Journal of Labour and Industrial Relations,* 3-4.

sui generis law of employment which tilts towards contractual theories for direction in certain areas.[20]

Despite statutory intervention, certain nature of the contract of employment remains unaffected. For instance, employment continues to be a voluntary relationship in its formation, and as far as the terms and conditions of employment are concerned, they remain negotiable by the parties, either by themselves as individuals or under the auspices of their collective parties.[21] The influence of common law customs, doctrines and practices over employment law in Nigeria, is both profound and fundamental and permeates the subject matter from commencement of the contract of employment to its conclusion.

The current legislation guiding employment relationships in Nigeria – the Labour Act – has been viewed in this treatise as a codification of common law principles on labour and employment relationships and changes permitted therein in Nigeria. The commencement date of the Labour Act in Nigeria is very instructive on two scores in the following respects: firstly, that was also the year that the Unfair Dismissal Act in UK debuted and the year 1971 was also the year of the ILO Convention 158 was made. That these two impressive developments at the international stage did not impact the 1971 Nigerian law on labour and employment relations was to say least unpleasantly surprising. Throughout the duration of the contract of employment from commencement to termination, the influence of the doctrines, customs and practice of common law have been noticeable.[22]

The downside in the employment relationship of the parties have been felt more in the areas of the rights and obligations as contained largely in the

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20 O. A. Leigh, PhD thesis at p. 18. See also the case of Smith and Wood, *Industrial Law*, 5th ed. (1993) Butterworths, London, pp. 64-65.

21 Emiola, *op. cit.* p. 17. A word need be said here about the treatment of terms of collective bargaining in construing the contract of employment. Contracts of employment are regarded as the end product of free and personal bargain between the individual worker and his employer. Ensuing from this therefore, terms of collective bargaining are not regarded as part of such a contract of employment as to influence its construction provided there are no express words or necessary implication which make this imperative. See the case of *Stratford (J.T.) and Sons Ltd. v Lindley* (1965) A.C. 307.

22 Isiaka S. B., "The Continued Relevance of strike as a Form of Industrial Action in Nigeria" (2001) 3(2) *Humanity Jos Journal of General Studies* 41.

contract of employment.[23] Though the parties to the contract of employment are regarded as enjoying some modicum of freedom in entering into the contract, the reality of the huge unemployment situation in Nigeria, whereby more workers in the employment market are chasing after fewer employment opportunities, has rendered trifle the concept of freedom of the parties to enter contracts of employment. While the employer is dealing with the employee on the basis of "take it (the employment on my terms) or leave it", the employee on his own part is contracting with the employer on the basis of "a bird in hand, is worth several in flight."[24] Due to this unfortunate situation, Eyongndi and Ajayi[25] have opined and rightly so in our estimation that the non-existent jobs have tilted the scale of freedom of the parties in favour of the employer while the employees continue to gnash their teeth.

The unequal status of the parties therefore coupled with the doctrine of the sanctity of contract as expressed in the phrase *pacta sunt servanda*,[26] has brought home with its full effects, the precarious nature of employment relationships, otherwise known as master and servant contracts in Nigeria.[27] It is in the area of termination of the contract of employment in Nigeria that case law resource has revealed the underbelly of precarious employment

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23 Talking generally, a contract of employment is not expected to be in any particular form – except specifically required by statute - and may therefore be oral or written and partly oral or partly written. At other times, a contract of employment may be inferred from the conduct of the parties. See *Nigerian Airways v Gbajumo* (1992) 5 NWLR (Pt. 244) 735. Unwritten contracts present the problem of determining the exact terms of the contract in the event of the resolution of an ensuing dispute on the contract.

24 Worugji I. N. E., "The Right to Work under the Nigerian Labour Law: The Need for Reforms" (1994-1996) 18 *Journal of Contemporary Law* 197.

25 Eyongndi, D.T. and Ajayi, M.O. "The Principles of Voluntariness and Equality under Nigerian Labour Law; Myth or Reality?" (2015-2016) 9 *University of Ibadan Journal of Private and Business Law,* 189-222.

26 *Pacta sunt servanda*, Latin for "agreements must be kept", is a Brocade and fundamental principle of law. According to Hans Wehberg, a professor of international law, "few rules for the ordering of Society have such a deep moral and religious influence" as this principle. Known by the Latin formula *pacta sunt servanda* ("agreements must be kept") is arguably the oldest principle of international law. Without such a rule, no international agreement would be binding or enforceable available at <www.britannica.com/topic/pacta-sunt-servanda> [Accessed on 12 October 2022].

27 Tinuoye, A. T., "Human Rights, Workers' Rights and Equality in the Nigerian Workplace: An Overview" (2015) 5(17) *Developing Country Studies* 99.

situation in Nigeria as one heavily weighted against the interest of the worker and in favour of bourgeois employers.[28]

In Nigeria, as well as under the common law employment principles, the contract of employment is terminable merely by the issuance of notice of the length and mode prescribed in the contract to the other party, and where no written contract exists or where there is an omission to prescribe a length of notice in such a contract, then recourse will be made to the period of notice as contained in the relevant provisions of the Labour Act.[29] Any enquiries as to the reason for the termination of the contract of employment as obtaining under the law of unfair dismissal are not relevant under employment contracts in Nigeria, save for employment contracts which enjoy statutory flavour in respect of its duration, and even at that all that the courts will insist on is strict compliance with the statutory stipulations for the ending of such contracts as to its duration and steps to be taken for its termination as stipulated under respective statutes.[30] This was the situation in *Olaniyan and Others v University of Lagos.*[31] Here, the Respondent as employer of the appellants invoked its powers to terminate the employment of the appellants (who were Professors in the university) by giving six months' notice or payment of salary in lieu.

Even though there were no reasons stated for the appellants' dismissals in the termination letters, yet evidence at trial revealed that appellants were dismissed based on allegations of misconduct against them. The Supreme

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28 *Osisanya v. Afribank Plc.* (2007) 4 MJSC 128 at 147; *Chukwuma v. Shell Petroleum Development Company* [1993] 4 NWLR (Pt. 298) 512; *Obanye v. Union Bank of Nigeria* [2018] 17 NWLR (Pt. 1648) 375.

29 Section 11 of the Labour Act on "Termination of Contracts by Notice" provides as follows: (1) Either party to a contract may terminate the contract on the expiration of notice given by him to the other party of his intention to do so. And subsection (2) goes on to stipulate the length of notice that can be issued for respective periods of continuous employment between the parties as follows: (a) One day (length of notice), where the contract (of employment) has continued for a period of three months or less; (b) one week (notice), where the contract has continued for more than three months but less than two years; (c) two weeks (notice), where the contract has continued for more a period of two years but less than five; and (d) one month (notice), where the contract has continued for five years or more.

30 *Olatunbosun v. NISER* [1988] 3 NWLR (Pt. 80) 25; *Adedeji v. Police Service Commission* [1967] 1 All NLR 67.

31 (1985) 2 NWLR 599.

Court in considering the case referred to the Regulations of the University, the Memorandum of Appointment of the appellants and section 17 of the University of Lagos Act and held that the appellants, to whom the various documents relied upon referred to, became invested by virtue of the relevant provisions of the law, with a special status beyond that of a mere servant in an ordinary master-servant relationship. That the appellants' purported dismissal by way of notice was *ultra vires* the employer whose only cause of action was to follow the procedure contained in the University of Lagos Act, which in cases of misconduct will entail strict observance of the of the rules of fair hearing in the enquiries of the employer culminating in the dismissal of the appellants.

The Supreme Court therefore voided the purported dismissal of the appellants, not because there were no reasons adduced for the dismissals in the various notices of termination of appointment of the appellants, but because the employer (University of Lagos management) failed to play by its own rules and procedures for termination of appointment of the appellants as contained in the university statute. The court then went ahead to reinstate the appellants to the exact position they were occupying prior to their removal.[32] Earlier, in the case of *Shitta-Bey v Federal Public Service Commission*,[33] the Supreme Court had hinted at its preparedness to chart a new path which accommodates some revolutionary steps to improve the lot of employees who are unjustifiably sacked from their employment due to no fault of theirs. The vehicle fashioned by the court for redressing this anomaly was located in the award of severance pay to the victim of "unfair dismissal".

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32 Karibi-Whyte JSC (as he then was) stated that the word reinstatement was not a term of art, but rather, simply meant replacing a person to the exact position occupied by him prior to his removal. The court held that there was accordingly, no logical or judicial basis for doubting the validity of the proposition that reinstatement was the correct remedy for an ineffective and invalid exercise of a power to dismiss. His Lordship further held that emotions, and other personal considerations, which had hitherto been the rationale for refusal of such remedy, were irrelevant and inapplicable in the circumstances of public office, which involves a contract of service, as distinct from a contract of personal service where personal considerations often come into play – p. 685 0f the judgment cited in Oyewunmi, A. *Job Security and Nigerian Labour Law: Imperatives for Law Reforms*, in Enobong Edet (ed) "Rocheba's Labour Law Manual", Rocheba Law Publishers, p. 31

33 [1981] N.S.C.C. 19

In the *Shitta-Bey's* case, the Supreme Court blazed the trail by holding the Civil Service Rules of the Federal Public Service as sacrosanct, while clothing the Rules with constitutional force thereby imbuing the public servant with a legal status which made his employment relationship with the government a step higher than that of the ordinary master and servant relationship, which the civil servant's employment was hitherto thought to be. Labour law scholars and academics, have warned that the Supreme Court decision in the *Olaniyan's* case should be seen for what it was, being based firmly on the issue of termination based on misconduct without extending the opportunity of fair hearing to the employee, rather than being seen as offering a blanket proclamation and protection of security of tenure of university staff.[34]

Another academic and labour law scholar,[35] also opined in a case review of the *Olaniyan's* case that the decision of the Supreme Court ought to be qualified so as not to precipitate practical problem and confusion in extending the *ratio* of the case to similar cases in future without proper distinguishing and distilling of the peculiar facts therein. That rather than seeing it as a restatement of the law which seeks to fetter the discretionary latitude of the master to terminate his servant's employment at any time and for any or no reason at all,[36] the decision should be seen as an example of the court's preparedness to "lift the veil of law, when justice of the case so demands."[37]

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34 See A. A. Adeogun, "From Contract to Status in Quest for Security" University of Lagos Inaugural Lecture (1986, University of Lagos Press); p. 27-30 cited in Oyewunmi, A. *Op. cit.* p. 31.

35 B. Atilola, "The Legal Nature of the Contract of Employment of a Managing Director: Longe v. First Bank" (2011) 1(1) *Nigerian Journal of Labour and Industrial* Relations) NJLIR, 5.

36 C. K Agomo, Case Comment on "Termination of Contracts of Employment: *Professor C.I.O. Olaniyan & 2 ors. v. The University of Lagos and Anor.*" 1985, 4 J.P.P.L. p. 49, cited Oyewunmi, A. *op. cit.* pp. 31-32.

37 Both learned writers (Professors Adeogun and Agomo), saw a way out of the problem in the highly illuminating concurring judgment of Karibi-Whyte J.S.C. who went out of his way to state categorically that the question of reason or motive was not the issue but rather, a proper construction of terms of the appellant contract of employment contained in the Memorandum of Appointment and Regulation of Service of Staff. The conflict between clause 6 of the former, which provided for termination by notice, and paragraph 15 of the latter which appeared to confer power to terminate for cause only, was resolved in favour of the latter which was later in time, and more in accordance with justice and fair play. In justifying this decision, Karibi-Whyte made a far -reaching observation that "the law has arrived at the stage where the principle should be adopted that the right to a job is analogous to a right to property" – See, Oyewunmi, A. *op. cit.* p. 32

When the courts are not considering termination of employments which are clothed with statutory flavour, where this oftentimes results in legal rigmarole, the courts have often times found themselves "out on a limb" when considering dismissal cases in respect of contract of employment in a master and servant relationship.[38]

The seeming spruced-up prospect of security of tenure of employments held to be with statutory flavour have always crumbled like a pack of cards in face of the dismissal of the category of staff whose employment does not enjoy such protection. In *Sogbetun v. Sterling Products Ltd.*[39] The Court regarded it as trite and therefore so held, that where a contract of employment has been properly terminated by employing with the procedure as laid down in the contract of employment - between the parties – for bringing it to an end, the court will neither enquire nor will it accord any importance to the motive or intention which occasioned the termination of employment.

In the *Sogbetun's* case, the employer terminated the plaintiff's appointment and gave the latter one-month salary in lieu of the duration of notice the plaintiff was entitled to receive under the contract of employment. During trial, plaintiff contended that her termination was wrongful as it was influenced by plaintiff's refusal to yield to the romantic advances from the employer. The Court, per coram Dosunmu J, nevertheless held the terminated to have been validly carried out while reiterating the immateriality of motive and or intention, when a termination has been validly carried out. The Judge opined that where an employee is lawfully dismissed by being given the notice or payment in lieu of notice stipulated in the contract of employment, the employer's motive in dismissing him is irrelevant, and the fact that the employer has a bad motive or gives an untrue reason does not make the dismissal wrongful.

Therefore, both at common law and currently in Nigeria, the enquiry in the case of dismissal or termination is focused not on the reasons for the dismissal but on whether the procedure for the termination of the employment

38 *Olufeagba v. Abdul-Raheem* [2009] 18 NWLR (Pt. 1173) 384.
39 [1973] NCLR 323

has been complied with.[40] And where this is found not to have been the case, the dismissal or termination is declared as wrongful. However, the legislation on unfair dismissal goes a step further not only to require an employer to state the reasons that led to the dismissal, but it is expected also of the employer, to bring the reason *prima facie* within the statutorily created fair reasons.[41] And the dismissal will therefore be justified only upon coming within the ambits of those reasons.[42]

2.0 THE PUSH FOR MORE SECURITY OF TENURE AT THE INTERNATIONAL FORA

In commenting on the efforts directed at achieving security of tenure of employment at the international stage, it is necessary to dwell on the historical trajectory of labour or employment law as it relates to Nigeria and juxtaposing the development therein with what is obtained from other international jurisdictions in order to appraise the attitude of, and the extent Nigeria has gone in fulfilling its international obligations. By virtue, and in consequence of its membership of the International Labour Organisation – the ILO – Nigeria was deemed to have subscribed to the fundamental principles of operation of the ILO which the body defer to always in carrying out its operations.[43] The efforts of the ILO have become visible in the steps taken in some foreign countries by propelling their legislatures to enact and ratify the conventions initiated by the ILO for the purpose of establishing welfare, health and safety at the workplace as important indices of development. These

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40 *Adeniyi v. Governing Council, YABATECH* [1993] 6 NWLR (Pt. 300) 426; *Bankole v. N.B.C.* [1968] 2 All NLR 371.

41 See paragraph 5.0 below.

42 *Jumbo v. Petroleum Equalization Fund Management Board* [2005] 14 NWLR (pt. 945) 443 at 467, Paras. A-B; *Garba v. Federal Civil Service Commission* [1988] 1NSCC 306.

43 The ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998 and mended in 2022 is an expression of commitment by governments, employers' and workers' organisations to uphold basic human values – values that are vital to our social and economic lives. It affirms the obligations and commitments that are inherent in membership of the ILO, and the body usually have recourse to the principles to guide the international body's operations namely: freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced labour; effective abolition of Child Labour; effective abolition of discrimination in respect of employment and occupation; and a safe and healthy working environment. https://ilo.org/declaration/lang—en/index.htm [Accessed on 12 August 2022].

national legislative efforts have crystallised into the various municipal laws of the countries concerned in the areas of employment and labour relations law and practice of such countries.

In the case of Nigeria, the nation has witnessed a sort of lethargy in keeping pace with salutary reforms and advancement recorded in the labour law jurisprudence of those countries. And the geographical spread of these countries has not been restricted to outside the African continent as quite a number of countries in Africa – with the exception of a few others among whom Nigeria is numbered - have leveraged on the leadership provided by the ILO, for achieving industrial peace through the option of legislation of unfair dismissal law.[44]

In the various countries that are member-states of the ILO, their sources of law regarding termination of employment relationships - at the employer's initiative – have been patterned after the international agreements and conventions brokered by the ILO.[45] Indeed, the developmental strides and robust reforms recorded in employment law at international, regional and national spheres have not taken place in isolation and without deliberate contributions from the ILO. Indeed, virtually every country member-state of the ILO that has attained some standards of safety, health and welfare in its industrial relations and labour jurisprudence, has a history of success anchored on important features of advances in labour principles championed by the ILO at the international level.

The vigorous efforts contributed by the ILO have resulted in the breakthrough achieved by the body and exemplified in obtaining member-states cooperation upon certain Conventions relating to different aspects and kinds of

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44 Chianu, E. *Employment Law,* (Akure, Bemicov Publishers (Nig.) Ltd., 2004) 209.

45 ILO Convention 158 on termination of employment relationships at the employer's initiative has been ratified by some African countries such as: Ethiopia, Namibia, Uganda, Cameroun, and Zambia with others such as South Africa, Ghana and Kenya resorted to enactment of unfair dismissal laws, Nigeria is yet to ratify or enact the unfair dismissal laws.

employment. Beyond assents and ratification by member-states, the ILO Conventions have also been domesticated at different times by the legislative organs of these member-states, thereby making these Conventions form part of the local laws of the enacting states. Unfortunately, while Nigeria has been reluctant in ratifying some of these Conventions, the country is equally lagging behind in fulfilling its complementary constitutional responsibility of subsequent incorporation of these forward-looking Conventions into its indigenous laws.[46]

The result is that some statutes which impact employment and advance the welfare of workers in Nigeria are denied the potency and status of enacted law and have instead been left to implication as well as to the gratuitous application of these unlegislated but proactive labour principles through the indirect medium of judicial activism, on the basis of the 3rd Alteration to the Nigerian constitution. In furtherance of its major mandate for the promotion of social justice and human and labour rights, the ILO has birthed Convention 158 which constituted a major breakthrough in the establishment of international policies and programmes for achieving improved working and living conditions.[47]

3.0 THE PRACTICE IN THE UNITED KINGDOM

The UK is the destination of choice for a comparative evaluation of the law of unfair dismissal therein for reasons *inter alia* of the colonial history between

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46 According to Section 12 (1), Constitution of the Federal Republic of Nigeria, 1999 (as amended), "No treaty ("treaty means an agreement, league, or contract between two or more Nations or sovereign formally signed by authorised person or persons and solemnly ratified by the several sovereigns) between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. In addition to the above, Section 4 of the Constitution reserves the exercise of legislative powers with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution, where Labour, including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitrations as item 34 thereof. This makes it the constitutional responsibility of the country to domesticate those ILO Conventions it has ratified into its national laws.

47 Okene, O.V. C., "Internationalization of Nigerian Labour Law: Recent Developments in Freedom of Association" 2016 (13), 4 *Port-Harcourt Journal of Business Law,* 10.

UK and Nigeria. The law of unfair dismissal first debuted in the UK employment law over fifty years ago, sequel to the introduction of statutory unfair dismissal law by the Conservative government as an integral part of a stimulus package intended by the government as a catalyst for increased productivity within an environment of industrial tranquillity. The introduction of unfair dismissal law constituted a central plank of UK employment law aimed at providing succour from the harshness and feeble protection from dismissal which the common law action for wrongful dismissal offered.[48] By 1996, the UK law of unfair dismissal had been enshrined in the Employment Rights Act (ERA) of same year and associated judicial authorities.

The right not to be unfairly dismissed from employment has over the years been reduced into a number of important questions which determine whether or not the subject matter of the action constitutes unfair dismissal and these are: (a) whether the claimant, that is, the person invoking the protection of the unfair dismissal law is a person qualified under the law to bring an action; (b) whether the claimant has actually been dismissed from employment; (c) whether the reason for the dismissal falls within the categories of approved reasons acceptable as veritable grounds of unfair dismissal; (d) whether or not the dismissal was fair considering the reasons and manner thereof; and (e) what are the remedies to which the claimant is entitled.

The law of unfair dismissal also recognises the traditional distinction made between a contract of service and a contract for services.[49] Consequent upon this distinction, the remedy of unfair dismissal is available only to a claimant involved in paid employment with the defendant, and the claimant has been so employed for a continuous period of at least one year or more but which period can be discounted within the exceptional cases known as "automatically unfair" cases. Expectedly therefore, the self-employed workers or the category of workers engaged in contracts for services commonly referred

48 Hood, David 'Unfair Dismissal' *The New Oxford Companion to Law*, Oxford University Press, Inc., New York, 2008 p. 1202.

49 Opara, L. C., Uruchi, O. B., & Igbaekemen, G. O. "The Legal Effect of Collective Bargaining as a Tool for Democratization of Industrial Harmony" 2014 (31) 1, *European Journal of Humanities and Social Sciences,* 168.

to as independent contractors are not regarded as coming within the category of those who can benefit from the remedial effect of unfair dismissal law.

In answering the question *whether there has been a dismissal*, unfair dismissal law in the UK requires that claimants show that they have been dismissed under the circumstances enumerated under section 95 ERA, 1996 which regard that dismissal is deemed to have occurred in the following ways expressed in the alternative: (i) where the employee's contract of employment is brought to an end with or without notice from the employer; (ii) or, the employee's contract is expressed to be for a limited time with no steps taken to renew the contract after expiration; (iii) or the termination of the contract of employment of the employee emanated from the employee himself as a result of the fundamental breach by the employer as a result of its dereliction in giving due observance to the twin duties of mutual trust and confidence owed to the employee; (iv) or where the employees pre-empt the crystallisation of a notice of dismissal by announcing their resignation which takes effect ahead of the maturity of the dismissal notice.

In interrogating the *reason for the dismissal*, the law regards as an "automatically unfair" dismissal, a dismissal predicated on matters relating to pregnancy and family leave or where dismissal of an employee is anchored on grounds of membership of trade union and participation in related activities.[50] A claimant hoping to found her claim on one of the 'automatically unfair' grounds, must discharge the onus of proof in respect of that particular ground under the 'automatically unfair' category. Conversely, a successful defence against a claim of unfair dismissal must turn necessarily on the conviction of an employment tribunal that the reason for the dismissal falls within the category of conditions regarded as "potentially fair reasons" as listed in Section 98 (1) (b) & (2) in the ERA.[51] Where there is a failure on the

50 *Lewis v. Heffer* (1978) 3 All ER 354 at 364.

51 Hood, David *op. cit.* at p. 1203. These "potentially fair reasons" are namely: (i) lack of capacity or qualifications; (ii) misconduct; (iii) redundancy; (iv) contravention of a statute (e.g., dismissing a lorry driver who has been banned from driving for multiple speeding offences); (v) some other substantial reasons (this condition is wide enough to embrace multiple miscellaneous factors and behaviours, e.g., pressure from a customer, clash of personalities, etc.).

part of the employer to convince the tribunal that the reason for dismissal falls within any of the five categories enumerated in the ERA, such dismissal will be regarded as unfair.

The next important question to be answered in order to claim the protection of the unfair dismissal law as enshrined in the ERA is to consider *whether the dismissal was fair*. Under this head, an employment tribunal first needs to consider whether the reason for the dismissal was potentially fair. And where this question is answered in affirmative, the employment tribunal goes on to the next stage of enquiry which is to investigate if the dismissal alleged to be carried out for "potentially fair reasons" was *actually* fair. In carrying out the probe under this head, an employment tribunal takes into consideration, the size and administrative resources of the organisation carrying out the dismissal of the employee, in order to determine whether the employer acted reasonably within the statutory tenets of the ERA when it dismissed the employee.

The question "was the dismissal fair" can be further separated into two compartments namely: firstly, to ask whether the decision to dismiss falls within the range of "reasonable responses" an employer might make[52] (substantive law compliance) and also secondly to ask whether the processes followed in carrying out the dismissal was a fair one (procedural law compliance). The "range of responses" option may be presented in so many ways and the fact that many employers may decide not to dismiss by opting for a response not leading to dismissal, and another employer may decide to dismiss, may not render the dismissal by the latter as unfair.[53] On the other

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52 See the case of *Iceland Frozen Foods Ltd. v Jones* [1983] I.C.R. 17. Facts: An employee (J) was dismissed by his employer (IFF Ltd) for attempting to defraud IFF into making extra overtime payments. Nonetheless J claimed unfair dismissal. **Issues**: However, was the dismissal unfair? Also, did IFF act unreasonably? **Held**: In *Iceland v Jones*, the Employment Tribunal (ET) held that J's conduct was not 'sufficiently serious.' However, IFF appealed against the decision. Overall, the Employment Appeal Tribunal (EAT) allowed IFF's appeal. The EAT held that the correct test was to assess whether IFF's decision to dismiss J was "within the band of reasonable responses to J's conduct that a reasonable employer would use" available at <https://simplestudying.com/iceland-frozen-foods-ltd-v-jones-1983-icr-17/> [Accessed on 18 August 2022].

53 The range of reasonable responses to a situation of say, fighting at work, could be an informal or serious verbal reprimand of "don't do that again" to a formal warning in writing, to a dismissal.

hand, it is possible that even though a dismissal falls within the range of "reasonable responses", yet such dismissal is found not to have complied with fair procedure and thereby declared as unfair dismissal.

Even though he courts have refrained from prescribing what constituted a fair procedure, yet, the House of Lords in *Polkey v A E Dayton Services Limited* (1988) gave a checklist of what is to be regarded as fair procedure to include *inter alia* (i) extending to employees an opportunity to be informed of and respond to allegations against them before an organisation lakes a decision to dismiss; (ii) insisting that the employer must follow its own disciplinary procedure, otherwise, failure to do this may render the dismissal unfair and this is without prejudice to the fact that the procedure contractually binding or not.

Also in 2004, the Labour government in UK introduced a minimum dismissal proceeding which employers are expected to follow if the dismissal made in contradiction to the procedure will not be declared unfair. The procedure which is contained in Schedule 2 of Employment Act, UK, 2002 was founded as a part of package of measures to facilitate dispute resolution mechanisms without recourse to law and it involves three steps as follows: (i) the employer must set out in writing the issues which have caused the employer to contemplate taking disciplinary action, and send a copy of this statement to the employee inviting him to attend a meeting; (ii) the meeting should take place before the action (e.g., dismissal) is taken; (iii) after the meeting the employer should inform the employee of the decision and notify him of his right of appeal.

Where the employee elects to appeal, a further meeting to be attended by the parties is arranged and the employee should subsequently be informed of the outcome of the meeting. It is noteworthy to observe that compliance with the statutory procedure does not mean that a tribunal will thereby find that the dismissal is fair. What compliance with statutory procedure simply achieves is that it avoids a finding of automatic unfairness for non-compliance, and

the tribunal must still enquire into the reasonableness *vel non* of the dismissal in all circumstances.[54]

The last in the series of important questions to be answered is "what are the remedies that a claimant may ask for?" Having held that a dismissal was unfair, what is next for an employment tribunal to do is to consider what remedy, if any, should be awarded to the claimant. Categories of available remedies from the tribunal can pick are essentially three and these are usually awarded at the request of the employee. They are reinstatement, re-engagement, or compensation. The first two remedies respectively involve the employee returning to work in the same position and on the same terms and conditions (reinstatement) or the doing of comparable work by the employee, on comparable terms and conditions (re-engagement).

These two remedies are not first choice options for the employee and are therefore seldom awarded by an employment tribunal. This is because an employee will want to factor in the friction that already existed in the relationship of the parties to the contact of employment – the employer and the employee – and will prefer not to risk a return to employment under a possibly hostile atmosphere. The third remedy – compensation – is the most frequently requested and therefore most frequently awarded by a tribunal. Compensation consists of a basic award[55] as well as a compensatory award.[56] Compensatory award is subject to a downward review where a tribunal finds as a fact that a claimant's behaviour is contributory to the dismissal suffered.

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54 Hood, David *op. cit.* at pp. 1203/4.

55 As from February 2007, the basic award is capped at a maximum of GBP 9,300. Currently however, it is 1 week's pay for each complete year of employment when an employee was between the ages of 22 and 40 inclusive; half a week's pay for each complete year of employment when an employee was below the age of 22 available at <https://www.winstonsolicitors.co.uk/how-much-claim-worth> [Accessed on 28 August 2022].

56 The compensatory award is an amount to compensate the claimant for the financial loss she has suffered on account of a dismissal. But currently, the maximum amount that can be awarded as compensation for constructive dismissal is presently the statutory cap of GBP 93,878, or 52-weeks gross salary – whichever is lower. This is in addition to basic award which can be ordered by the Tribunal of up to a maximum of GBP 17,130 available at <https://landaulaw.co.uk> [Accessed on 28 August 2022].

The debates have gone back and forth as to whether the law of unfair dismissal is best considered as an employment protection measure which offers protection to workers from arbitrariness from and unfair treatment by employers or whether the remedy constitutes an unnecessary burden or business. However, the debates have merely thrown up fears which are more imaginary than real. This is due to the fact that in practice, average awards are very low and many workers fall short of the requirement of qualifying as employees, which is a condition precedent to accessing the remedy of unfair dismissal. Instead, the law of unfair dismissal is seen more as a management tool which affords the employers the leverage of managing their human resources effectively and efficiently. Howbeit it is considered, there is no gainsaying the fact that unfair dismissal legislation still represents an important part of a category of rights, without which the British workers will remain vulnerable.

4.0 THE PRACTICE IN SELECTED AFRICAN JURISDICTIONS

Employment protection legislation represents a deliberate attempt by those with the will and capacity to offer desired protection to workers in a geographical state the vast majority of whom are numbered among members of groups regarded as vulnerable in labour relations situations. This is because there is no place where inequality is more pronounced than the workplace contrary to the often-hyped parity in the capacity and status of the major parties to the contract of employment. There is the welcome trend among some countries in Africa exemplified in their progressive movement away from the common law position on termination of employment to the current position of the protection of workers from whimsical termination of employment presented in unfair dismissal legislation.

A comparative examination of the legal systems of selected countries in respect of the existence and extent of the employment protection legislation against unfair dismissals from employment, which obtained in their respective jurisdictions, reveals a two-pronged approach adopted by these countries. While one group consisting of countries such as Ethiopia, Namibia,

Uganda, Cameroun, Malawi and Zambia ratified the ILO instruments and incorporated the provisions of the instruments into their local laws, other countries - in Africa - such as South Africa, Ghana and Kenya, resorted to the enactment of unfair dismissal laws in line with the provisions as they are contained in the ILO instruments. Either way, Nigeria is yet to identify with the ILO instruments by its refusal to ratify the Convention coupled with the country's further refusal to enact unfair dismissal laws as part of its labour laws.[57]

5.0 NIGERIA'S EFFORT TO SAFEGUARDS

Unfortunately, what constitutes "unfair dismissal" is yet to assume certainty in Nigeria's body of laws. As a result of this, the paper adopts a working definition of the term "unfair dismissal" to mean a dismissal carried out arbitrarily to the prejudice of the employee especially by refusing or ignoring to disclose the reason (s) for the dismissal not to talk of justifying same. It is done capriciously without recourse to due process and at the prejudice of the employee. Granted, the employer has the power to hire and fire but it is expected that the right to fire will only be activated under justifiable circumstances however, where it is exercised without justifiable reason to the ultimate detriment of the employee, it is said to be an unfair dismissal. The adequacy and or sufficiency of current efforts aimed at preventing situations of unfair dismissal in Nigeria, is first seen in the compelling need to enact unfair dismissal legislation as an integral part of the body of laws governing labour and industrial relations in the area of termination and or dismissal from employment contracts in Nigeria. Proceeding from the threshold of positive laws will afford the opportunity to consider more closely the process of judicial interpretation of employment legislation generally and unfair

57 Philip, F.A, "Job Security in Developing Countries: A comparative perspective" Ife Journal of International and Comparative Law IJICL 2016, Part 1 (January – June) pp. 51 – 75. Cited in O. A. Leigh, "Prospects and Challenges of Developing the Legal and Institutional Regimes of Unfair Dismissal in Nigeria", a PhD thesis written in the Faculty of Law and submitted to the Postgraduate College, Obafemi Awolowo University, Ile-Ife, Nigeria, p. 127-128.

dismissal provisions in particular. This will provide an opportunity for a mutually benefitting interface between the methods of interpretation applied by judges when they are confronted with the interpretation and appreciate to what extent, if any, it will have to factor the canons of interpretation applied by judges in its own legislation.[58]

It is an understatement to posit that legislation on unfair dismissal is long overdue for promulgation in Nigeria. This is because such legislation represents the only protection against harsh and precarious position occupied by Nigerian workers under the common law, whereby, apart from employees engaged under employments regulated by statutes, whose termination from such employments could be declared invalid, null and void for non-observance of and failure to comply strictly with the procedure prescribed by such statutes.

For the Nigerian worker, his termination or dismissal by the employer even though without any reason adduced by the latter, have been upheld by the courts in Nigeria as valid. Since according to the courts, "ordinarily at common law, a master is entitled to dismiss his servants from his employment for good or bad reason or for no reason at all".[59] Primarily, an unfair dismissal legislation is tailored towards providing individual employees some form of statutory protection for their employment relationships from arbitrary termination by the employers, a protection not enjoyed by employees whose contract of employment take off at common law - as is the situation currently in Nigeria - whether in form or in substance.[60] That the primary purpose of

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58 O. A. Leigh, "Prospects and Challenges of Developing the Legal and Institutional Regimes of Unfair Dismissal in Nigeria", a PhD thesis written in the Faculty of Law and submitted to the Postgraduate College, Obafemi Awolowo University, Ile-Ife, Nigeria, p. 64.

59 Obidinma, O. C. *et al*, *op. cit.* at page 139. *Daodu v UBA Plc.* [2004] 9 NWLR (Ppt. 878) 276 at 280; *Chukwuma v SPDC (Nig.) Ltd.* [1993] 4 NWLR (Pt. 289) 512. Cited in O. A. Leigh, "Prospects and Challenges of Developing the Legal and Institutional Regimes of Unfair Dismissal in Nigeria", a PhD thesis written in the Faculty of Law and submitted to the Postgraduate College, Obafemi Awolowo University, Ile-Ife, Nigeria, p.125.

60 Anderman, S.D. The Law of Unfair Dismissal, (1978) London, Butterworths, p. 1. Since 1971, the right of dismissed employee to complain of unfair dismissal has become a firmly established element of statutory protection. Despite the sharp fluctuations in labour legislation in the same period, the law of unfair dismissal has made steady progress on the legislative front.

an unfair dismissal law is directed at providing some form of statutory protection against unfair dismissal for the employee, is underscored in the hugely inadequate protection offered an employee under the common law regime of employment relationship where no questions are asked - neither are answers obligated to be offered - as to the reasons for the dismissal of an employee and or the arbitrariness of the reason given. All that the common law purports to achieve is to answer in the affirmative the question whether the terms of the contract of employment on the giving of the requisite notice required for termination has been complied with.[61]

Even though Nigeria has been signatory for the ratification of quite a large number of ILO conventions and a subscriber to some of the international body's regulations, yet Nigeria has not matched her pace of ratification with the enactment of the provisions of these conventions and or regulations into its national laws and Nigeria is yet to ratify ILO Convention 158 since its existence in 1985. This neglect to enact provisions of ILO conventions into national laws has brought a renewal to the controversy surrounding the distinction between the force of ratification in juxtaposition with the vigour of enactment.

This distinction has become more pronounced in the light of the 3rd Alteration to the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended) which berthed the far-reaching jurisdictional expansion and independence of the National Industrial Court, (hereinafter, NIC).[62] Firstly, the NIC assumed its place among the pantheon of superior courts of record listed in the constitution thereby resting any hitherto controversy bordering

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61 O. A. Leigh, PhD thesis at p. 66.

62 Agomo, C. K., *Nigerian Employment and Labour Relations Law and Practice*, (2011) Concept Publication Limited, Lagos, p. 339. The Federal Republic of Nigeria official Gazette No. 20, Vol. 98 of 7th March, 2011, represents a fitting milestone in constitutional development in Nigeria when it published as supplement to the Gazette, the Constitution of the Federal Republic of Nigeria (Third Alteration), Act, 2010 (Short Title) and in its long title was described as "An Act to alter the Constitution of the Federal Republic of Nigeria Cap. C.23, Laws of the Federation of Nigeria, 2004 for the establishment of the National Industrial Court under the Constitution.

on the status of the court.[63] And secondly, it enjoyed a jurisdictional expansion through the Third Alteration Act of 2010 to the CFRN, 1999 to cover causes and matters "relating to or connected unfair labour practice or international best practices in labour, employment and industrial relation matters."

This omnibus phrase has become very controversial among labour scholars pitting them into two separate divides where one group regards the omnibus provisions as good enough for the courts especially the NIC to leverage on to adjudicate on unfair dismissal law and other unfair labour practices. On the other hand, it is the view of the other group of scholars that these omnibus phrases are not only vague phrases but also nebulous as no clearly spelt conditions can be pointed out as having the force of a legislation which may grant its application by the NIC, the force of law of a positive enactment.

6.0 CONCLUSION AND RECOMMENDATIONS

One noticeable gap in knowledge in Nigeria in the area of unfair dismissal is the omission by labour law scholars to address the new global trend in the area of security of tenure of employment since the establishment of ILO Convention No. 158 and the accompanying ILO Termination of Employment Recommendation No. 166 both of 1982.[64] Discussions bordering on the parameters covered by the ILO together with recommendations made to national governments which would have pointed the way out for Nigeria, in the area of security of tenure of employment were omitted from the discussions.[65] A necessary fallout from this is the precarious situation of an

63 Ibid. Section 2 of the CFRN (3rd Alteration), Act, 2011 inserts a new paragraph "(cc)" after Section 6 (5) (c) of the Principal Act. That the NIC is a superior court of record with all the powers of a High Court and exclusive jurisdiction in civil causes and matters relating to labour including trade unions and industrial relations is not in doubt, as far as the NIC Act, 2006 is concerned, for example in ss.1(3)(a) (b); and s. 7(1)(a) -(c), NIC Act,2006 together with the possibility of an expansion of the court's jurisdiction through further conferment on the court of such additional jurisdiction as the National Assembly may make in accordance with See S.7(2) NIC Act, 2006.

64 O. A. Leigh, PhD thesis at p. 123. The ILO Convention No. 158 was adopted by the International Labour Conference – ILC – a major organ of the ILO, during the ILC's 68th Session on 22nd of June, 1982.

65 O. A. Leigh, PhD thesis at p. 122/3.

existential living which the Nigerian worker endures in the socio-economic environment on account of the inadequacies of extant law and industrial practice which govern labour relationships in Nigeria.[66]

The only viable option for achieving job security for workers is the enactment of unfair dismissal legislation in accordance with the template provided by the ILO Convention No. 158. Integrating this progressive law into the body of labour and industrial relations law and practice in Nigeria, will ensure a boost on workers' morale and result in a reduction in labour turnover as well as promote stability of the workforce leading to workers' duty of fidelity and faithful performance of workers' obligations. There will be increased prospects of enhanced productivity and efficiency to the advantage of the employers in particular for the overall wellbeing of the Nigerian economy in general.

An enduring solution which will constitute a big stimulus for labour law reforms in Nigeria can be achieved by the promulgation of an unfair dismissal legislation as the needed palliative for security of tenure of employment of workers in Nigeria. It is to be desired therefore that the protective shield enjoyed by vulnerable British workers in the promulgation of unfair dismissal legislation in the UK, should also be extended to Nigeria where hapless, helpless and vulnerable workers are exposed to better-imagined than experienced harrowing conditions of employment in the workplace.

Based the foregoing, the following recommendations are considered necessary for articulation in this paper in other to attain the desired and necessary reforms in labour relations in Nigeria.

As a matter of urgent national importance, the Federal Government of Nigeria should, through the Nigerian Law Reform Commission, initiate a reform of the country's labour laws with a view to developing a framework that will embrace both legal and institutional regimes of the law of unfair dismissal in the country; and taking the provision of improved industrial relations very seriously for its many prospects of enhanced industrial relations in the

66 Oyewunmi, A. *Job Security and Nigerian Labour Law: Imperatives for Law Reforms*, in Enobong Edet (ed) "Rocheba's Labour Law Manual", Rocheba Law Publishers, pp. 17-51 cited in O. A. Leigh, PhD thesis at p.123.

country and the many positive fallouts culminating in economic advancement for the country. Where there is industrial peace and harmony, then the economy will be set on a sure footing of advancement.

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EFFECTIVENESS OF REGULATION OF PRIVATE SECURITY INDUSTRY IN MAINLAND TANZANIA

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EFFECTIVENESS OF REGULATION OF PRIVATE SECURITY INDUSTRY IN MAINLAND TANZANIA

Lydia Mshare[*] & Ines Kajiru[*+]

ABSTRACT

This article examines the effectiveness of the legal framework regulating the private security industry in Mainland Tanzania. The study found that the existing legal framework is not effective in regulating the private security industry. The study concluded that the legal framework regulating the private security industry in Mainland Tanzania is not effective since the existing legal framework is not adequate to govern the private security industry. The study recommends that there is a need to ensure that there is an effective legal framework system that will govern matters related to the private security industry in Mainland Tanzania. This can only be achieved by having in place comprehensive laws that will control all matters related to standard training, vetting of private security personnel, how to use firearms, arrest, respect for human rights, customer care and establishing an electronic database for all registered private security service providers in Tanzania. One important measure is the law to have a provision that provides an independent regulatory authority responsible for overseeing and regulating the private security industry in Mainland Tanzania.

1.0 INTRODUCTION

Private security industries are undertakings that provide security of persons and property or the maintenance of order.[1] They mainly engage in guarding and patrol services primarily described as protecting personnel and assets.[2] In most cases, the private security industry provides a range of activities such as watching and protecting persons and properties, surveillance of public

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[1] Jaap De Waard, 'The Private Security Industry in International perspective' (1999) European Journal on Criminal Policy and Research,145.

[2] Ibid.

highways, transport of cash, central alarm monitoring, in-house detectives, supervision of apartments, custody of detainees or prisoners, handling alarm systems, CCTV monitoring, emergency responses, traffic control, guarding houses, stores, and consultation.[3]

Globally the task of enhancement of security of people and their properties is not the sole role of the governments alone but of every individual including groups such as private security companies, neighbourhood watch and street volunteers to make sure there is safety to the community. This involvement depends on a variety of factors such as population size, resources and capacity.[4]

Tanzania like other developing countries has many social, political and economic problems that include a high unemployment rate, poverty, poor education and inequality, all these factors often contribute to the increase of crime and necessitate the government to allow private security industry to come into play in supplementing the deficits of the government in enhancement of security to the society.[5] However, despite the increased number of private security service providers operating in the country there is still a gap in how this sub-sector is regulated which can cause a threat to national security.[6]

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3 Ibid.

4 Omotosho O, & Aderito, AA. 'Assessing the Performance of Corporate, Private Security Organisations in Crime Prevention in Lagos State' Nigeria Journal of Physical security (2012)73-90.

5 Aisha M. Mkilindi, 'Assessment of the Role of Private Security Companies in the Enhancement of Public Security, The Case of Ultimate Security Company in Kinondoni Municipal Council,' (Master of Human Resource Management of Mzumbe University 2014)58.

6 Ibid.

1.1 HISTORICAL DEVELOPMENT OF POLICING IN MAINLAND TANZANIA

Historically, public policing, which exists today, has passed through different phases to get the position and status it has now.[7] In pre-colonial societies, Tanzania's security services were the responsibility of an individual and community.[8] During that time, the government was not only answerable for the security of people and their properties; instead, society was liable for security matters.[9]

The private security industry in Tanzania started in 1886 during German colonial rule but had no official policing mechanism. Thus, the colonialists employed armies and mercenary officers to preserve law and order.[10] At the local society level, (Akida and Jumbe) protected the colonial masters but did not often conduct policing activities.[11] The role of local rulers in security was seen at some points in the First World War (WWI) when Colonel Paul Von Lettow-Vorbeck (German Commander included local servicemen (askari) into the military to fight in opposition to British Colonial rule.[12]

After overthrowing the German colonial rule, Tanganyika was under the British authority in 1919. [13]The Tanganyika Police Force and Prisons Service were introduced by the Police and Prisons Proclamation in May 1919.[14] During the British colonial administration, the Police Force was separated from the Military.[15] The mandate of the Police was to protect the interest of British

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7 Augustino Ivo Mbele, 'Assessment of Public-Private Partnership in Security Services Delivery' (Master of public Administration, Morogoro Mzumbe University 2017).

8 Ibid.

9 Ibid.

10 Jaba Shadrack,'The Private Security Industry in Tanzania Challenges Issues and Regulation' (Master of laws (LLM) University of Dar es Salaam 2011).

11 Ibid.

12 Commonwealth Human Rights Initiative, The Police, The Politics, Police accountability in Tanzania, (2006).

13 Ibid at n(3).

14 Ibid.

15 Ibid.

colonialists, especially in urban and rural areas with settler populations, to maintain peace and security under the exclusion of the local African community.[16]

In 1948, a law, namely the Auxiliary Ordinance, introduced the Auxiliary Police.[17] Due to the changes that required supervision and monitoring of the additional unit, the Auxiliary unit was merged into the Police Force and Auxiliary Services Act.[18] The Auxiliary Police unit enforces city by-laws and guards city properties to help the Police Force maintain law and order.[19] The law gives the Inspector General of Police powers of command over supervision, equipment, training, and discipline over Auxiliary Police units.[20]

After the political independence of Tanganyika in 1961 (now Tanzania Mainland), the Police force, which was formed during colonialism, continued to provide security services to everyone.[21] Thus, the government could only secure citizens and their properties at all levels.[22] The importance of security in any state cannot be taken for granted. Still, due to the increase in the government budget in the security sector, another form of policing was introduced to reduce government expenditures through Public-private partnerships in service delivery. Another form of development of security policing is the Peoples Militia (Mgambo), a Military reserve, but they are answerable to the Police Force and are trained by the Military.[23] This kind of policing during wartime is working with the Military.[24] Militia are always unarmed unless they are called for duty

16 Ibid.
17 Auxiliary Police ordinance Cap, 262 of 1948.
18 Police Force and Auxiliary Services Act, Cap 322 [R.E 2002].
19 Commonwealth Human Rights Initiative, The Police, The Politics, Police accountability in Tanzania, (2006)18.
20 The Police Force and Auxiliary Services Act, Cap 322 [R.E 2002].
21 Mbele (n.4) 1.
22 Ibid.
23 Commonwealth Human Rights Initiative, The Police, The Politics, Police Accountability in Tanzania, (2006)18.
24 Ibid.

under the supervision of Tanzania Police.[25] Apart from the Peoples Militia (Mgambo), Sungusungu is another form of security policing. It is a group of community members who practice self-policing. The People's Militia Act[26] and Peoples Militia (compensation for death or injury) Act[27] were amended to include Sungusungu.

The expansion of the private security industry in Mainland Tanzania can be traced back to the 1980s and 1990s and increased in the 2000s when the government began to comprehend the transformation of the socialist policy to a liberal policy.[28] During the transformation period, PSI became one of the major sectors contributing to Tanzania's economy. At the same time, governments could not provide security services for each citizen.[29] Therefore, many citizens turned to private security service providers to protect their lives, property, residences, commercial centres, and factories.[30] Despite the importance of this sub-sector in enhancing security services for the citizen and their properties, there is still a gap in how the private security industry is regulated.[31]

Generally, the regulation of the private security industry requires effective law that provides for regulatory authority, registration of all private security service providers, the requirement for registration, maintaining the register of all

25 Ibid.
26 Peoples Militia Act, Cap 111of 1973.
27 Peoples Militia (compensation of Death or injury) Act, No. 27 of 1973.
28 Commonwealth Human Rights Initiative, The Police, The Politics, Police accountability in Tanzania, (2006) 2.
29 Knox R, 'Effectiveness of Private Security Companies in Enhancing Clients Safety and Security, A case Study of Ilala Municipal' (Master in Public Administration Kampala International in Tanzania, 2020)1.
30 Ibid.
31 Robert Knox & Borniventure Oyagi, 'Effects of Private Security Companies on Enhancement of Public Security and Safety in Dar es Salaam, Tanzania: Case Study of Ilala Municipality' (Vol.2, No 5, 2020), International Journal of Research in commerce and Management studies, 46.

private security service providers, codes of conduct for private security personnel, investigation, and monitoring.[32]

What exists so far in Mainland Tanzania in terms of regulation is that the applicant has to seek a permit from the office of the Inspector General of Police to be registered as the security service provider.[33] The existing Inspector General of Police Secular does not provide sufficient criteria for the applicant to fulfil to be issued a permit to offer security services in Mainland Tanzania.[34] This causes difficulties for the Tanzania Police Force to take action against a private security service provider that operates contrary to security norms and practices such as vetting of private security personnel, standard training, physical fitness, and patriotism.[35]

2.0 LEGAL FRAMEWORK FOR THE PRIVATE SECURITY INDUSTRY

The security of any country plays a vital role in economic development; without having a proper legal and institutional framework regulating the private security industry, there would be a risk of the security sector being penetrated by criminals and increasing insecurity in the state. Since the regulation of the private security industry varies from state to state, this chapter examined the legal and institutional framework regulating the private security industry at international, regional, sub-regional, and national levels. The detailed analysis of the legal framework is done hereunder;

2.1 INTERNATIONAL INSTRUMENTS

This part presents and discusses the international laws relating to the regulation of the private security industry. These instruments include the following:

32 Tanzania Police Force, Annual Report on Private Security Companies, (2019) 13.
33 Tanzania Police Force, Annual Report on Private Security Companies, (2009) 2.
34 Inspector General of Police Secular No. 3 of 2009.
35 TPF, Annual Report on Private Security Companies (2019) 3.

2.1.1 THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES OF 2008

The Montreux Document was endorsed in September 2008 by seventeen states, including the US, UK, China, Iraq, and Afghanistan.[36] It was initiated by a joint effort by the Swiss government in collaboration with the International Committee of the Red Cross (ICRC).[37] The Swiss initiative and other countries in the World address substantive legal issues such as the status of private military and security company personnel under the 1949 Geneva Conventions, individual accountability for misconduct in different jurisdictions, and the authority's duty to oversee and screen the firms for potential misconduct.[38] For instance, the document provides that each contracting State to the international law is responsible for complying with the obligation it has undertaken under international law to which is a part.[39]

Furthermore, to ensure respect of international humanitarian law during the performance or contract of the Private military and security companies. In addition, they do not take part in or encourage the violation of humanitarian law by private military and security companies' personnel.[40]

The document also provides for contracting states to take measures by enacting laws as agreed under international law. States must pass any legislation necessary to provide effective penal sanctions for persons committing or violating the 1949 Geneva Convention.[41] These initiatives set legal obligations and propose good practices for States and the private security

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36 James Cockayne and Emily Mears, Private Military and Security Companies: A framework for Regulation, (International Peace Institute 2009)1.

37 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict A/63/467-5/2008/636.

38 Ibid.

39 Ibid at n(11).

40 Ibid at n(12).

41 United Nation Working group, 'An Overview on the Work by Working Group on the Use of Mercenaries as a Means of Volating Human Rights and Impending the Exercise of the Right of People to Self-determination (2005) 18.

sector.[42] The Montreux document is not legally binding as such. Still, it contains some relevant international legal obligations and rules that states can take as directives on legal and practical points on the source of international law.[43]

2.1.2 INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (ICOC) 2010

These codes of conduct are aimed directly at private security companies, and members are committed to and responsible for providing security services to support the rule of law regarding human rights and the protection of clients' interests.[44] The ICoC applies primarily to security services delivered in complex environments regardless of the validity and context of standards and recommendations.[45]

The code of conduct is a multi-stakeholder initiative consisting of three pillars representing the state, private security companies, and civil society organizations (CSOs); all members of a state, private security companies, and civil society organisations must participate in the International Code of Conduct for Private Security Association (ICoCA) general assembly having equal representation in the Board of directors.[46] Any decisions concerning private security companies emanate from the executive decision-making.

The Association aims to promote, direct, and supervise the implementation of the International Code of Conduct for Private Security Service Providers.[47] The process is through certification of member companies to ICoC standards, the

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42 James S. Kakalik & Sorrel Wildhorn, Current Regulation of Private Police: Regulatory Agency Experience and Views Santa Monica, CA: Rand (1971) 12 available at <http://www.rand.org/pubs/reports/2007/R871.pdf> [Accessed on 22nd August, 2023].

43 Mark Lalonde, State Regulation concerning Civilian Private Security Service and Their Contribution to Crime Prevention and Community Safety, (United Nations Office on Drugs and Crime 2014)84.

44 The International Code of Conduct for Private Security Service Providers (ICoC) **2010.**

45 Ibid.

46 Ibid.

47 Ibid.

review of company self-assessments, the monitoring and evaluation of member private security company compliance with the ICoC, and the processing of complaints about alleged violations of the ICoC by member private security companies.[48]

The principle of ICoC intends to help CSOs engage Private Security Companies to encourage them to provide security services in a committed and responsible manner that respects the rule of law and human rights.[49] The ICoCA's prime function is to define a standard set of principles for Private Security Companies. It lays the groundwork for translating these principles into standards and mechanisms of governance and oversight.[50] The advanced principles pray to guide the CSO in advocating and awareness-raising activities.

ICoCA, in like manner, provides inspiration and support to civil society organisations in their role of monitoring and managing complaints and supporting victims of misconduct of private security companies' members or employees.[51] The Civil Society Organization is obliged to contact the ICoCA in case of any alleged complaints and become a member of the association. All members of ICoCA must support and observe the code to improve governance, compliance with standards, and accountability of private security.[52] Likewise, members of private security companies are committed to working together to increase compliance worldwide with international rules and standards for providing personal security services with the mandate of the ICoCA's of reporting, monitoring, and evaluation, including performance assessment.

48 The International Code of Conduct for Private Security Service Providers (ICoC) 2010.
49 Laura A. Dickinson, Government for Hire: Privatizing Foreign Affairs and the Problem of Aaccountability under International Law, (2005) William and Mary Law Review,47.
50 ASIS International, International Glossary of Security Terms. (2009) available at <http://www.asisonline.org/library/glossary/index.xml> [Accessed on July 30, 2023]
51 The International Code of Conduct for Private Security Service Providers (ICoC) 2021) 5-7
52 Ibid.

Other related appointments include verifying or providing data on complaints with the ICoC principles in operations Conducted by the PSCs.[53]

The International Code of Conduct for private security companies provides for the detention of persons humanly under national and international law prohibiting torture or other cruel, inhuman, or degrading treatment or punishment, prohibition of child labour, sexual exploitation, and Gender-based violence.[54]

2.1.3 UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

It is among the legal instruments adopted immediately after the Second World War· Private security service providers must adhere to most of the rights covered because fundamental human rights may be violated. The rights covered under this instrument are freedom from discrimination,[55] Right to life,[56] Freedom from torture,[57] Freedom from arbitrary detention,[58] Freedom of assembly, and so forth.[59]

The UDHR is essential to this study as it sets out the international standard to be adhered to by private security service providers to enhance people's and their properties' security.

The United Republic of Tanzania has ratified UDHR; therefore, it forms part of the laws of Tanzania. Since states accept it, it acts as a yardstick in regulating the activities of private security companies and PSI in general. UDHR has been ratified by many states, including the United Republic of Tanzania, as it has been incorporated into different states' national constitutions and laws. However, it is adopted as a soft law and is not binding.

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53 Ibid.
54 The International Code of Conduct for Private Security Service Providers (ICoC) 2021) r.38.
55 Universal Declaration of Human Rights(adopted on 1948, came into force 1976) Art.2.
56 Ibid Art.3.
57 Ibid Art 5.
58 Ibid Art 9.
59 Ibid Art 20.

2.1.4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

The instrument was adopted to promote, protect, and enhance the first generation of human rights. The International Covenant on Civil and Political Rights (ICCPR) provides for civil and political rights.

The International Covenant on Civil and Political Rights (hereinafter, ICCPR) commits state parties to respect individuals' classical civil and political rights. Classical rights include the right to life,[60] prohibition of torture or cruel, inhuman, or degrading treatment or punishment, [61]right to liberty and security,[62] and equality before courts and tribunals.[63]

Any private security service providers could violate these rights in exercising their duties. Therefore, this instrument is essential in regulating the private security industry.

The ICCPR is an essential human rights instrument because it is a binding law that Tanzania ratified on 11th June 1976. Since it is acute, Tanzania is duty-bound to comply with all standards set in the ICCPR, whereby all state organs are bound to adhere to those standards for effectively regulating the private security industry.

60 The International Covenant on Civil and Political Rights (adopted on 16 December 1966 , Came into force1976) Art.6.
61 Ibid Art 7.
62 Ibid Art 9.
63 Ibid Art 14.

2.1.5 OPTIONAL PROTOCOL TO INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1966

This instrument was adopted in 1966, establishing a system for the Human Rights Committee to receive and consider claims from individuals who may be victims of human rights violations by a state party to the covenant.[64]

The Optional Protocol to ICCPR is relevant to private security service providers because the committees state that every signatory state is responsible for ensuring the delegated activities are exercised fully and conform to international obligations, particularly human rights.[65] For example, the committee investigated the torture of detainees in Abu Ghraib conducted by the United States of America. This instrument is relevant to this study because private security service providers can violate rights set out in the Instrument.

2.1.6 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CAT) 1987

This instrument is an international human rights law treaty adopted on 10th December 1984 and came into force on 20th June 1978. It prohibits torture or any other inhuman or degrading treatment in the process of soliciting information from a suspect**.**

The CAT provides that state parties to the convention include in their training of law enforcement personnel to avoid torture and other inhuman treatment during the arrest, detention, and interrogation of suspect in their jurisdiction.[66] It mandates state parties to the convention to make a review of the interrogation rules, instructions, methods, practices, and arrangements on how

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64 Optional Protocol International Covenant on Civil and Political Rights (adopted on 1966, come into force on 1976) Art.1

65 Kalma (n 111)153.

66 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment Art.10.

to treat a person subject to any form of arrest, detention, or imprisonment to prevent case or torture.[67]

Furthermore, the state party is to be prompt and impartial to conduct an investigation whenever there is reasonable ground to believe that an act of torture has been committed in any jurisdiction.[68] It allows member states to include in their legal system redress and enforce the right to fair and adequate compensation, including the means for full rehabilitation as possible.[69]

This instrument is relevant to this study because it mandates the state party to establish a legal system that regulates law enforcement agencies and other non-state actors like private security service providers in dealing with interrogation, arrest, and detention of suspects to avoid torture, inhuman, cruel, and degrading treatment.

2.1.7 INTERNATIONAL CONVENTION ON THE REGULATION, OVERSIGHT, AND MONITORING OF PRIVATE MILITARY AND SECURITY COMPANIES, 2010

In 2005, the Human Rights Council set up a 'Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination.[70] In 2010, this group submitted a Draft Convention to regulate the activities of private military and security companies. Through Resolution 15/16, the United Nations Human Rights Council also established an open-ended intergovernmental working group to examine the possibility of developing an international regulatory framework for the regulation, supervision, and oversight of the activities of private military

67 Ibid Art.11.
68 Ibid Art 12.
69 Ibid Art.14.
70 Yu. Skruratova & Elena Korolkova 'Private Military and Security Companies' Moscow Journal of International Law, (2020)84.

and security companies, complementing the Draft Convention and considering the possibility of developing an international regulatory framework.[71]

In 2017, the Human Rights Council Resolution 36/11 established a new open-ended intergovernmental working group for three years to elaborate the content of an international framework to protect human rights and ensure accountability for abuses relating to the activities of private military and security companies.[72]

2.1.8 OAU CONVENTION FOR THE ELIMINATION OF MERCENARIES IN AFRICA 1977

OAU adopted it in Libreville, Gabon, on 3rd July 1977 as a response to traditional mercenaries as opposed to the use of private military/security companies.[73] At the time, mercenaries were regarded as being partly responsible for supporting illegitimate colonial regimes and intimidating the ambitions of independence of the African peoples.[74]

The Convention was purposely established to prohibit activities of mercenaries as defined under Article 1 of the Convention that is a person who trained locally or abroad to fight against an armed conflict,[75] take direct part in hostilities,[76] and is motivated to take part in the hostilities by desire for private gain or promised by the party to conflict to be compensated, is neither a national of a party to conflict nor a resident of territory controlled by a party to

71 Ibid.

72 ASIS Foundation, The ASIS Foundation Security Report: Scope and Emerging Trends: Executive Summary.(2005)<http://www.asisonline.org/foundation/trendsinsecuritystudy.pdf> accessed on July 30, 2023

73 The OAU Convention for the Elimination of Mercenaries in Africa in Libreville, Gabon, on 3 July 1977.

74 Ibid.

75 Ibid Art.1.

76 Ibid.

the conflict, is not a member of armed forces of party to the conflict and is not sent by a state or other than a party to the conflict.[77]

This convention's deficiencies are compounded by the fact that only 28 of the 53 Member States of the AU have ratified the convention. Accordingly, the private security sector's more activities that are 'legitimate' are carried out in an environment with little or no regulation.

In 2017, the Human Rights Council Resolution 36/11 established a new open-ended intergovernmental working group for three years to elaborate the content of an international framework to protect human rights and ensure accountability for abuses relating to the activities of private military and security companies.[78]

In other words, the private security industry offers excellent opportunities for former Military personnel, especially in conflict-infected countries in Africa and beyond.[79] In the absence of a working social reintegration scheme, former South African soldiers continue to serve as a recruitment pool for local and international companies, but now within a context that criminalizes their future employment opportunities.[80]

The President of South Africa has assented to a new Act, which will replace the Foreign Military Assistance Act, namely The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.[81] However, it will only become operational after a presidential proclamation in

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77 Ibid.

78 ASIS Foundation, The ASIS Foundation Security Report: Scope and Emerging Trends: Executive Summary. (2005) available at <http://www.asisonline.org/foundation/trendsinsecuritystudy.pdf> [Accessed on July 30, 2023].

79 Ibid.

80 Ibid.

81 Country of Armed Conflict Act, 2006 (Act No. 27 of 2006).

Africa's (DDR) processes could exacerbate the supply-side problem of private security companies and mercenaries.[82]

2.2 DOMESTIC LAWS

This section analyses various laws governing the private security industry in Mainland Tanzania. These laws include the Constitution of the United Republic of Tanzania and other legislations as follows;

2.2.1 THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA

The Constitution of the United Republic of Tanzania is the mother law of the country, establishing all the Militaries in Tanzania. According to the Constitution, peace and security are union matters and are vested in the government of the United Republic of Tanzania.[83] Also, the Tanzania Police Force is the agency of the government, which, among other things, is responsible for the peace and security of people and their properties.[84] However, the Constitution does not directly mandate PSI to perform security services. Still, it is relevant to this study because the private security industry conducts some of the roles of the TPF.

2.2.2 POLICE FORCE AND AUXILIARY SERVICES ACT

The Act is the principal legislation governing the activities of the Police Force in Tanzania. Under this law, the primary function of the Tanzania Police Force is to preserve peace, maintain law and order, prevent and detect crime, apprehend and guard offenders, and protect properties.[85] The same law authorises the Inspector General of Police to administer the force throughout the United Republic of Tanzania.

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82 Ibid.
83 Ibid Art 3 (4).
84 The Police Force and Auxiliary Services Act, Cap 322 [R.E 2002].
85 The Police Force and Auxiliary Services Act, Cap 322[R.E 2002] s 5.

Under the general power given to the IGP under the Act,[86] the Inspector General of Police was made secular to improve the performance of the private security industry in Tanzania. However, under the general power given to the IGP by the law, such authority of the IGP to make secular is not directly stated. In most cases, the Inspector General of Police has been conducting the usual routine of verifying the criminal record of the intended employees, regulating uniforms, requirements for bank statements of each director of the company, and controlling how private security companies should be issued arms and ammunition.[87]

2.2.3 COMPANIES ACT

The Company's Act is the law that provides all the requirements for establishing and registering private companies. The same rule has established the Business Licensing Agency, vested with the mandate of registering and de-registering all private companies in Tanzania.[88] Private security companies are among the companies that must be registered as regular companies with share capital and need to file annual returns to the Registering Agency.[89] Though the law does not provide for any other requirement, the agency has provided the procedural requirement that for the private security service providers to register, the applicant must obtain authorization from the Inspector General of Police.[90]

The Companies Act is relevant to this study because it is the primary law that provides the procedures for registering all businesses in Mainland Tanzania, including private security companies providing security services.

86 Ibid.
87 Firearms and Ammunition Control Act, No. 2 of 2015. S.16.
88 The Companies Act, Cap. 212[R.E 2019] s14.
89 Ibid S 7.
90 Ibid S.14 (4).

2.3.4 FIREARMS AND AMMUNITION CONTROL ACT

The Firearms and Ammunition Control Act is an Act for the general control and management of firearms and ammunition and licensing, possession, importation and exportation, transit, and dealing in brokering and tracing weapons and ammunition.[91]

This law provides an application for a license to possess firearms by a company to be made by the Chief executive officer.[92] It prohibits an individual from using guns for security or any purpose firearms issued to another person.[93] Furthermore, the law authorises registering to issue a license for business purposes, a private company, or any other institution.[94]

This law is relevant to this study because the Inspector General of Police is given power under this law to issue licenses to private security service providers to possess firearms for security activities.

2.3.5 CYBER CRIME ACT

This law is established to criminalise offences related to computer systems and information communication technologies and to provide for investigation, collection, and use of electronic evidence and matters pertaining there.[95]

Cyber security is the application of technologies, processes, and controls to protect systems, networks, programs, devices, and data from cyber-attacks.[96] It aims to reduce the risk of cyber-attacks and protect against the unauthorized exploitation of systems, networks, and technologies. A robust cyber security regime is founded on a comprehensive cyber risk assessment programme to

91 The Firearms and Ammunition Control Act, No.2 of 2015.
92 Ibid s 10 (5).
93 Ibid s 10 (7).
94 The Firearms and Ammunition Control Act, No. 2 of 2015 s16 (b).
95 Cyber Crime Act, No 14 of 2015.
96 The Cyber Crimes Act No.14 of 2015, s 3

identify the gaps in an organisation's critical risk areas and determine the right actions to close those gaps.[97]

Offences such as illegal access are prohibited by the law to a person who intentionally and unlawfully accesses or causes a computer system to be accessed.[98] It also criminalizes the illegal remains of a person who deliberately and illegally remains in a computer system or continues to use a computer system after an unauthorized time to use the computer system.[99] In addition, it criminalizes illegal interference with a computer system,[100] data espionage,[101] and illegal interface with the computer system and the act shall be intentional and unlawful,[102] and illegal device to be used to commit an offence.[103]

The Cybercrime Act, the substantive law in this arena, is relevant to this study because private security service providers use computers and other technologies. Private security companies can also commit the offences established by this law in their daily activities.

2.3.6 NATIONAL SECURITY ACT

The National Securities Act is an Act that provides for better provision of state security that usually expresses and deals with espionage, sabotage, and other related activities prejudicial to the interest of the Country.[104] The Act clearly describes the desire to eliminate any individual from using any uniform that resembles the uniform of the Police Force and other law enforcement agencies.[105] However, the said law does not direct state prohibition to private

97 Ibid s 34& 35.
98 Ibid s 4(1).
99 Ibid s 5 (1).
100 Ibid s 7(1).
101 Ibid s 8 (1).
102 The Cyber Crimes Act No.14 of 2015, s 9.
103 Ibid s 10 (1).
104 The National Security Act of 1970.
105 Ibid s 6(1), (a).

security guards, but this provision is relevant to this study since private security guards are not armed forces.

2.3.7 CRIMINAL PROCEDURE ACT

This Act is primary procedural legislation regarding criminal proceedings in Mainland Tanzania. The Criminal Procedure Act specifies the institutions that have mandated the arrest of a person suspected of having committed an offence with or without a warrant.[106] The same law provides for arrest by a private person, any person who has committed a crime in his presence.[107]

However, the law does not directly mandate private security guards to arrest anyone who has committed an offence.

2.3.8 PEOPLE'S MILITIA (POWERS OF ARREST) ACT

This law gives the same powers to people militia to arrest in case of any breach of provision of written law and search as vested in Police Officers of the rank of constable.[108]

People's militia, in most cases, is communities based on some sought of nature where the Tanzania People's Defense Force is training the indigenous to operate as crime foster actors of the community.[109] The same has a connection with the private security industry since one of the requirements to be employed as a security guard is that the applicant shall either be a Militia or Serviceman. Likewise, security guards must be trained on arrest before being employed in the private security industry. This Act is relevant to this research because it empowers people's militia to arrest as part of their duties, and this law has already provided this.

106 The Criminal Procedure Act, Cap 20 [R.E 2022] s 11 and s 14.
107 Ibid s 16.
108 Peoples Militia (Powers of Arrest) Act, No 7, 1975 s.3.
109 Ibid.

2.3.9 WARD TRIBUNAL ACT

The Ward Tribunal Act is another law enacted by the Parliament of the United Republic of Tanzania to provide for the jurisdiction of the ward tribunal, powers, practice, and procedures.[110] Under the law, it established a ward tribunal with the primary function of securing peace and harmony in the area, which it established by mediating disputes among people to reach amicable and just settlement of disputes.[111]

The provision above the law shows that peace and security are not the responsibility of the Tanzania Police Force alone but of every citizen, including private security actors. Therefore, this law is relevant to this study because it authorizes all citizens to maintain peace and security.

2.3.10 NATIONAL DEFENCE ACT

The Act regulates the issue of security in Tanzania. The National Defense Act has established various forces and means of governing the same. The primary department established by this Act is the National Service, which usually operates as the supplemental Force to the main Force.[112] However, the legislation has neither provided for industry regulations nor established the mechanisms for how the industry can function. In practice, the Tanzania Police Force, in regulating the private security sector, gives conditions to the applicant to provide security services to employ security guards who are either Militia or service members.

The issue of concern is that the law alone does not provide anything regarding regulating the private security industry. Still, it has a relation since service members are trained by Tanzania Peoples Defense Forces and employed as security guards by PSI.

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110 The Ward Tribunal Act, No 7 of 1985 s 3 & 8.
111 Ibid.
112 The Ward Tribunal Act, No 7 of 1985, s 19 & 21.

2.3.11 TANZANIA INTELLIGENCE AND SECURITY SERVICE ACT

Tanzania Intelligence and Services is neither military nor paramilitary, but it is usually handled as a particular entity that cuts across various issues, especially those with state interests. The Service is under the supervision and control of the office of the president of the United Republic of Tanzania.[113] The intelligence services' prime functions and responsibilities are to collect and disseminate all intelligence information concerning some issues of the state's interests. However, the said law does not directly regulate the private security industry, but there is a connection in the performance of their activities. Establishing a private security industry in Tanzania was supposed to be the product of intelligence information disseminated to the Tanzania Police Force to regulate and supervise it.[114]

2.3.12 BUSINESS NAMES (REGISTRATION) ACT

This law deals with establishing private security companies in Mainland Tanzania. Private security service providers required after starting to operate a security business shall make an application for a business name to the Registrar of Companies within twenty-eight days from the day of commencement of business. Still, for the firm commenced before the enactment of this Act, the statement of particulars shall be furnished after the expiration of two months and three months from the passing of this Act.[115]

The Act also provides for the manner and particulars of registration to include; the business name, general nature of business, where the registration to be effected is that of a firm, the present name and surname, any former name or surname, the nationality, and if that nationality is not origin, the nationality of origin, the age, the sex, the usual residence, and the other business occupation (if any) of each individuals who are partners and the corporate name. The

113 The Intelligent services Act, No 15 of 1996, s 14.
114 Ibid s 15.
115 The Business Names (Registration) Act, Cap 312 of 2013 s 8.

registered or principal office or principal office of every corporation which is a partner, where the registration is that of corporation, its corporate name and registered office, if the business to be registered commenced before the passing of this Act.[116] The date of commence shall be stated, where the company to be registered is that of the firm, the names of every person empowered to operate the firms bank account or to sign, draw or endorse on behalf of the firm any bill of exchange, promissory note or other negotiable instrument or holding the firms general power of attorney, if the business is carried under two business names of both should be stated.[117]

Therefore, this law is relevant to this study since it provides procedures for registering names to private security service providers as part of the private security industry.

2.3.13 NATIONAL SECURITY COUNCIL ACT

This Act established the National Security Council, defence, security committees at various administrative hierarchies to regulate and coordinate national security matters, to establish machinery for individual persons, and public and private institutions to cooperate and participate effectively in defence and National security and provide for related matters.[118] The Act establishes District security committees, which are mandated to consider applications for ownership of arms and explosives and make decisions per the laws or advise the Regional security committee on such applications.[119]

This law is relevant to this study because it provides for Regional and District security committees that deal with, among other things, considering applications for ownership of arms since some private security service providers use firearms in their activities.

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116 Ibid.
117 Ibid s 6 (1) (a-h)and (2).
118 National Security Council Act, of 2010.
119 Ibid s 8(b) and 11(f).

2.3.14 THE ELECTRONIC AND POSTAL COMMUNICATION ACT

This Act establishes a comprehensive regulatory regime for electronic and postal communication services.[120] The law allows any person or company wishing to operate the electronic communications system in their duties to apply for a license from the authority.[121] This law is relevant to this study because private security service providers, in their duties, use electronic communication.

3.0 SECURITY NORMS AND PRACTICES IN REGULATING PRIVATE SECURITY INDUSTRY

The private security industry deals with the protection of people and their properties as an assistant to public Police, therefore should adhere to security norms and practices such as standard training, and vetting of private security personnel before being allowed to perform security activities. Furthermore, private security service providers need education on laws regulating PSI, licensing and certification requirements under relevant laws, Monitoring and Enforce Adherence to Professional Standards and Code of Conduct, Penalties and Sanctions Imposed to Private Security Service Providers**,** and Challenges Faced by Regulatory Authority.

3.1 TRAINING OF PRIVATE SECURITY PERSONNEL

Training constitutes a basic concept in human resource development. It is concerned with developing a particular skill to a desired standard by instruction and practice.[122] Training is a highly useful tool that can bring an employee into a position where they can do their job correctly, effectively, and conscientiously.[123] Training is the act of increasing the knowledge and skill of

120 Electronic and Postal Communications Act, [R.E 2022]

121 Ibid. s 6(1).

122 Parliament Subcommittee on Security and Defense (SEDE) 'Private Security Companies in International Crisis Management Operations' European 2011) 8-9.

123 Ibid.

an employee for doing a particular job. Training always categorized into various phases, the first phase according to security personnel is based on the basic training at the stage of first employment. The second phase is always taking place at the promotion where employees are being offered training packages depending on the level of position holding in the private security company. The last phase of training is in job training which focuses much on the remembrances and brain sharpening on the daily work performance within the private security company. Normally training is not an emergency phenomenon; it is in most cases scheduled and has a specific duration to attend as per every private security service employee.

Security guard training helps make sure that your security officers can effectively perform their duties, from protecting premises to dealing with various emergencies. It is also a good way to keep them from making mistakes that could harm your clients and legally damage your business reputation. According to the nature of security jobs performed by a security officer, their positions did require much training or qualifications.[124] But in most cases while employing private security personnel the employer and Police Force institutions put their eyes and focus only on general education development tests and a clear criminal record. In most cases, private security guards during their employment as security guards are not trained on how to use firearms, arrest, customer care and respect for human rights. The employers believe that since they are militia and service members there is no need to train them. Standard training is very important for all private security personnel since there is a need to be equipped with security norms and practices such as vetting, physical fitness and patriotism.

[124] European Parliament Subcommittee on Security and Defencee (SEDE), Private Security Companies in International Crisis Management Operations' 2011) 8-9.

3.2 VETTING OF SECURITY PERSONNEL

Vetting is the examination of a person's background and private life to make sure an individual can be trusted to hold certain jobs or learn secret information.[125] Vetting varies depending on the reason behind vetting but this study involves background checks, assessment of competency, drug tests, and physical fitness and health checks.[126] One of the main things often examined during security vetting is criminal behaviour; this would include any previous convictions on a person's record. It might also include further investigations to make sure a person is not currently engaged in secret questionable behaviour. Another area of investigation is about a person's lifestyle and habits. The investigations will look at things like drug problems or a history of unreliable behaviour.

In Mainland Tanzania private security guards are not vetted during employment, the reason is that the owners are given conditions by the TPF to employ service members and militia. Under the permit, the condition is that only owners are subjected to vetting on criminal background checks without taking into consideration family background and lifestyle.[127]

3.3 AWARENESS OF THE EXISTENCE OF A LEGAL FRAMEWORK GOVERNING PRIVATE INDUSTRY

Education is paramount for private security personnel to adhere to the laws governing the private security industry. Most private security administration and other personnel in the industry have little knowledge about the existing laws governing the private security industry. Most private security personnel from private security companies are not familiar with the laws regulating matters related to the operations of the private security industry apart from

125 Muyiwa B Afolabi, Intelligence and Security Studies Programme, (2017) Department of Political Science and International Studies, Afe Babalola University, Ado-Ekiti, Nigeria 62.

126 Ibid.

127 Interview by Lydia Mshare, Student, Faculty of Law, University of Dodoma (Nyerere Square, Dodoma 1st October, 2023)

knowing that they are registered through BRELA and issued permits by the TPF.[128] Education about laws governing PSI is essential because awareness can help players in the industry adhere to the laws to meet the goals of enhancement of security in society. Suppose personnel in the private security sector fail to know what does and doesn't. In that case, the regulatory authority will find it difficult to supervise and monitor the daily activities of private security service providers.

3.4 LICENSING AND CERTIFICATION FOR THE PRIVATE SECURITY INDUSTRY

The Companies Act covers registering private security businesses.[129] At the same time, the Inspector General of Police Secular[130] deals with the general governance of the private security industry in Tanzania however the secular does not provide conditions or criteria for the applicant to fulfil to be issued with a permit to run a security business.[131]

For effective monitoring of the operation of PSI, we still need adequate laws which provide for the criteria or conditions for the applicant to fulfil to be issued with a permit to provide security activities. It will enable the regulatory authority to set standards for the applicant to meet conditions for eligibility to operate security activities. An effective law could establish minimum standards for the applicant and qualifications, ensuring that private security personnel have the necessary skills and knowledge to perform their duties effectively.

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128 Interview by Lydia Mshare, Student, Faculty of Law, University of Dodoma (Nzuguni, Dodoma October, 2023)

129 Companies Act, Cap 212 [R.E 2019].

130 IGP Secular No.3/2009.

131 Interview by Lydia Mshare, Student, University of Dodoma, Faculty of Law, (PHQ Dodoma.03rd September, 2023.)

3.5 TRAINING OF PRIVATE SECURITY PERSONNEL

Matters related to licensing and certifications of private security businesses are covered by the Companies Act.[132] At the same time, the Inspector General of Police Secular[133] provides issues associated with the training of private security guards. Training offered to private security guards does not cover aspects to be covered such as how to arrest, use firearms, physical fitness, patriotism, and respect for human rights, just to mention a few.[134]

From that point of view, it can be said that most of the activities are regulated by BRELA under the umbrella of the Companies Act[135] and Inspector General of Police Secular.[136] However, the researcher believes that we still need adequate laws that will handle all issues related to training of private security guards to have qualified personnel to perform duties of protection of people and their properties. This will enable the consumers to hire qualified people who will provide quality services and contribute to reducing crimes. An effective law could establish minimum standards for training and qualifications, ensuring that private security personnel have the necessary skills and knowledge to perform their duties effectively.

Private security service providers are often contracted to provide security for businesses, schools, and other public places. An effective law would help to ensure that these personnel are adequately trained and equipped to handle security threats. It would also help to prevent private security guards from abusing their power or using excessive force. To protect the rights of private security guards, private security guards are often paid low wages and work in dangerous conditions.

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132 Companies Act, Cap 212[R.E 2019]

133 IGP Secular No.3/2009

134 Interview by Lydia Mshare, Student University of Dodoma, Faculty of Law a (PHQ Dodoma03rd September, 2023)

135 Companies Act, Cap 212 [R.E 2019].

136 IGP Secular No.3/2009.

A comprehensive law would help to ensure that these workers have their rights protected, such as the right to a minimum wage, the right to a safe working environment, and the right to unionise and to regulate the use of weapons by private security guards. Private security guards in Tanzania are sometimes allowed to carry firearms. An effective law would help to regulate the use of these weapons, ensuring that they are only used in self-defence or to protect the public.

African Countries need to adopt a matrix approach to regulate the private security industry, which consists of the regulatory scheme at different levels, namely, the national, regional, and international, as well as within the industry. Effective national regulation would also comprise mandatory standards in health, safety, minimum wage, insurance, vetting, training, and criminal record checks.[137]

Similarly, minimum standards should be addressed in every regulation, such as registration, licensing, training, and use of security and powers given to private security guards. That any regulatory framework does not regulate private security service providers and their employees in Zambia. This situation is thereby an explosion of national threat.[138]

3.6 MONITORING AND ENFORCING ADHERENCE TO PROFESSIONAL STANDARDS AND CODE OF CONDUCT.

The Tanzania Police Force is mandated to monitor and enforce adherence to professional standards of the private security industry through the commission of community policing in the office of the Chief of Police Force and Regional Police Commander's Office. In the case of the code of conduct, this is treated by an individual private security service provider through self-regulation.[139] TPF is

137 Beapark and Schulz (n 40)81-86.
138 Ndugu (n 42) 1015 -1016.
139 Interview by Lydia Mshare, Student, University of Dodoma, (Police headquarter, and Regional Police Commander office, Dodoma.14 November, 2023)

ineffective in monitoring adherence to professional standards because they found it challenging to sanction private security service providers due to a lack of provision of the law, which authorises them to enforce compliance with professional standards.[140]

The Tanzania Police Force performs most activities since it is mandated to secure citizens and their properties. Private security firms often operate in various capacities, such as protecting events, businesses, or individuals. As these firms are entrusted with safeguarding people and property, it is crucial to ensure that they adhere to professional standards to effectively carry out their duties without compromising public safety.[141] Through monitoring and enforcing adherence to professional standards, the TPF helps to prevent potential misconduct or negligence within the private security industry that could pose risks to public safety.[142]

Furthermore, TPF finds it challenging to monitor the private security sector through desks/offices under Regional Police Commanders and in the Police headquarters because of the fast growth of the private security industry in Tanzania.[143] Through established desks/offices under Regional Police Commanders it is difficult to monitor and supervise the fast-growing PSI in Tanzania. Therefore, it is convenient for the TPF to expand its structure by establishing the Commission as a regulatory authority to regulate PSI in Tanzania since security is a union matter.[144]

Private security firms are granted certain powers and authorities, such as making arrests or detaining individuals under specific circumstances.[145] However, these powers must be exercised responsibly and within legal

140 Ibid.
141 Ibid.
142 Interview by author, (14th November, 2023) Police headquarter, and Regional Police Commander office, Dodoma.
143 Interview by author, (21st December, 2023) Police headquarters, Dodoma.
144 Ibid.
145 Bearpark and Schulz (n 40)81-86.

boundaries. Through monitoring and enforcing professional standards, the Police Force can hold private security personnel accountable for their actions and ensure that they operate within the confines of the law.[146]

This accountability helps to maintain public trust in the private security industry and law enforcement agencies. It ensures that all individuals, including those in the private security industry, are subject to laws and regulations governing their conduct. The Police Force is a regulatory body that oversees compliance with these laws and regulations. Through monitoring and enforcing adherence to professional standards, the Police Force helps uphold the rule of law within the private security industry. It ensures that private security personnel act ethically, respect individual rights, and do not engage in illegal activities while carrying out their duties.

The above point is supported by institutional theory; it describes formal, informal, and legal aspects of governmental institutions: their formal and informal structure, legal powers, procedural rules, social behaviours, and functions or activities in public service delivery.[147] The institutional theory is relevant to this study since it shows the processes, influence, and reasons for institutional behaviours, policies, and institutional decision-making as organisations seek to implement and legitimise their projects and practices in ensuring practical and efficient public service delivery. Furthermore, it shows that for private security firms to survive in providing security services, the organisation or company needs to comply with the legal and regulatory framework; failure to adhere to the law may result in the cancellation of the business.

146 Ibid.
147 Bearpark and Schulz (n 40)81-86.

3.7 PENALTIES AND SANCTIONS IMPOSED TO PRIVATE SECURITY SERVICE PROVIDERS.

There is no specific code of conduct for the private security industry in Mainland Tanzania, apart from the sanctions imposed on private security service providers who operate contrary to the law, such as warnings and time to correct faults.[148] These sanctions do not help to improve compliance since they are not sanctioned in reality. From that point of view, it can be said that although there are no specific codes or rules or regulations governing the private security industry when they do misconduct, there are actions taken by the Police Force.[149]

In addition, the Tanzania Police Force does not have the mandate to cancel permits issued to private security service providers who operate contrary to security norms and practices because no law authorises them to do so.[150] That is to say; the law should provide TPF the authority to cancel permits for private security service providers that operate contrary to the laws.

The sanctions are implemented to ensure accountability, compliance with regulations, and protection of individuals and property. Private security companies typically require a license to operate legally, and regulatory bodies or government agencies responsible for overseeing the private security industry grant this license. When a company acts contrary to the legal framework, authorities have the power to suspend or revoke its license.[151] Private security companies that violate legal regulations may also face financial penalties in the form of fines. The amount of these fines can vary depending on factors such as the violation's severity, the company's size, and any previous offences.

148 Interview by Lydia Mshare, Student, University of Dodoma, Faculty of Law, (Regional Police Commander office Dodoma. 22nd October, 2023),

149 Ibid.

150 Interview by Lydia Mshare, Student, University of Dodoma, Faculty of Law, (BRELA office through telephone, 22nd October, 2023)

151 Banda (n 33) 33.

Penalties serve as a deterrent and aim to discourage non-compliance with legal requirements.[152]

4.0 CHALLENGES FACED BY REGULATORY AUTHORITY

Tanzania Police Force is a regulatory authority in regulating the private security industry in Mainland Tanzania. However, TPF is ineffective in governing the private security industry that is the major problem in the field.[153] Similarly, there is a problem of non-compliance to security norms such as vetting of personnel, standard training on how to use firearms, arrest, respect for human rights, physical, fitness and patriots since there is no law that provides effective sanctions that can deter the defaulters from violation of laws regulating private security industry.[154]

Based on the above context, it suffices to argue that the ineffectiveness of regulatory authority challenges the significant impact of private security industry operations. But the remarkable challenge is the ineffectiveness of laws governing this sector.

There are two types of responses to the challenges of privatising the security industry. These are legal and regulatory frameworks at regional, national, and international levels.[155] It is important to establish legal and regulatory frameworks at regional, national, and international levels.

5.0 CONCLUSION AND RECOMMENDATIONS

The study concluded that the legal framework regulating the private security industry in Mainland Tanzania is not effective since the existing legal framework does not contain provisions that consider security norms and

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152 Ibid.

153 Interview by Lydia Mshare, Student, University of Dodoma, Faculty of Law, (BRELA office headquarter, Dar es Salaam 25th September, 2023).

154 Ibid.

155 Caroline Holmqvist, 'The Private Security Companies, the Case for Regulation' Stockholm International Peace Research Institute (policy paper No.9 2005) 59.

practices. The study recommends that there is a need to ensure that there is an effective legal framework system that regulates the private security industry in Mainland Tanzania. Finally, since there are other Mechanisms like the Inspector General of Police Secular which was established to supervise and improve the performance of private security industry in Tanzania it is the recommendation of this paper that the IGP secular be amended to include vetting of security personnel, standard training on how to use firearms, arrest customer care, patriotism, respect for human rights just to mention few. The study further recommends that there is a need to establish an independent regulatory authority to oversee and monitor the operation of PSI in Tanzania because security is a union matter.

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THE JUSTICIABILITY OF THE ARGUMENT FOR THE RECOGNITION OF FREEDOM TO TRANSACT AT THE EMERGENCE OF BLOCKCHAIN TECHNOLOGIES IN UGANDA AND WORLD WIDE

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THE JUSTICIABILITY OF THE ARGUMENT FOR THE RECOGNITION OF FREEDOM TO TRANSACT AT THE EMERGENCE OF BLOCKCHAIN TECHNOLOGIES IN UGANDA AND WORLD WIDE.

George Okitoi*

ABSTRACT

The paper discusses the need for recognition for freedom to transact due to the emergence of block chain technologies. It looks at the existing legal framework on block chain and the fact that it has the potential to revolutionize a wide range of industries by enabling secure, transparent and efficient record-keeping and communication. As a result, many countries have recognized the importance of blockchain and have begun to legislate and regulate various aspects of its use. He asserts that freedom to transact is justiciable to the extent that individuals can seek legal remedies if their freedom to transact is violated or infringed upon. The author argues for a need to develop specific legislation on block chain technologies as well as the adoption of guidelines to ensure that these technologies are used in a way that respects the freedom to transact and promotes human rights.

1.0 INTRODUCTION

1.1 FREEDOM; THE HUMAN RIGHTS

Human rights are fundamental rights and freedoms that are inherent to all human beings, regardless of their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.[1] These rights include the right to life, liberty, and security of person; the right to education; the right to work and to form a family; and the right to participate in the cultural

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1 The United Nations, General Assembly Universal Declaration of Human Rights 1945, Article 2. (Adopted 10 December 1948) <Universal Declaration of Human Rights | > [Accessed 20 February 2023]

life of the community, among others.[2] These rights are recognized and protected by international law and are based on the principle that every individual is entitled to certain rights and freedoms simply because they are human.

1.1.1 THE LAW ON HUMAN RIGHTS

The Universal Declaration of Human Rights,[3] sets out the fundamental human rights that are to be protected by law. It includes a wide range of civil, political, economic, social, and cultural rights, and is considered to be the cornerstone of international human rights law. The International Covenant on Civil and Political Rights,[4] sets out the civil and political rights that are to be protected by law. It includes rights such as the right to life, liberty, and security of person; the right to freedom of expression and religion; and the right to a fair trial, among others.

The International Covenant on Economic, Social, and Cultural Rights,[5] sets out the economic, social, and cultural rights that are to be protected by law. It includes rights such as the right to work and to form a family; the right to education; and the right to an adequate standard of living, among others. This treaty also embodies the basis for the right to transact. In Uganda, human rights are protected under Chapter Four of the Constitution[6] that provides for a variety of human rights protection, and mechanisms for the enforcement of those rights. Uganda is also a signatory to various international and regional human rights treaties such as the African Charter on Human and People's Rights,[7] among others.

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2 The Constitution of Uganda 1995, Chapter 4 available at <1995_Constitution_of_Uganda.pdf> [Accessed 20 February 2023]

3 Ibid.

4 The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) available at <https://www.ohchr.org/en/> [Accessed 25 February 2023]

5 International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966) available at <International Covenant on Economic, Social and Cultural Rights> [Accessed 20 February 2023]

6 Ibid

7 African Charter on Human and Peoples Rights (ratified on 27 May 1986) available at <www.achpr.org> [Accessed 20 February 2023]

1.2 BLOCKCHAIN TECHNOLOGIES

Blockchain technologies, are decentralized and distributed digital ledger systems that are used to record transactions across a network of computers. These technologies use cryptography to secure the data and ensure that it cannot be altered or tampered with. Blockchain technologies have the potential to revolutionize the way we store and exchange information, as well as the way we conduct business and interact with each other.[8]

Blockchain technologies were originally developed as the underlying technology for the crypto currency, such as Bit coin. However, they have since been applied to a wide range of other applications, including supply chain management, financial services, healthcare, and even voting systems.[9]

One of the key features of blockchain technologies is that they are decentralized, meaning that they do not rely on a central authority to verify or validate transactions. Instead, transactions are validated and recorded by the network of computers that make up the blockchain. This makes them resistant to tampering or fraud, and allows for greater transparency and accountability in the recording of transactions.[10]

Blockchain is the technology that underlies most cryptocurrencies and is used to record transactions on a digital public ledger. A blockchain is a decentralized, distributed database that maintains a continuously growing list of records called blocks. Each block contains a timestamp and a link to the previous block, creating a chain of blocks.[11]

Crypto currencies use block chain technology to record transactions on a digital public ledger. When a transaction is made, it is broadcast to the network and validated by nodes (computers) on the network. Once a transaction is validated,

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8 Nicolas Kube, 'Daniel Drescher: Blockchain Basics: A Non-Technical Introduction in 25 Steps' (2018) 32 Financial Markets and Portfolio Management 329.

9 Melanie Swan, *Blockchain: Blueprint for a New Economy* (O'Reilly Media, Inc 2015).

10 Ibid

11 'Blockchain Facts: What Is It, How It Works, and How It Can Be Used' (Investopedia) < https://investopedia.com> [Accessed 20 February 2023]

it is added to the blockchain as a new block. This block is then linked to the previous block, creating a chain of blocks that cannot be altered.[12]

The use of blockchain technology in cryptocurrencies helps to ensure the security and integrity of the transaction record. It also allows for transparent and verifiable transactions, as the entire history of a crypto currency's transactions is recorded on the blockchain and can be accessed by anyone.[13]

Overall, blockchain technologies have the potential to revolutionize the way we store and exchange information, as well as the way we conduct business and interact with each other.[14]

1.2.1 BLOCKCHAIN AND FREEDOM TO TRANSACT

An essential aspect of blockchain technologies that relates to freedom to transact is crypto currencies. Crypto currency is a digital or virtual currency that uses cryptography for security and is not backed by any government or central authority. Cryptocurrencies are decentralized systems that allow for secure online transactions to take place directly between users.[15] The most well-known crypto currency is Bit coin (BTC), but there are many other types of cryptocurrencies as well such as Ethereum (ETH), Tether (USDT), Binance Coin (BNB), Dogecoin (DOGE), Litecoin (LTC), Cardano (ADA), Polkadot (DOT), Chainlink (LINK), Bitcoin Cash (BCH) among many others.[16]

In relation to freedom the matter at hand, freedom to transact is a core tenet of crypto-libertarian ideology whereby the individual is sovereign and the state has no authority to limit what a person can do with their assets, digital or otherwise. An extension of the same school of thought that elevates economic freedom above

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12 Ibid

13 Ibid

14 Don Tapscott and Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin and Other Cryptocurrencies Is Changing the World* (Reprint edition, Portfolio 2018).

15 'A Beginner's Guide to Investing in Cryptocurrencies | CoinMarketCap' (*CoinMarketCap Alexandria*) available at <www.coinmarketcap.com> [Accessed 21 February 2023]

16 The CoinMarketCap website lists the top cryptocurrencies by market capitalization: available at <https://coinmarketcap.com/> [Accessed 21 February 2023]

all other social, cultural and political interests. The freedom to transact is increasingly invoked by crypto currency promoters and right-wing politicians, who share similar ideological leanings, in response to measures by governments and private sector actors to impose political consequences through economic means.[17]

A non-fungible token, or NFT, collector who goes by the pseudonymous Twitter handle @punk6529 posted a 56-part Twitter thread that ripped through the crypto world with viral intensity. Writing in response to the Canadian government's decision to obstruct bit coin transactions by members of the trucker convoy occupying Ottawa, punk6529 began with a stern pronouncement: "There are no other constitutional rights in substance without freedom to transact." What followed was a lengthy explication of how the ability to transact without government interference, with whomever one wants, in whatever amount or currency one wants was the wellspring from which all other rights flowed.[18]

1.2.2 THE LAW ON BLOCKCHAIN

In terms of the law on blockchain technologies, there is currently no specific legislation in place that regulates the use of these technologies. However, there are various laws and regulations that apply to the use of blockchain technologies, depending on the jurisdiction in which they are used. For example, some countries have laws that regulate the use of digital currencies, such as Bit coin, which are based on blockchain technology.

Other countries have laws that regulate the use of blockchain technologies in specific sectors, such as finance or healthcare. It has the potential to revolutionize a wide range of industries by enabling secure, transparent and efficient record-keeping and communication. As a result, many countries have

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17 Elizabeth M Renieris, 'Crypto's "Freedom to Transact" May Actually Threaten Human Rights' (*Centre for International Governance Innovation*) available at <https://centrecigionline.org)> [Accessed 20 February 2023]

18 Jacob Silverman and others, 'Bitcoin Goes to War' [2022] *The New Republic* available at <https://newrepublic.com/article/> [Accessed 20 February 2023]

recognized the importance of blockchain and have begun to legislate and regulate various aspects of its use.

One of the first countries to legislate on blockchain technology was the United States. In 2017, the U.S. Commodity Futures Trading Commission (CFTC) approved the first bit coin futures contracts, recognizing the crypto currency as a commodity.[19] The CFTC also released guidance on the regulation of virtual currencies and blockchain-based derivatives.[20]

Additionally, the U.S. Securities and Exchange Commission (SEC) has issued guidance on the use of blockchain for securities settlement, and has taken enforcement actions against companies that have violated securities laws through their use of blockchain.

Australia: In 2017, the Australian Securities and Investments Commission (ASIC) released guidelines for initial coin offerings (ICOs) and issued a regulatory sandbox for fintech companies, including those working on blockchain projects.[21]

Canada: In 2014, the Canadian Securities Administrators (CSA) released a notice on the use of distributed ledger technology in the securities industry. The CSA has also issued guidance on the regulation of ICOs and has established a regulatory sandbox for fintech companies.[22]

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19 CFTC (Commodity Futures Trading Commission) Approves First Bitcoin Futures Contracts, https://www.cftc.gov/ [Accessed 20 February 2023]

20 CFTC Issues Advisory on Virtual Currency Derivatives, https://www.cftc.gov/ [Accessed 20 February 2023]

21 '17-325MR ASIC Provides Guidance for Initial Coin Offerings' available at <https://ASIC.com> [Accessed 20 February 2023]

22 'The Canadian Securities Administrators Launches a Regulatory Sandbox Initiative | New Brunswick Financial and Consumer Services Commission (FCNB)' <https://securities-administrators.ca> [Accessed 20 February 2023]

China: In 2017, the People's Bank of China (PBOC) issued a statement on the regulation of ICOs, banning them in the country. The PBOC has also issued guidelines on the use of blockchain in the financial industry.[23]

France: In 2018, the French National Assembly passed a law recognizing the legal validity of smart contracts, which are often implemented on blockchain platforms.[24]

Germany: In 2019, the German Federal Financial Supervisory Authority (BaFin) issued guidelines on the regulation of ICOs and the use of blockchain in the financial sector.[25]

Japan: In 2017, the Japanese Financial Services Agency (FSA) recognized bit coin as a currency and regulated bit coin exchanges as financial instruments. The FSA has also issued guidelines on the use of blockchain in the financial industry.[26]

Singapore: In 2017, the Monetary Authority of Singapore (MAS) issued guidelines on the regulation of ICOs and has established a regulatory sandbox for fintech companies, including those working on blockchain projects.[27]

Switzerland: In 2018, the Swiss Federal Council released a report on the legal and regulatory framework for blockchain and distributed ledger technology.[28]

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23 'China: Central Bank Issues New Regulatory Document on Cryptocurrency Trading' (*Library of Congress, Washington, D.C. 20540 USA*) available at <www.loc.gov> [Accessed 20 February 2023]

24 Julie Zorrilla, Stephan de Navacelle, Thomas Lapierre, 'A French Law Perspective on Blockchain Technology' available at <https://www.ibanet.org/> [Accessed 20 February 2023]

25 'BaFin - Activities Relating to DLT, Blockchain and Crypto Assets' available at <www.BaFin.com> [Accessed 20 February 2023]

26 Luke Graham, 'As China Cracks down, Japan Is Fast Becoming the Powerhouse of the Bitcoin Market' (*CNBC*, 29 September 2017)

27 'Overview of Regulatory Sandbox' available at <https://www.mas.gov.sg/> [Accessed 20 February 2023]

28 The Federal Council, 'Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland - An Overview with a Focus on the Financial Sector'. Available at <https://www.newsd.admin.ch/newsd/> [Accessed 20 February 2023]

These are just a few examples of the countries that have legislated on blockchain technology. It is important to note that the regulation of blockchain varies widely across different jurisdictions, and it is likely that more countries will continue to legislate and regulate this technology as it continues to evolve.

1.2.3 BLOCKCHAIN TECHNOLOGIES AND UGANDA

The Ugandan President Yoweri Museveni has spoken has spoken positively about blockchain technology, and its application in Uganda. At the Africa Blockchain conference held in May 2019, the president said that there is a need "to look for a new technology of enabling things to move faster and new systems that go with it."[29]

Several crypto to fiat currency exchanges have been launched in Uganda, like BitPesa, Coin Pesa and Binance Uganda, Yellow card and Chipper Cash. However, crypto currency is not considered a legal tender in Uganda. It is not regulated by the government or central bank, which makes it risky for one to use in the country.[30]

In October 2019, the Minister of Finance issued a public statement stating:

> *"The government of Uganda does not recognize any crypto-currency as legal tender in Uganda. It has not licensed any organization in Uganda to sell crypto-currencies or to facilitate the trade in crypto-currencies and so these organizations are not regulated by the Government or any of its agencies. As such, unlike other owners of financial assets who are protected by Government regulation, holders of crypto-currencies in Uganda do not enjoy any consumer protection should they lose the value assigned to their holdings of crypto-currencies, or should organization facilitating the use,*

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29 Alice Namuli Blazevic, 'Blockchain, Cryptocurrencies and the Law in Uganda – KATS' available at <https://Blockchain, Cryptocurrencies and the law in Uganda.com> [Accessed 25 February 2023]

30 Ganyanna Sheba Percy, 'CRYPTOCURRENCY IN UGANDA – Nabasa & Company Advocates' available at <https://nabasalaw.com/> [Accessed 21 February 2023]

holding or trading of crypto-currencies fail for whatever reason to deliver the services or value they have promised"[31]

Despite this, there have been attempts by the government to control crypto currency exchanges from carrying out money laundering activities, for example, on 12 September, 2020, the Financial Intelligence Authority (FIA) published a press release, notifying the public of an Amendment of the Second Schedule to The Anti-Money Laundering Act 2013.[32]

The amendment included virtual asset service providers among the list of accountable persons under the Act, that required them to register and made them subject to supervision and monitoring by the FIA. This was done in a bid to hold crypto service providers accountable due to the numerous reported scams in relation to crypto-currency that were being recorded in the country.[33]

Despite the lack of regulation specifically targeted at cryptocurrencies, there are various laws existing in Uganda that tackle the subject, for example, Section 3 of the Foreign Exchange Act, 2004, defines "foreign currency" to mean a currency other than the legal tender of Uganda. It further defines "foreign exchange" to include banknotes, coins or electronic units of payment in any currency other than the currency of Uganda which are or have been legal tender outside Uganda. It can be argued that crypto currency falls under the bracket of electronic units of payment.

Under the current legal regime in Uganda, the Electronic Transactions Act,[34] the Electronic Signatures Act,[35] and the Computer Misuse Act as Amended,[36]

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31 Ibid

32 Sydney Asubo, 'Amendment of The Second Schedule To The Anti-Money Laundering Act 2013 | Financial Intelligence Authority' available at <https://www.fia.go.ug/> [Accessed 21 February 2023]

33 Ibid.

34 Electronic Transactions Act 2011 available at <https://ulii.org/akn/ug/> [Accessed 20 February 2023]

35 Electronic Signatures Act 2011 available at <https://ulii.org/akn/ug/> [Accessed 20 February 2023]

36 Computer Misuse Act 2011 available at <https://ulii.org/akn/ug/> [Accessed 20 February 2023]

provide a seemingly comprehensive legal framework for e-commerce in Uganda, meaning that de facto, these acts could regulate the use and transfer of crypto currency.

In addition, the National Payment Systems Act,[37] has been enacted, from the long title, as an Act to regulate payment systems; to provide for the safety and efficiency of payment systems; to regulate issuance of electronic money; to provide for the oversight of payment instruments among other related matters. Therefore, regulators in theory would be able to use this legislation to control crypto currencies in Uganda.

2.0 FREEDOM TO TRANSACT

The freedom to transact is a fundamental human right that is protected by reading all together, the various international human rights instruments, including the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. In theory, it could exist by reading it into these various instruments. It should be noted however that there is no law providing for the right to transact.

This right nonetheless is essential for the exercise of other economic, social, and cultural rights, such as the right to work, the right to form a family, and the right to participate in the cultural life of the community, the right to health, the right to property and many others. This is because all these rights rely on one's ability to be able to contract and receive these services, publicly or privately.

Freedom to transact, according to me, refers to the right to enter into contracts and conduct business freely, without interference or discrimination. This would essentially include the right of two contracting parties to determine what mode of consideration they are willing to give to each other. There are various international human rights instruments that would protect the right to freedom to transact, including the International Covenant on Civil and Political Rights

[37] National Payment Systems 2020 <https://ulii.org/akn/ug/> [Accessed 20 February 2023]

and the Universal Declaration of Human Rights. These instruments recognize the right to freedom of contract and the right to engage in any lawful occupation, as well as the right to protection against discrimination in the exercise of these rights.

In terms of the law that provides for this freedom, there are various laws and regulations that protect the freedom to transact in different jurisdictions. For example, anti-discrimination laws and consumer protection laws may provide protections against discriminatory or unfair practices in the conduct of business.

In addition, contract law and commercial law may provide the legal framework for the formation and enforcement of contracts and the conduct of business. Therefore, it is clear from the above submission that there is no specific mention of the right to transact under international or regional human rights instruments. However, in the words of Elizabeth M. Renieris,

> *"This is not to say that a freedom to transact could never become enshrined as a right or that rights do not expand or evolve, they do. But even then, it most likely would not be absolute, as rights rarely are."*[38]

The argument for the existence of the right is strong, however, it is likely that even when recognised as a right under international law, freedom to transact shall have a claw back clause. Claw back clauses constitute restrictions that are built into human rights provisions. These internal modifiers qualify rights and permit the state to restrict those rights to the maximum extent permitted by their domestic law.[39]

Therefore, the individual is given the right, and simultaneously deprived of it, because it is subject to domestic constraints that often deprive people of all legal protection.

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38 Ibid 17

39 General Comment No. 34

One of the most abused clawback clauses under these international human rights systems is the one that appears under all these treaties in relational to freedom of expression, most notably under *Article 19(3)* of the ICCPR which states that, the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: For respect of the rights or reputations of others; For the protection of national security or of public order, or of public health or morals.

General Comment No.34,[40] states that restrictions are permitted in respect of, inter alia the rights and reputations of others and protection of national security. In Uganda, Article 43 of the Constitution provides for general limitation on fundamental and other human rights and freedoms.[41]

There have been several court cases that have tried to define and protect freedom to transact. For example, in the case of *Brennan v Titusville Steel Co.*[42] the Supreme Court of Pennsylvania recognized the right to freedom of contract as a fundamental right protected by the state constitution. It found that an ordinance that imposed a tax upon interstate commerce was in violation of the provisions of the Constitution of the United States. In the case of *Griswold v Connecticut,*[43] the Supreme Court of the United States struck down a state law that prohibited the use of contraceptives on the grounds that it violated the right to privacy and the freedom to transact in private medical matters.

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40 'United Nations: International Covenant on Civil and Political Rights' (1967) 61 American Journal of International Law 870 available at <https://www2.ohchr.org/> [Accessed 20 February 2023]

41 Ibid 2

42 *Brennan v Titusville*, 153 U.S. 289 (1894) available at <https://supreme.justia.com/> [Accessed 20 February 2023]

43 *Grisworl v. Connecticut*, 381 U.S. 479 (1965) <https://supreme.justia.com/> [Accessed on 20 February 2023]

3.0 THE JUSTICIABILITY OF FREEDOM TO TRANSACT

Justiciability deals with the boundaries of law and adjudication. Its concern is with the question of which issues are susceptible to being the subject of legal norms or of adjudication by a court of law.[44] The justiciability of a human right refers to the extent to which it can be enforced or protected through the legal system. In the case of freedom to transact, this right is justiciable to the extent that individuals can seek legal remedies if their right to transact is violated or infringed upon.

For example, if an individual is denied the right to enter into a contract or to conduct business because of their race, religion, or nationality, they may be able to seek legal remedies through the courts on grounds of discrimination.[45] Similarly, if an individual is denied access to financial services or is subjected to discrimination in the financial sector, they may be able to seek legal remedies to protect their freedom to transact.

3.1 THE UGANDAN PERSPECTIVE

In Uganda, the freedom to transact is recognized and protected by the Constitution, which guarantees the right to freedom of contract and the right to engage in any lawful occupation, trade, or business. It is provided for under Article 40(2) of the 1995 Constitution that provides that, every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.[46] Article 21(2) of the Constitution prohibits discrimination on grounds such as race, ethnicity, religion, and gender, which may interfere with the freedom to transact.

The justiciability of the freedom to transact in Uganda refers to the extent to which this right can be enforced or protected through the legal system in

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44 Ariel L Bendor, 'Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience' (1997) 7 Indiana International & Comparative Law Review 311 available at <https://mckinneylaw.iu.edu/> [Accessed on 20 February 2023]

45 Ibid n (4), article 2

46 Ibid n (2), Art 21(2)

Uganda. In general, the freedom to transact would be considered, justiciable in Uganda, as individuals have the right to seek legal remedies if their freedom to transact is violated or infringed upon.

Article 45 of the Constitution of Uganda provides for human rights and freedoms additional to other rights. It states that, the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

Therefore, the fact that there is no explicit mention of the right to freedom to transact under Chapter Four of the constitution, does not in itself extinguish the justiciability of freedom to transact. In *Attorney General v Susan Kigula & 417 others***,** the Supreme Court of Uganda stated that the rights in the Constitution are not exhaustive.[47]

There have been very few court cases in Uganda that have addressed issues related to the freedom to transact but several on freedom of contract. For example, in the case of *Madrama v Attorney General* the Supreme Court of Uganda held that, it is trite that there is freedom of contract. However, it noted that, one cannot contract out of the law, let alone out of the Constitution.[48]

The freedom to transact is a fundamental human right that is recognized and protected by the Constitution of Uganda. This is because, without the ability to transact, most of the rights protected under Chapter Four would not be realized such as the right to education under Article 30, economic rights under Article 40, and the rights derived from Article 8A under the National objectives and guidelines for state policy such as the right to health. This freedom to transact

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47 *Attorney General v Susan Kigula & 417 Ors* [2009] UGSC 6 <https://ulii.org/ug/judgment/> [Accessed 25 February 2023]

48 *Madrama v Attorney General* [2019] UGSC 1 <https://ulii.org/ug/judgment/> [Accessed 25 February 2023]

is justiciable to the extent that individuals can seek legal remedies if their freedom to transact is violated or infringed upon.

4.0 CONCLUSION

The argument for freedom to transact fundamental to the realization of other human rights. Through a holistic reading of the various international human rights instruments as shown above, freedom to transact can be implied into the provisions. This freedom is essential for the exercise of other economic, social, and cultural rights, and it is justiciable to the extent that individuals can seek legal remedies in the courts of law if their right to transact is violated or infringed upon, such as the right to enter into a contract, on grounds such as discrimination.

Given the potential of blockchain technologies to revolutionize the way we conduct business and interact with each other, it is important that these technologies be recognized and regulated in a way that promotes the freedom to transact and protects the rights of individuals. This could involve the development of specific legislation on blockchain technologies as well as the adoption of standards and guidelines to ensure that these technologies are used in a way that respects and promotes human rights.

The fact the two contracting parties wish to conduct business using cryptocurrencies should not be infringed upon by the state. This is because this would be a violation of the right to self-determination of an individual and also the common law principle of freedom of contract. Consideration under contract should always be left open to the contracting parties to decide; what is valuable in to eyes of one person may not be valuable to another. As the saying goes, one man's meat is another man's poison.

The mere fact that in an increasingly capitalistic world, it is nearly impossible to get any service or good without a form of payment or consideration being rendered. Therefore, this strengthens the case of the right to freedom to transact, and with the emergence of cryptocurrencies, now being threatened by

governments that feel their gasp on economic control is slipping, this has only helped supporters of this right as discussed in this paper.

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ANALYSIS OF THE TRANSITIONAL POLICY ON ORGANISED CRIME IN THE REPUBLIC OF SOUTH SUDAN

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ANALYSIS OF THE TRANSITIONAL POLICY ON ORGANISED CRIME IN THE REPUBLIC OF SOUTH SUDAN

Benjamin Aciec Garang Kuot*

ABSTRACT

This article focuses on the influence of transitional policy on organised robbery crime in the Republic of South Sudan. The Transitional constitution of the Republic of South Sudan affirms combating international and transnational organised crime, piracy, and terrorism. There is a lack of strict procedures and enforceable laws which results in low convictions and limited sanctions in terms of taking away the money and assets gained through illegal activities. This article concentrates on the impact of a transitional policy and recommends the government to adopt the model of tracing the money of organised robbery crime through the creation of an official body empowered to monitor all forms of monetary transactions, governed by suitable protections.

1.0 INTRODUCTION.

South Sudan gained its independence from Sudan in 2011, but hopes of a peaceful future were thwarted when fighting broke out in December 2013. Since then, conflict has spread across the country and this has led to immense loss of life, dislocation of people, and land occupation. Since the start of the South Sudanese civil war, more than four million people have fled their homes but with adverse consequences on the criminal justice system.

The South Sudanese criminal justice system is a fundamental pivot to dispute resolution and deterrence of crime.[1] South Sudan gained independence in July 2011 from Sudan following a referendum that was part of the January

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1 Sonja Theron (2018) Understanding Peaceful and Violent Nation-Building Through Leadership: A Case Study of South Sudan

2005 Comprehensive Peace Agreement (CPA). The CPA sought to address some of the causes of civil wars that plagued Sudan between 1955 to 1972, and 1983 to 2004.[2] At the centre of the civil wars were grievances against economic marginalization and exclusion from the Arab-dominated government.

1.1 ORGANISED ROBBERY IN SOUTH SUDAN.

In South Sudan, armed groups have allegedly been involved in a variety of criminal robbery activities from natural resources control and exploitation, trafficking of wildlife, drugs, and arms, looting, organised violence, human trafficking, and people smuggling. The expansion of some criminal markets can be more destabilizing than others. For instance, in some counties in Central Equatoria, livestock theft, or cattle rustling, is exacerbating levels of violence and fuelling illicit weapons demand.

Organised crime according to the United Nations Convention against Transnational Organised Crime, is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand.[3] Its continuing existence is maintained through the corruption of public officials and the use of intimidation, threats, or forces to protect its operations.[4] While organised crime refers to a category of transitional, National, or local groupings of highly centralized enterprises run by criminals to engage in illegal activities, most commonly for profit. Organised crime is generally thought of as a form of illegal business, some criminal organisations, such as terrorist groups, rebel forces, and separatists are politically motivated. Organised crime has come to be defined as a recent and contemporary phenomenon, a 'malady of modernity;' presented as a major threat in law enforcement discourse.[5]

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2 Grawert Elke (2010) After the comprehensive peace agreement in Sudan. Boydell & Brewer.

3 Article 2(a) of the United Nations Convention against Transnational Organised Crime.

4 F Oduro 'Reconciling a Divided Nation Through a Non-Retributive Justice Approach: Ghana's National Reconciliation Initiative' (2005) 9 International Journal of Human Rights 330.

5 Dick Hobbs, Goergios A Antonopoulos, 'Endemic to the the specicies': ordering the 'other' via organised crime. Global Crime 14 (1), 27-51, 2013

1.2 ORGANIZED CRIME AND CRIMINAL JUSTICE IN THE REPUBLIC OF SOUTH SUDAN.

The transition has not been smooth in the Republic of South Sudan and the transition has been riddled with challenges, brought about by, amongst other factors; the underlying political tensions amongst the elite that have, over time, developed into profound structural political disputes and dysfunctionality; deep psychological and emotional effects of long-term violence; deep-seated corruption; endemic inter-communal conflicts; and a deteriorating humanitarian situation, worsened by the COVID-19 pandemic and the shrinking economic base.[6]

Majorly, there is still a problem of Organised robbery crime which is likely driven by vulnerabilities linked to armed conflict, violence, and instability combined with a high presence of natural resources, growing youth unemployment, and corruption, organised by politicians. Criminal legislations of the Republic of South Sudan is in line with both the 2000 UN Palermo protocol and the 2009 PTPA although South Sudan is not a signatory to the protocol. The South Sudan National Police Service Act 2009, Criminal Code Procedure Act 2008, and Penal Code Act 2008 regulate organized robbery crime in the state.

In terms, the state has the Criminal Investigations and Intelligence Directorate that is charged with investigation of criminal issues including organised crime. To a certain extent, civil society is also involved in the fight against human trafficking for instance the International Organisation for Migration (IOM)-South Sudan and the Human rights commission against Trafficking in Persons. In all this, however, there is a lack of consistency not only regarding statistics on human organized robbery in South Sudan but also on the actual existence of policies and plans.

6 Emmaculate Asige Liaga, South Sudan's transitional government Realities, challenges and opportunities (Institute of Security Studies)

When the National Action Plan on human trafficking and the national database are finally and formally established there will be quotable and reliable sources of figures, statistics, and comprehensive data on organized robbery crime in South Sudan. Alliances between and among armed groups and criminal organisations in South Sudan may evolve, often related to the groups' motivation and potential economic profit. Organised robberies can contribute to prolonging conflicts in South Sudan by enabling armed groups' financing, recruiting fighters, and illicit exploitation of natural resources.

According to the report given by Nongovernmental organisations operating in the field, organised robbery crimes were caused by the following factors linked to the inconsistency of state government departments. According to the criminality score by the Global Organised Crime Index 2021, South Sudan is ranked 27th of 193 countries globally, the country ranks 9th of 54 African countries, and 3rd of the 9 East African countries in terms of criminality. Prof. Mahmood Mamdani argues that South Sudanese will need the continued support of the rest of Africa to redefine their politics and effect the fundamental changes that are needed to repair the damage of their recent history.[7] Although there is no consensus on what this will mean in practical and policy terms, it will be necessary to have a Transition Period in which the necessary foundations can be laid for South Sudan's recovery. He further noted that:

> *"Justice must not be transposed onto South Sudanese society in purely formalistic terms alien to the vast majority of the population. Those who have suffered the most harm as a consequence of the violations and abuses that the Commission has identified deserve to be genuinely involved in the processes of accountability and reconciliation using mechanisms that are accessible and with which they can fully identify."*

[7] African Union Commission of Inquiry on South Sudan (AUCISS) report available at <https://www.peaceau.org/uploads/auciss.separate.opinion.pdf> [Accessed on 23 March 2024]

According to the report given by the Interpol General Secretariat and Institute for security studies, in association with the Global Initiative against organised crime, there exists human trafficking, Human kidnapping, money laundering, Continuous rebelling, roadblocks, drug trafficking, theft, and arm robbery, people smuggling, trade in small arms, light weapons, explosives, illicit flows of money. Many researches have been conducted on the influence of transitional policy on organised crime elsewhere in the world but not in South Sudan, hence the intended research gaps.

Transnational organised crime emerged at the beginning of the 20th century arising in 'parallel to the development of economic regulation, protection, and social support initiated by the modern Welfare State, and to the development of international law'.[8] TOC is primarily viewed as an occurrence arising from 'consumers' demand for products and services, which are unmet due to criminogenic government prohibitions and exercises. Early examples include the illegal sale of alcohol in the United States during the Prohibition Era or the control of territory by the Italian Mafia, which 'encompasses all facets of the resident social community, with a particular emphasis on the local political powers and economic activity. Kupatadze, A. recommended that organised crime must be accommodated by various sub-field of political science and international relations in order for us to understand the development and transition paths of developing states,[9] where organised crime is often interrelated with politics and affect the way state's function and evolve.

Formally, the South Sudan transitional constitution establishes an independent judiciary.[10] The South Sudanese judicial system is organised in a centralized manner, with a national body of appeals and no separate

8 8 Letizia Paoli, 'The Paradoxes of Organised Crime' (2002) 37 Crime, Law & Social Change 51, 63

9 Sudan People's Liberation Movement and Sudan People's Liberation Army (SPLM/SPLMA). 2003. SPLM Preparations for War-To-Peace Transition. 4 November. General Headquarters. Retrieved from Sudan Open Archive: available at <https://sudanarchive.net/cgi-bin/> [Accessed on 23 March 2024]

10 Article 122 of the 2011 constitution

jurisdiction at the state level. There is a single appeal court, without functional division into civil, criminal or administrative courts. Despite the right to equality before the law enshrined in the constitution,[11] there is a widespread feeling among South Sudanese that the political and military elite abuse their powers to influence court cases and end criminal investigations. According to Amnesty International and Human Rights Watch, the government and security forces regularly obstruct the independence of the judiciary. Numerous individuals within the government and the armed forces who are guilty of committing human rights abuses have never been charged. Many South Sudanese see the traditional courts as more inclusive and closer to the people than the statutory courts. However, when the Local Government Act formalized the role of the local chiefs in the judicial system, their role as independent voices and representatives of ordinary people came under pressure.

The African Commission of Inquiry on South Sudan acknowledged the fragile character of infrastructure that can support the existence of the rule of law in South Sudan. Whereas the means for an internally administered form of justice has yet to be created inside South Sudan, the International Criminal Court (ICC) remains highly politicised. The Commission recommends that criminal jurisdiction over high state officials individually responsible for war crimes and/or gross violation of human rights be the responsibility of the African Court of Human and Peoples Rights. The fact that this Commission has held high public officials politically accountable and has called for their withdrawal from public office for the duration of the transition period signals the end of an era of impunity.[12]

In the Commission's view, individual criminal accountability should follow collective political accountability, to give priority to the creation of a stable political order capable of withstanding the inevitable stress generated by the

11 Article 14 of the 2011 constitution

12 African Union Commission of Inquiry on South Sudan (AUCISS) report at pg. 60 available at <https://www.peaceau.org/.pdf> [Accessed on 23 March 2024]

trial of prominent public officials. Whereas this Commission was charged with a holistic mandate calling on it to charter a way forward for a crisis-torn society, it would be the responsibility of the High-Level Oversight Panel to mandate an investigation into the culpability of individual officials for the extreme violence that followed December 15, 2014. Criminal trials have been the cardinal approach in transitional justice as noted by RutiTeitel, *"In the public imagination, transitional justice is commonly linked with punishment and trials of ancient regimes."* These prosecutions occur at different levels such as domestic and international levels. The field of transitional justice has extensively focused on criminal justice with the pursuit of accountability.

The TJ policy mechanism is meant to recognise and address the harms suffered and acknowledge wrongdoing. Reparations can be material or symbolic, and they are frequently the most obvious signs that a state recognizes the rights and dignity of victims and is committed to desist from committing the same wrongs again. TJ policy has been employed to end conflicts. For instance; the Juba Peace Talks (2006-2008) involving the Government of 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).

Transitional justice is an essential part of the peacebuilding process, as the need to obtain justice for victims of conflict has been recognised as imperative when constructing peace. After the established role of justice, the debate on approaches to justice has emerged. 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 recognised the need to adopt appropriate justice mechanisms, including customary processes of accountability.

According to the International Centre for Transitional Justice, prevention is a top priority on the global policy agenda, including among actors such as the United Nations and within frameworks such as the Sustainable Development Goals and the UN's Common Agenda. This agenda has repeatedly recognised the preventive value of transitional justice in addressing common drivers of violations and violence such as exclusion, fragility, and inequality.[13] In 2004, for example, the UN Secretary-General's report on transitional justice and the rule of law stated emphatically that regarding peace and stability, "prevention is the first imperative of justice." Transitional justice favours inclusion and participation as instruments to repair the harm caused by crimes, while retributive justice favours accountability through criminal punishment.

2.0 IMPORTANCE OF TRANSITIONAL JUSTICE POLICY AND THE LEGAL FRAMEWORK FOR REPRESSING THE ORGANISED CRIME OF ARMED ROBBERY IN SOUTH SUDAN.

2.1 INTERNATIONAL LAW AND STATE OBLIGATIONS.

International law primarily addresses questions of governmental conduct such as territorial claims, the use of force, and human rights, to name a few. While some criminal problems may result from governmental conduct, most international environmental issues (such as the depletion of natural resources) result, generally, from private activities. International law is a branch of law that governs relations between international persons such as states.[14] States lie central to the idea of international law,[15] and can be said to be the principal parties to international law.

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13 United Nations Mission in the Republic of South Sudan (UNMISS). 2017. A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016. Jointly published by UNMISS and OHCHR available at <https://www.ohchr.org/Documents/Countries/SS> [Accessed on 22 March 2024]

14 A State is a type of legal person recognized by International Law. See generally; Brownlie, *Principles of Public International Law,* 8th ed, Oxford University Press, New York at page 405. Also see Article I of the Montevideo Convention on Rights and Duties of States on the criteria of statehood.

15 Janis Grzybowski and Martti Koskenniemi, International Law and Statehood: A Performative View, available at <https://www.researchgate.net/> [Accessed on 22 July 2024]

General obligations do not require states to legislate to perform their international obligations but rather provide guidelines that state parties ought to follow to achieve a given objective and obligation. States are free to choose the ways and means of attaining these objectives and obligations. International law is made up of an autonomous set of international treaty norms and various sovereign sets of domestic criminal norms with distinguishing legal authorities. The increasing number and complexity of international treaty norms and their transmutation into domestic laws enable better assimilation of domestic criminal laws into the international prohibition regime. Through the ratification of so-called suppression conventions, state parties agree to criminalize the unlawful behaviour specified in those conventions and to adopt mutual legal assistance and extradition provisions, which warrant cooperation with other states attempting to establish and exercise jurisdiction over those individuals accused of a crime.[16]

2.1.1 THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WAS ADOPTED IN 1982 (UNCLOS).

The UNCLOS provides that all States must cooperate to the fullest possible extent in the repression of piracy (Article 100) and have universal jurisdiction on the high seas to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board (Article 105). Article 110, inter alia, also allows States to exercise a right of visit vis-à-vis ships suspected of being engaged in piracy.

2.1.2 CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF (SUA CONVENTION).

The SUA Convention targets combating illegal violence at sea. The SUA Convention does not talk about piracy or armed robbery. However, it

16 Neil Boister, 'The concept and nature of transnational criminal law' in Neil Boister and Robert J. Curie (eds), Routledge Handbook of Transnational Criminal Law (Routledge 2015)

addresses those offenses through the concept of unlawful acts against the safety of maritime navigation. Therefore, the concept of unlawful acts must be clarified. It is also important to understand the correlation between the concepts of unlawful acts, piracy, and armed robbery. Article 9 of the SUA Convention states, *"Nothing in this Convention shall affect in any way the rules of international law about the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag."*

2.2 THE HYBRID COURT OF SOUTH SUDAN.

On August 25, 2020, the Transitional Justice Working Group of South Sudan, Human Rights Watch, and the Institute for Security Studies held a webinar for the African Union (AU) Peace and Security Council (PSC) members and other officials to discuss the urgency for the establishment of the AU Hybrid Court for Republic of South Sudan, as a key factor to ensuring long term stability and accountability for serious crimes in South Sudan.[17]

The Hybrid Court for South Sudan is an AU-led hybrid court that has the mandate to investigate and prosecute individuals bearing the responsibility for the serious crimes committed since 15 December 2013 in South Sudan – including the deliberate killing of civilians, rape and other sexual violence, forced recruitment of children, forced displacements, among other crimes.[18] The decision to establish the Hybrid Court was taken through the 2015 peace agreement signed by the Government of South Sudan and the Sudan People's Liberation Movement/Army-In Opposition (SPLM/A-IO) and reiterated through the revitalized peace agreement (R-ARCSS) in September 2018.

Existing tribunals are not independent nor impartial enough and lack the necessary capacity to deal with most crimes on a mass scale and for which people in power are likely to be suspected, as Amnesty International has previously documented, while the International Criminal Court (ICC) is not

17 Webinar Report: The Establishment of the African Union Hybrid Court for South Sudan

18 South Sudan: African Union must set precedent for African-led justice by establishing court for South Sudan available at <https://www.amnesty.org/en/> [Accessed on 23rd March 2024]

competent (South Sudan has not ratified the Rome Statute and the United Nations Security Council has not referred the situation to the ICC).

3.0 THE CHALLENGES OF THE TRANSITION JUSTICE POLICY ON ORGANISED CRIME.

3.1 LIMITED ACCEPTANCE OF TRANSITION POLICY IN THE CRIMINAL JUSTICE SYSTEM.

Various scholars have criticized Transitional Justice Mechanism as being outdated and inapplicable in the current legal regime. It is difficult for them to fathom a system where the formal regime which has been set up for years is complemented or replaced by the Transitional Justice Mechanism. Although hybrid courts are constituted primarily to combat impunity and deliver justice to victims by adjudicating serious violations of international law in line with international standards, many of these courts were created to serve broader societal goals as well, reflecting the motivations and objectives of a host of different actors, both national and international. Because most conduct trials in the country where the crimes occurred, they are seen as a mechanism for making a lasting impact on society.

In some countries such as Uganda, transitional justice processes have been frustrated by the positivistic approach to law. The judges prefer to stick to the black letters of the law as was displayed in the case *Uganda versus Kanyamunyu.*[19] To begin with the reasoning of counsel for the respondent, his argument against the adjournment to allow room for the completion of the *mato oput* was that such ground was not envisaged under Section 53 of the Trial on Indictment Act.[20] In this case, the judge noted that the mechanism was not well documented and tested for the court to use it as a reconciliation tool. The learned Judge also added that the court has not been well equipped and with enough resources to engage in the application of the Transitional

19 Criminal Miscellaneous application no. 151 of 2020

20 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

Justice Mechanisms. He concluded that Transitional Justice should not serve to displace or undermine or delay the formal justice system.

3.2 'LOCKING IN' INTERNATIONAL COOPERATION.

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.[21]

Besides the options for selection bias with state cooperation and vice versa, South Sudan authorities also envisaged galvanising international assistance in apprehending the organised crimes with the referral. For instance, the rebel groups escape to neighbouring countries such as Uganda which makes it difficult to arrest them due to the rebels' operations from South Sudan, which was beyond their judicial reach (ICC 2009, 19). For instance, because of the absence of effective enforcement of laws against the illicit organ trade and public tolerance of these practices, certain countries have attracted transplant tourists seeking organ donors.

3.3 HUMAN RIGHTS STANDARDS VERSUS TRANSITIONAL JUSTICE POLICY.

Transitional Justice Mechanisms have also been attacked on the ground that they are below the standards of justice expected of any legal regime.[22] Most observers have noted that Transitional Justice entrenches violation of

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21 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

22 United Nations Human Rights, Office of the Commissioner, Human Rights and Traditional Justice Systems in Africa, New York and Geneva, 2016. 34 available at <https://www.ohcr.org/> [Accessed 4 March 2023]

the recognised international human rights with their retribution measures coming out as inhumane and cruel.[23]

3.4 CRIMINAL NETWORKS AND ARMS TRAFFICKING.

Criminal networks operate across a variety of illicit markets in South Sudan. They are usually well-armed and violent. The most prominent – the Toronto Boys Gang and the Mob Gang, are well known and engage in theft, and have links to business and political leaders. State-embedded actors are heavily involved in all criminal markets in South Sudan.[24] Abuse of no-bid contracts is widespread, with such contracts often awarded with no control and at inflated prices to companies held by members of the ruling political class. Similarly, oversight over state spending, in general, is lacking. On the other hand, establishing a company in South Sudan involves an enormous amount of bureaucracy, which becomes a prerequisite for state officials to seek bribes or acquire undocumented company shares. On a larger scale, state actors in South Sudan are actively involved in poaching and illicit mining activities.

There is a large number of foreign actors, particularly Kenyans, and Ugandans, involved in arms trafficking. In addition, there has been increasing foreign involvement through investment in the oil industry, involving different entities from China, the UK, and Malaysia as well as trader networks originating in Kenya, Eritrea, and Ethiopia. Foreign nationals are commonly arrested attempting to smuggle wildlife contraband out of the country and a shadowy Eritrean businessperson is said to control much of the illicit business in Juba.

In 2018, a senior Sudan People's Liberation Movement-in-Opposition official blamed the government for operating like a mafia syndicate alongside as many as 14 militia groups that often camouflage as opposition parties. These factions are often in violent conflict with each other for territory and control

23 Stephen Oola, A conflict-sensitive justice: Adjudicating traditional justice in transitional contexts, in Where Law Meets Reality: Forging African Transitional Justice, ed. Moses Chrispus Okello, Chris Dolan et al, (Cape Town: Pambazuka Press,2012),53

24 Global Organised Crime Index report on South Sudan 2021

of resources. Mafia-style groups aligned with rebel and government actors control extractive industries and are involved in illicit economic practices.

3.5 FRAGMENTATION OF INTERNATIONAL LAW AND THE INTERNATIONAL CRIMINAL COURT'S LEGACY IN AFRICA.

The fragmentation has manifested itself in various ways. For instance, in July 2009, the assembly of heads of state of the African Union (AU) adopted a decision on the International Criminal Court indictment of President Omar Bashir, the then-sitting president of the Republic of Sudan.[25] The International Criminal Court (ICC) pre-trial chamber issued an arrest warrant for Bashir to stand trial. Members of the AU did not accept this indictment and hence endorsed a decision that prohibited African state parties from cooperating with the ICC under Article 98 of the Rome statute.[26] This decision highlights the questions surrounding the institutional relationship between the AU and UN as well as more critically the issue of institutional fragmentation between the UN – general body of international law and the AU – specialized regime of international law for African states. This also raises a fundamental question about the accountability of regional organisations in the broader genus of international law.

Contrary to the aspirations of the drafters of the Rome Statute, the GoSS's selective referral and the Jubilee Alliance's neo-colonial narratives invented the ICC's legacies in the African region – demonstration effects and African protectionism. These outcomes undermined the ICC's universality of justice in other conflict scenarios, notably the DRC, Côte d'Ivoire, South Sudan, and Burundi.

Precisely, the GoSS's example was followed by domestic authorities in the DRC and Côte d'Ivoire, who similarly invited the ICC to investigate their

25 AU summit Decision on the meeting of African States Parties to the Rome Statute of the ICC, Assembly/AU/Dec245 (XIII) (July 2009)

26 This provision relates to Cooperation with respect to waiver of immunity and consent to surrender.

military/political opponents, with almost the same implications on Transitional justice. On the other hand, the Jubilee Alliance's neo-colonial narrative provided the impetus for African protectionism as well as a demonstration of the narrative's utility in battling global justice.

3.6 DIRECT INVOLVEMENT OF THE MILITARY IN CIVILIAN AFFAIRS AND DRUG CARTELS.

Part of the problem is from leaving the military to take over civilian affairs and undermining civilian law enforcement authorities. It has been noted from the African Union Commission's recommendations on criminal accountability for South Sudan which were loaded with such phrases as: "Africa-led, Africa-owned, Africa-resourced and the AU's leadership" (AU 2014, 300). Instructively, the AU's language left little room for manoeuvres with international criminal intervention, in addition to sending a clear message that the ICC's intervention was unwarranted in South Sudan. As a human rights activist argued, Kenya's anti-ICC rhetoric and the AU's collective action:

> *"created an environment where there is no alternative voice; the AU is governments, and the governments are the only voices, which is certainly the most dangerous situation."*

Additionally, the Crime Index Report 2021 found that Juba is a transit point for Brazilian heroin moved into Kenya by transnational drug trafficking syndicates. South Sudan does not however have a significant user population for heroin as it is unaffordable to most citizens. Cannabis, on the other hand, is smuggled into South Sudan through border points in Nadapal and Nimule and is the most profitable and prevalent drug in the nation. In 2017, South Sudan had one of their largest seizures, and the national police have acknowledged a rise in cannabis trafficking and consumption in recent years. Conversely, there is little evidence to suggest that structured illegal markets for cocaine and synthetic drugs exist in the country, but there have been sporadic seizures in the country.

3.7 THE COLLAPSE OF THE PEACE AGREEMENT IN 2016 AND UNWILLINGNESS TO PROSECUTE ATROCITIES.

Notwithstanding the South Sudanese authorities' blatant admissions of unwillingness to prosecute the atrocities and the escalating humanitarian situation, the UNSC was hesitant to refer another African situation to the ICC. Such a referral would attract backlash from the AU and individual African states. With the deadlocks in the UNSC in referring to other potential situations, such as Syria, Yemen, and Israel/Palestine, an African referral would reinforce the arguments that the ICC is surely targeting Africans.

3.8 'PRESIDENTIALISM' AND VIOLATION OF THE SEPARATION OF POWERS

The constitution of South Sudan established a presidential system with a separation of powers, which is coded in Article 48 of the South Sudan constitution. South Sudan has de jure a fairly strong separation of powers (for example, a ban on ministers holding a parliamentary mandate). However, on the legal side, far-reaching transitional provisions of the constitution grant exceptionally strong powers to the president while the government is still "in transition" which contradicts constitutional principles. For instance, the power of a president to appoint members of parliament under the transitional constitution is a clear violation of the principle of separation of powers.

In practice, the previously mentioned mélange of political and military power undermines the separation of powers. Even before the start of the civil war, it was often unclear in which capacity state officials act, in their military/security force's function or in their civil function (e.g., local public servant or member of parliament).[27] The COVID-19 pandemic has had no discernible effect on the separation of powers. Due to the combination of political and military powers in the SPLM/A, the armed forces can use their power for political purposes. In addition, military personnel cannot be judged in civilian courts. In conclusion, South Sudan does not have a functional separation of powers.

[27] Bertelsmann Stiftung's Transformation Index (BTI) 2022 report on South Sudan

3.9 CORRUPTION AND LIMITED TRUST IN THE JUSTICE PROCESSES.

Capacity-building efforts in Southern Sudan are currently neither strategic nor focused.[28] The institutional capacity of the justice sector remains low and corruption is widespread. The weak rule of law means that even officials found guilty of corruption are unlikely to face sanctions.

Some unauthorised Security personnel create many roadblocks to collect revenues for their gains in the state. This can be seen in Juba city as many roadblocks have been mounted by unauthorised people who collect money or materials by force pretending to be working with government authorities. This is organised robbery which needs to be tackled by the government. Some claim to be part of the army belonging to a political party signatory to RTGNU. Conflicts in Central Equatoria have led to shortages of goods and supplies in some Counties outside Juba city. These can be exploited by OCGs and armed groups who are increasingly involved in the smuggling of such goods as a source of revenue. Organised Criminal Groups most likely profit from the high levels of movement of people in Juba City notably for people smuggling and human trafficking purposes, and in some cases, they collude with armed groups to get safe passage along smuggling routes.

Of course, organised crime has also thrived in circumstances characterized by strong government structures, but the important feature is the extent to which the operation of government agencies reflects the interests of the public versus the private interests of corrupt officials or organised criminal groups. Despite the government rhetoric on accountability and measures against the abuse of office, a widespread lack of transparency hampers the fight against corruption. Many people in the government have a sense of entitlement toward their positions because of their contribution to the fight against the North during the War of Independence. Corrupt practices, patronage, murky deals, and the abuse of office are seen as simply a part of politics in South Sudan. The financial resources that became available during the years

[28] Coffey International Development (2010) Government of Southern Sudan Strategic Capacity Building Study

immediately following the signing of the CPA, both in terms of oil revenues and development aid, were unprecedented for the semi-autonomous government. There was no system available to monitor the use of the funds, and billions of dollars were reportedly stolen or embezzled from the government of Southern Sudan.

4.0 RECOMMENDATIONS

Formalizing the court's relationship to other bodies, including other courts and transitional justice mechanisms such as truth commissions. Hybrid courts have a distinct function from truth-seeking and documentation institutions; they may also have primary or exclusive jurisdiction over international crimes. The relationship and modalities of cooperation between hybrid courts and other bodies should be defined in advance to ensure that each can operate effectively and in a complementary manner while protecting the rights of the accused and others who appear before them.

There is also a need to re-enforce the operational capacity of the National police services, National security service, in terms of manpower and logistics to boost the existing effort of the other enforcement agencies. This is in line with the Ministry of Defence report recommendations to increase salaries for organised forces across the country. Additionally, policy coordination is generally poor. This is partly attributable to the lack of institutional capacity, economic development, and persistent insecurity, particularly since the start of the civil war in 2013.

To maximize its legacy in South Sudan, the HCSS could be designed to transition into a permanent court within the South Sudanese judiciary.[29] Under this approach, the HCSS would start as an internationalized hybrid tribunal established outside of the national judiciary, and over time, the international participation would phase out and the institution would become a permanent international crimes court within the hierarchy of the national

[29] South Sudan Law Society Conference analysis report (2016) New Beginnings A Way Forward for Transitional Justice in South Sudan

judiciary. A similar approach was used for the War Crimes Chamber in Bosnia and Herzegovina, which started as a hybrid tribunal but phased out international participation over time.

Still, hybrid tribunals such as the Hybrid Court of South Sudan have been criticized for prosecuting a relatively small number of perpetrators in contexts where hundreds of people were involved in the commission of crimes. More often than not, they pursue only exemplary prosecutions involving a handful of suspects. SCSL operated for 11 years but only issued 13 indictments for serious crimes, conducted four trials, and convicted nine defendants. Since it was established in 2005, the ECCC has charged seven persons, conducted three trials, and convicted three defendants. Even when measured against a narrow mandate of prosecuting culpable individuals at the highest levels, these efforts pale in comparison with the horrific numbers of lives lost and harm suffered.

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AN APPRAISAL OF SUCCESSION TO THE ESTATE OF A DECEASED UNDER CUSTOMARY LAW IN SOUTHERN NIGERIA

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ABSTRACT

The article appraises the different customary laws governing succession to estate of a deceased in Benin, Igbo and Yoruba land and the variations that come to play among ethnic groups. The application of some of the customs are fraught with many challenges creating acrimony and bad blood among family members who had hitherto dwelt in harmony before the death of the deceased. Some are discriminatory especially to the female gender, which the courts have tried to address from the plethora of cases in recognition of section 42 (1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria. It concludes that eradication of illiteracy and sensitization about writing wills can mitigate the challenges of succession to estate of a deceased under customary law.

1.0 INTRODUCTION

Succession, in legal terms, means inheriting the rights of another. The word commonly refers to the distribution of property under a state's intestate succession laws, which determine who inherits the property when someone dies without a valid will.[1] The sources of succession law in Nigeria include case law, Received English Law, Legislation and customary law.[2] Customary laws are recognized as binding in

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1 Definition of Succession, Legal Information Institute available at <https://www.law.cornell.edu/wex/succession> [Accessed 21 June, 2024]

2 Wisdom Okereke Anyim, Research Under Nigerian Legal System: Understanding the Sources of Law for Effective Research Activities in Law Libraries (2019), University of Nebraska - Lincoln Digital Commons University of Nebraska - Lincoln <https://digitalcommons.unl.edu/cgi/viewcontent> [Accessed 21 June, 2024]

the day-to-day dealings of local communities to which they belong.[3]Under Nigerian customary law, succession is essentially intestate.[4] The implication is that a deceased person in Nigerian customary law, rarely makes a will. That is not to rule out completely testate succession under customary law, which is by way of a nuncupative will, also referred to as death bed declaration.[5] There are various patterns of intestate succession under Nigerian customary law as there are diverse ethnic groups in the country. In some parts of the country, succession pattern is along the principle of primogeniture while in other parts, it is bi-lineal.[6] Yet in some parts, succession is based on the concept of family property.[7]

In a work of this nature, it may be unrealistic to discuss the various patterns of succession in all the ethnic groups comprising the Southern part of the country conclusively. Therefore, we shall embark on a discussion that cuts across some ethnic groups in Southern Nigeria by limiting our discussion to succession patterns under Igbo, Benin and Yoruba, customary laws.

2.0. IGBO CUSTOMARY LAW OF SUCCESSION

The primary Igbo (also referred to as Ibo) states in Nigeria are Anambra, Abia, Imo, Ebonyi and Enugu States. Slight differences exist in customary law of succession prevalent in various parts of Iboland, the dominant principle of customary law of succession in Iboland is the principle of primogeniture.[8] This is the rule by which the eldest son succeeds to the property of the deceased,[9]that is to say, the first male child of the deceased inherits the property.[10] This will be so even where he is not the

3 J.O. Asein, Introduction to Nigerian Legal System (2nd Edition: Abba Press Ltd Lagos) 2005

4 Itse Sagay, Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries (Malthouse Press Limited, 2006) 257. Lydia Lawal-Osula v Lawal Osula [1993] 2 NWLR [Pt. 274] 158, per Adio, JCA.

5 Babatunde Oni, 'The Rights of Women to Inheritance under Nigerian Law: An Evaluation' [2008] (2) NJAL, 40.

6 Itse Sagay, supra. Niki Tobi was of the opinion that there exists a notorious diversity of customs and practices amongst the different tribes and amongst the different lineage groups at times. See Nike Tobi, Cases and Materials on Nigeria Land Law (Mabrochi Books, 1992) 75.

7 Ibid.

8 EI Nwogugu, Family Law in Nigeria (Heinemann Educational Books Plc, Nigeria 1974) 401.

9 AA Utuama, Nigerian Law of Real Property (Shaneson Limited, 1989) 30.

10 AB Kasunmu and JW Salacuse, Nigerian Family Law (Butterworths Publishers Ltd, 1966) 294.

eldest child. Where the children are of the same mother, the eldest will be the heir and the one to succeed to the property. Where however there is more than one wife, the property will be succeeded to jointly by the eldest sons of the respective wives.[11]

The view has been expressed that in Bini and Onitsha communities, under the rule of primogeniture, the eldest son is expected to look after his younger siblings[12] and may sell the house over the heads of other children or treat it as if it were his privately-acquired absolute property.[13] Kasunmu and Salacuse suggest that the eldest son only has a right of control over the property which he must use for the benefit of his younger brothers. He must use the property to discharge the obligations of the deceased father and the younger brothers can stop him from alienating it without their consent.[14]

The latter view was supported by the court's holding in the case of *Uboma & Ors v. Ibeneme & Anor.*[15] The court rejected the evidence that among the Igbos, the oldest son inherited his father's entire estate to the exclusion of his brothers and could dispose of them by sale without the brothers' consent. The court held that among the Igbo, all the sons succeeded to land of the deceased as family property and the eldest son, as the new family head, is just a "caretaker".[16]

Under the principle of primogeniture, the eldest male child of the family known as 'Okpala', 'Diokpala' or 'Drokpa' succeeds to his father's property in the case of a nuclear family.[17] He becomes the head of the family notwithstanding that he is junior in age to other members of the family if it is an extended family.[18] On the demise of the founder of a family, his eldest son succeeds him. He inherits the father's objects

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11 Ibid.
12 PA Oluyede, Modern Nigerian Land Law (Evans Bros, Nigeria 1989) 153.
13 IO Smith, The Law of Real Property in Nigeria (The Law Centre, Lagos State University 1995) 65. Relying on TO Elias, Nigerian Land Law and Custom (3rdedn, Routledge and Paul, California1962) 24.
14 Kasunmu and Salacuse, supra.
15 [1967] FNLR 251.
16 Ibid.
17 EI Nwogugu, supra.
18 Ibid. See also Ejiamike v Ejiamike (1972) 2 E.C.S.L.R 11, Ngwo & Nwojei v Onyejana (1964) 1 All NLR 352.

of worship including his personal "ofo". Where the father holds a title that survives him, the eldest son inherits the title.[19] By virtue of his position as the eldest male child, the eldest son inherits the following movable property of the intestate's personal estate namely: furniture, wearing apparels and other articles of dressing, farming implements and livestock. He inherits these to the exclusion of his brothers. However, all the sons of the intestate will inherit any money left behind by him.[20]

As a matter of right, he inherits the late father's "obi" which is the dwelling place and thus entitled to farm the compound or the immediate surroundings.[21] Additionally, he is entitled, as the new head of family, to one distinct piece of land whereas the sons of the deceased as a body have the right to succeed to the other land and houses of the intestate. A female cannot be the family head notwithstanding her seniority in age. Under Igbo customary law, both the daughters and the widows lack the right to succeed to the real estate of the intestate. If the deceased does not have a male child, his brother will inherit his property. If the male child who survives the father dies leaving no male child; the brother of the deceased father will inherit the property. If a man dies and his only son and brother die subsequently, where the late brother has male children, the first male child of the late brother will inherit all the property.[22] This is known as "Oli-Ekpe" custom in Nnewi.

2.1 DISCRIMINATORY PRACTICES UNDER IGBO CUSTOMARY LAW OF SUCCESSION

2.1.1 DAUGHTER

Unlike Yoruba customary law, when it comes to real properly, the Igbo customary law of succession excludes female children.[23] In *Ugboma v. Ibeneme,*[24] the deceased died and left landed property including No. 44, New Market Road, Onitsha. The first

19 Ibid.
20 Ibid.
21 SNC Obi, The Customary Law Manual: A Manual of Customary Las Obtaining in Anambra and Imo States in Nigeria (Government Printer 1977) 100.
22 Epiphany Azinge, Restatement of Customary Law of Nigeria (Nigeria Institute of Advanced Legal Studies 2013) 109.
23 Kasunmu and Salacuse, supra.
24 (1967) FNLR 251

defendant, who was the eldest son and the head of the family, sold the property at the New Market Road, Onitsha to the second defendant. In an action by the plaintiffs, who were the second son and six of his sisters, the court held that in accordance with the general Ibo custom, which is also the custom of Awkuzu, the home of the deceased, a daughter was not entitled to inherit land from her father. However, such a daughter has a right of maintenance by whoever inherits her father's estate until she marries or becomes financially independent or dies.[25]

An exception to this rule has been stated to exist where a daughter in respect of whom *nrachi* ceremony has been performed.[26] This ceremony is performed for a daughter whose father has no son and who is persuaded to remain unmarried in the family with the hope of bearing a male heir to ensure the continuation of the family line. Such a daughter has the right to inherit her father's compound and other houses. This practice exists in parts of Idemili Local Government Area of Anambra State.[27]Despite initial resistance, recent Supreme Court judgments in the landmark case of *Ukeje V Ukeje*[28]have affirmed the rights of Nigerian women to inherit from their deceased parents, reinforcing constitutional provisions. This decision solidified a female's entitlement to her late father's estate, though dissenting factions point to earlier concerns about potentially unsettling established customary norms. In that case, Hon. Justice Rhodes – Vivour, JSC who delivered the lead judgment said:

> *"No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitled a female child from partaking in the sharing of her deceased father's estate is in breach of Section 42(1) and (2) of the constitution, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with Section 42(1) and (2) of the constitution."*

This landmark decision cemented a female's entitlement to her late father's estate, reinforcing constitutional provisions. The third millennium development goal is

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25 SNC Obi, (supra n.18) 150-151.
26 EI Nwogugu, supra. 402 (as cited in S.N.C. Obi, supra. 103).
27 Ibid
28 (2014) LPELR-22724(SC)

gender equality which encompasses the right of the female gender to own property. The above practice in Anambra also contravenes the provision Convention Against All Forms of Discrimination Against Women (CEDAW),[29] particularly the right of women to family property and protection against all forms of discrimination in the family. Also, the Universal Declaration of Human Rights provides for freedom from discrimination, right to equality before the law and right to own property.[30]

2.1.2 WIDOW

Nowhere in Southern Nigeria does the customary law give a widow the right to inherit, or to share in the intestate estate of her husband.[31] Under Onitsha customary law, a widow without a male issue is excluded from succession to the intestate property.[32] She may with the concurrence of her deceased husband's family deal with the deceased's property but she cannot assume ownership of it or alienate it. Subject to her good behaviour, she has right of occupation of the building. In the case of *Nezianya v. Okagbue*,[33] on the death of the husband, a native of Onitsha, his widow started to let his houses, also situated at Onitsha, to tenants. She later sold a portion of the deceased's land and constructed two huts on another portion of the deceased's land. When she wanted to sell more of the land, the family of her late husband raised objection.[34]She had a female child for her husband who predeceased her. The widow devised the property to the child of her late daughter who sued the husband's family claiming a right to exclusive possession on grounds that the grandmother had long adverse possession of the land. The Supreme Court upholding the decision of the lower court held that a widow cannot assume ownership of the late husband's real estate or alienate it. The Supreme Court observed thus:

> *"The Onitsha native law and custom postulates that a married woman, on the death of her husband without a male issue, with the concurrence of her husband's family, may deal with his (deceased) property. Her dealings, of course, must receive the consent of the family. The consent, it would appear,*

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29 See Article 13 of the Convention Against All Forms of Discrimination Against Women(CEDAW)
30 See Articles 2, 7, and 18 of the Universal Declaration of Human Rights
31 SNC Obi, Modern Family Law in Southern Nigeria, (Sweet & Maxwell Limited 1966) 280.
32 TO Elias, Nigerian Land Law, (Sweet & Maxwell Ltd 1971) 194.
33 (1963) 1 All NLR 352.
34 This action by the late husband's family discriminatory against the female gender in contravention of the both national and international human rights statutes

> *may be actual or implied from the circumstances of the case, but she cannot assume ownership of the property or alienate it. She cannot by effluxion of time, claim the property as her own. If the family does not give their consent, she cannot, it would appear, deal with the property. She has, however, a right to occupy the building or part of it, but this is subject to good behaviour."*[35]

That notwithstanding, a widow is not entirely without rights in her late husband's estate. She has a legal right to retain the use and possession of the matrimonial home, whoever may be the new owner of the radical title and notwithstanding that the said matrimonial home happens to be part of the family property.[36] The widow also has the right to make use of as much portion of her late husband's farmland as she ordinarily requires. In both cases, it does not matter that she has or does not have any children surviving. The right is vested in her for as long as she wishes to be living among her late husband's people.[37] The implication is that the right of the legal heir to possession is postponed till the widow dies or remarries or otherwise leaves the family for good.[38]

2.1.3 HUSBAND

In customary law generally, the husband is excluded from succession to his deceased wife's share of her family property. This is because he is treated as a stranger lacking the right to share in such property, not being a family member.[39] In *Caulcrick v. Harding,*[40] the deceased had three daughters for whom he left property. The Plaintiff's deceased wife was one of the three daughters. The Plaintiff (i.e. the husband) claimed a one-third share of the property to which his deceased wife was entitled. It was held that the Plaintiff had no such right as the property devolved on the wife's family as family property.

Under Igbo customary law, in case of a married woman, generally the husband can inherit her post-nuptial movable property and any ante-nuptial property brought by

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35 Nezianya v Okagbue (1963) 1 All NLR 352 at 567.
36 SNC Obi, supra (n.18) 281
37 Ibid. See also I O Smith, supra. 67 – 68
38 SNC Obi, supra.
39 IO Smith, supra. 67. See also T O Elias, supra. 184.
40 (1929) 7 NLR 48.

her to the matrimonial home.[41] This is where there are no children of the marriage or, more generally, if the woman has no children who are entitled to succeed to her property intestacy. The husband cannot inherit her deceased wife's ante-nuptial landed property, at all events where such land is situated in the territory of her maiden community.[42] Similarly, the husband cannot inherit his deceased wife's share of her maiden family land.[43] This is simply because it would mean that the land in question would pass away from the wife's family to the husband.[44] However, the husband can and does inherit his wife's post-nuptial acquired landed property if it is situated in his or in a neutral community.[45]

2.2 QUEST FOR JUSTICE IN DISCRIMINATION PARADIGM

Discrimination based on sex depriving females from succession to their father or their husband's property under Igbo customary law continued unabated until the case of *Mojekwu v. Mojekwu*.[46] The Court of Appeal, in that case invalidated "Oli-Ekpe" customary law of Nnewi which disinherited the biological daughter of a deceased man from inheriting her father's land in preference of her uncle as repugnant to natural justice, equity and good conscience. Niki Tobi, JCA (as he then was) who delivered the lead judgement stated as follows:

> *"The appellant claims to be that 'Oli-ekpe' is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs, which discriminate against the womenfolk in this country. They are regarded as inferior to men folk. Why should it be so? All human beings, male and female, are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi "Oli-ekpe" custom relied upon by the appellant are not consistent with our civilized world in which we all live*

41 SNC Obi, supra; TOG Animashaun and AB Oyeneyin, Law of Succession, Wills and Probate in Nigeria, (MIJ Professional Publishers Limited 2002) 17 – 18.
42 SNC Obi, ibid.
43 Ibid
44 Ibid
45 Ibid 281 – 282.
46 (1997) 7 NWLR (Pt 512) 283.

> *today, including the appellant… Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the "Oli-ekpe" custom of Nnewi is repugnant to natural justice, equity and good conscience."*[47]

In a similar vein, the Supreme Court held in the case of *Lois Chituru Ukeje & Anor. v. Gladys Ada Ukeje*[48] that no matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her father's estate in breach of section 41(1) and (2) of the Constitution a fundamental rights provision guaranteed to every Nigerian is repugnant to natural justice, equity and good conscience.[49] In the above case, one Lazarus Ogbonaya Ukeje, a native of Umuahia in Imo State died intestate on the 27th December, 1981. He had real property in Lagos State and for most of his life was resident in Lagos State. The 1st appellant got married to the deceased in 1956 and the wedlock was blessed with four children. The respondent is one of the four children. After the demise of Ukeje, the 1st and 2nd appellants (mother and son) obtained Letters of Administration for and over the estate of the deceased. On being aware of this development, the respondent filed an action in court wherein she claimed to be a daughter of the deceased, and by virtue of which she had a right to partake in the sharing of her father's estate. The matter succeeded in the High Court. The appellants' appeal was dismissed at the Court of Appeal as well as their subsequent appeal to the Supreme Court.

In the case of *Onyibor Anekwe and Anor. v. Mrs. Maria Nweke*,[50] the court was of the view that such custom that deprived a widow of the inheritance of her husband's property is repugnant to natural justice. On the question of disinheritance, the learned justice, Ogunbiyi J.S.C. who delivered the unanimous judgment observed as follows:

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47 See pages 304-305.
48 (2014) 7SCM 148.
49 Per Bode Rhodes – Vivour, JSC at 167 para G – H.
50 (2014) 9NWLR (PT1412) 393

> "*I hasten to add that at this point, that the custom and practice of Awka people, upon which the appellant have relied for their counter-claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of realities of human civilization it is primitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the woman folk in the given society. One would expect that the days of obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or a wife from husband's property by reason of God's instituted genders differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she lived all her life with her late husband and children by her late husband's brothers on the ground that she had no male child is indeed very barbaric, worrying and flesh skinning.*"[51]

As shown in the cases referred to above, the provisions of section 42(1) (a) & (2) the 1999 constitution of the Federal Republic of Nigeria (as amended) which is a similar provision with section 39(1) (a) and (2) of the 1979 Constitution has reversed the discriminatory customary practice against female rights to intestate succession hitherto in practice.[52] Section 42(1) (a) and (2) state as follows:

> 42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person -
>
> (a) be subjected either expressly by, or in the practical application of, any law in force in or restrictions to which citizen of Nigeria of other communities, ethnic groups places of origin, sex, religion or political opinions are not made subject.
> (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

By virtue of the above constitutional provisions the said discriminatory customary law is void as it conflicts with the Constitution and any law or custom that is

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51 See Ajabor Ifeanyi & Ovreme Olika Aforkoghene, 'The Female Right of Succession under the Igbo Customary Law: A Critique' (2019) 7(1) International Journal of Innovative Legal and Political Studies 59-67.

52 See Akinnubi v Akinnubi (1997)2 NWLR 144, Nezianya v Okagbue (1963) 1All NLR 352, Obusez v Obusez (2001) 15 NWLR (pt736) and Anekwe v. Nweke (Supra).

contrary to the constitution shall to the extent of its inconsistency with the Constitution be void.[53]

3.0 BENIN CUSTOMARY LAW OF SUCCESSION

The principle of primogeniture governs succession under Bini customary law. However, when a father dies intestate, the eldest son succeeds to all his disposable property to the exclusion of the other brothers and sisters. This makes it different from succession under Ibo customary law. In practice, for the purposes of maintaining family peace and harmony, the eldest son at his discretion gives some part of the estate to his younger brothers.[54]

Benin Customary Law dealing with the distribution of an estate of a person who dies intestate is both interesting and intriguing. Its sole motive is the maintenance of the identity of the family, and the perpetuation of the family shrine. The principle of Bini Law of inheritance is that succession is by inherent and inalienable right and not by appointment.[55] No problem arises when a person dies leaving only a child, irrespective of the age and sex of the child. The child takes everything after performing the final burial ceremony of his or her deceased father. The brothers and other relations of the deceased hardly have any claim to his property.[56] Where, however, the deceased is survived by many children, which is generally the case, distribution of his estate becomes a serious matter for the family although all the children have legitimate claims to some property of their father.[57]

In considering the estate of the deceased the most important property is the house wherein he lived and made his home before his death. That house passes to his heir, who is the most senior son, after performing the father's burial rites. Although the house becomes his absolute property on the death of his father, he may allow his younger brothers to continue to live in it until they are old enough to own their own

53 CFRN 1999 s1(3)
54 EI Nwogugu, op. cit. 412.
55 RAI Ogbobine, Materials and Cases on Benin Land Law (Midwest Newspapers Corporation) 36.
56 Ibid.
57 Ibid.

houses, and in the case of the sisters, until such time as they marry and move into their husbands' homes. He thus becomes the customary guardian of his minor brothers and sisters.

In *Ogiamien v. Ogiamien*,[58] the respondent who was the plaintiff in the High Court, had brought a claim that the first defendant, the eldest male child of their father had no right to sell a piece of landed property which their late father, a Senior Benin Chief, had owned during his life time. The Supreme Court endorsed the decision earlier given in the same case based on the principle that with regard to Benin Chieftaincy families, the customary law is that the eldest son who inherits the chieftaincy takes all the property of the deceased with the exception of that which the deceased has given away before his death.[59]

In line with the other judgements on Benin customary law of succession, the eldest son of the deceased retains all the property of the deceased in trust for himself and the other children of the deceased. He is only entitled exclusively to the "Igi ogbe", i.e., the house in which the deceased father-lived until his death. The other children are entitled to a share in the other properties.[60]

4.0 YORUBA CUSTOMARY LAW OF SUCCESSION

Going by the general rules of customary practice in Yoruba land, the children of the deceased are the beneficiaries of the real estate of the deceased,[61] as family property.[62] Invariably, if there is no real estate, succession does not arise; a man who has no property (movable or immovable) has nothing to which his children can succeed.

58 [1967] 1 All NLR 191.
59 See Idehen v. Idehen (1991) 9 NWLR (Pt. 198) 352, Arase v. Arase (1981) 5SC 33 and Lawal Osula v Lawal Osula (1995) 9 NWLR (Pt 419) 259.
60 Itse Sagay, op. cit. 268.
61 Adeseye v Taiwo (1956) Vol. 1FSC 84
62 EI Nwogugu, Nigerian Family Law, Heinemann Educational Book Nigeria PLC, 2001, 399

4.1 DETERMINING THE APPLICABLE CUSTOMARY LAW

Under Yoruba customary law the estate of a deceased subject to customary law, who dies intestate, will be administered by the customary law of the deceased.[63] However, if the property is land, the appropriate customary law is that of the place where the land is situated. There is no stipulated indication on how to determine customary law applicable to the deceased, but could be according to the customary law of the place where he permanently resided at the time of his death; the customary law applicable to his parents or the customary law of the place of his birth.[64]

4.2 CLASSES OF BENEFICIARIES

Under the Yoruba customary law of succession, there are different classes of beneficiaries entitled to the properties of the deceased. They are discussed according to hierarchy.

4.2.1 CHILDREN OF THE DECEASED

In the days of yore, Yorubas believe in extended family which includes: parents, children, aunties and uncles and their children.[65] By this, family members especially the blood siblings of a man are often beneficiaries where a man dies intestate.[66] Since modernisation has rubbed off on many customary practices, the category of persons that can succeed to the estate a deceased is gradually narrowed under Yoruba custom of succession. The children of the deceased are now the sole beneficiaries to the estate of their deceased parent(s).[67]

Under the general custom, there is no demarcation as to male or female children; they are joint owners[68] all inherit equally without discrimination to gender or age. Although before the case of *Lopez v. Lopez*[69], where family property is to be

63 AB Kasumu and JW Salacuse, supra. 298. Itse Sagay supra. 257.
64 Kasunmu and Salacuse, 298
65 Sogbesan v Adebiyi (1992)5 NWLR (Pt 242) pg. 503.
66 Kasumu and Salacuse, supra, 291
67 Ibid., 291
68 BA Oni, 'Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms' (IOSR-JHSS) 19(2) Ver. IV (Feb. 2014), 30-43 e-ISSN: 2279-0837, p-ISSN: 2279-0845.
69 (1924) 5NLR 43

partitioned among the children or when they have to distribute proceeds from a sale or lease, distribution is made according to age and sex as the female child is often to take last.[70] Thus, in *Salami v. Salami,*[71] the plaintiff and the defendants were the surviving children of one Salami Goodluck, a native of Abeokuta who died intestate leaving a house and farmland in Abeokuta. After his demise in 1927, the plaintiff at age seven was taken by the mother to Cameroon and returned in 1953. All that was allocated to her were some clothes and two chairs at the time of the father's death and nothing more. She brought an action for an account and partition against her two brothers. The court held that the plaintiff is entitled to inherit under Yoruba customary law and cannot otherwise be disinherited due to age or gender and that the eldest child who is the Dawodu will share with others equally, and is not entitled to a greater share, unless as specified by the father as the case may be.[72] An instance is where the father in his lifetime made a gift of his personal property as opposed to family property to a child before his demise. Such property is for the child and will not be administered as family property. In a situation where family property is involved the Dawodu cannot alienate the family land, except by the consensus of the principal members of the family.[73] The court also has recognised the right of a female to succeed as family head,[74] especially in a situation where there is no eldest male, the eldest daughter becomes the family head.[75]

4.2.2. ILLEGITIMATE CHILD

A child born out of wedlock is termed an illegitimate child under the received English laws where there is a marriage subsisting under the Marriage Act. Such a child is not recognized and is never entitled to a share of the deceased father's estate.[76] The illegitimate child cannot become legitimate by acknowledgement of paternity by the

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70 Kasunmu and Salacuse, supra. 292
71 (1957) WRNLR 10, Lewis v. Bankole (1908)1NLR 82, Andre v. Agbebi (1931) 5 NLR 47
72 Bankole v. Tapo (1961)1 All NLR 140
73 Damole v Dawodu (1958) 3 FSC 46
74 Amusan v Olawunmi (2002) 12 NWLR (Pt 780) 30, Akande v Oyewole (2003) 6WRN 36
75 Otuo v Otuo (2004) 14 NWLR Pt 893
76 Paul OkhaideItua, 'Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance' (2012) JLCR 4(3)31-44 available at <https://academicjournals.org/journal/JLCR/article> [Accessed 10 August 2021]

father under English law.[77] The only way by which such is to be recognized under English law is by legitimization. In *Cole v Akinyele*,[78] the deceased who was married under the Act, had a romantic association with another woman during the subsistence of that marriage. The relationship produced two children. The first child was born during the subsistence of the statutory marriage, while the other child was conceived during the marriage but born shortly after the death of the wife of the statutory marriage. The issue for determination before the court was whether the two children could be regarded as legitimate children of the deceased as a result of the acknowledgement of their paternity by the deceased. For the child born during the subsistence of the statutory marriage, the court held that it was contrary to public policy to allow the father to legitimise that child by any other method other than the procedure provided by the Legitimacy Ordinance.

However, under the Nigerian customary laws a child even if not born within a marriage or the parents coming together subsequently in marriage; such a child is considered legitimate under native law.[79] According to Ademola CJF in *Lawal v. Younan*[80]

> "*Unlike England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimate by subsequent marriage of their parents. In Nigeria a child is legitimate if born in wedlock according to the marriage ordinance. There are also legitimate children born under native law and custom. Children not born in wedlock under the marriage ordinance or who are not the issues of a marriage under native law and custom, but are born without marriage can also be regarded as legitimate for certain purposes if paternity has been acknowledged by the putative father. This rule has been established in array of cases Bamgbose v. Daniel,*[81] *and Olulode v. Oviosu."*[82]

However, by the advent of section 42(2) of the 1999 Constitution Federal Republic of Nigeria as amended prohibits discrimination in its entirety based on circumstances

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77 AR Onuoha 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' available at <http://edojudiciary.gov.ng/wp-contentry-Law-In-Nigeria> [Accessed 16 August 2021]

78 (1960) 5 FSC 84

79 EI Nwogugu, 'Legitimacy in Nigerian Law' [1964] (8)(2), Journal of African Law 94

80 Lawal v Younan (1961) All NLR Pt. II, 245

81 (1954)3 WLR 561

82 Unreported, High Court of Lagos State, Ikeja Judicial Division, 27th Nov., 1981, Suit No M/133/81

of birth,[83] gender or religion.[84] There is no illegitimate child, and being born out of wedlock does not deprive the child the right of succession to parents' estate once the child is acknowledged by the father. In *Bassil v. Honger*,[85] the West African Court of Appeal held that a child born to a freeman by his female slave had a right to inheritance on equal basis as if the child and his mother were freeborn.[86]

4.2.3. SPOUSE

Inheritance under native law and custom is deemed by bloodline.[87] A wife is not a blood relative of the husband and therefore cannot inherit the real properties of the husband where he dies intestate; she is treated as chattel that is inheritable.[88] Therefore, a wife can only hold on to property proved to have been given to her as a gift before the husband's demise, [89]else, such property passes to the husband's family at her demise or when she remarries outside the family. However, as the widow of the deceased, she is entitled to stay and live in the house until she dies or remarries.

It is also worthy of note that under Yoruba native law and custom, a husband cannot inherit his deceased wife's property; either inherited from her family[90] or her prenuptial properties. If she is survived by her children, her property devolves to her children in common[91] and it is distributed per capita. Where her child or children predeceased her, the descendants of predeceased children of intestate will share in the division of her real property *per stirpes*.[92] If she was childless, her properties will

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83 Aduba & Ors v Aduba (2018) LPELR-45756 (CA)

84 Duru v Duru (2016) LPELR- 40444 (CA), Igbozuruike v Onuador (2015) LPELR- 25530 (CA),

85 (1954)14 WACA 569, Philip v Philip (1946) 18 NLR 102

86 Emiola, African Customary Law: Customary Law of Succession, Emiola Publishers Ltd, Nigeria, 2011,

87 Sogunro Davies v Sogunro Davies (1928)8 NLR 79

88 Suberu v Sunmonu (1957)12 FSC 33

89 OO Abikoye, 'Inheritance Practices in Yoruba Land: Case Study of the Awori Women's Inheritance Rights' <https://www.academia.edu/38927168/inheritance_rights> accessed 20 March 2024

90 JM Yusuf, 'Rights of Spouses under Customary Law of Succession: A Case of Yoruba Muslims in South West of Nigeria'<https://www.academia.edu/38083519/right_of_spouses> [Accessed on 20 March 2024]

91 Johnson v Macaulay (1961) 1 All NLR743

92 Nwogugu supra 400

go to her parents or siblings of full blood whoever survives her. In all, spouses cannot inherit one another under Yoruba customary law. In *Oloko v Giwa*[93] the defendant's mother had been allotted a room in his father's compound during her lifetime. The defendant argued that on her death, he and her other children inherited the room from their mother. It was held that no such custom existed in the Yoruba customary law, and that an allotment of a house or room by a man to each of his wives did not vest the room allotted to the wife as her separate property.[94]

It is however, sobering that there is no recognition for contributions made by wife to her husband's property as improvements[95] or that she has rightfully contributed to develop or invested in jointly with her husband.[96] These discriminatory practises engender poverty; the woman is denied power to own property which reduces her earning capacity to support her children if a young widow. It can also affect the mental well-being of a woman who is deprived resources for her economic advancement and welfare. In all, it impinges on the sustainable development goal 5 to achieve gender equality and empower women and girls.

4.2.4. AN ADOPTED CHILD

In customary Yoruba land, adoption seems to be a remote concept, however, from time immemorial, relations have fostered children who they train in school, learn a vocation or trade. The fostered children are often times children of relatives; either extended or compound family members. In some instances, it is not a relative, but the child of a friend or member of the community taken to a different location to live with the foster family. When it comes to outright adoption of a child, it was not too common, though not non-existent. In *Re Martin v. Johnson and Henshaw*[97]it was decided that under customary law, adoption takes the form of "a ceremony to be performed to which the family is bidden. The adopter nominates his or her adoptee to the family and the ceremony is over". An adoptee thus becomes a legal child of

93 (1939) 15 NLR 31
94 Sagay supra. 271
95 Rabiu v Absi (1996) NWLR (Pt 462) 505 S.C (69-70)
96 Vanessa Emery, Women's Inheritance Rights in Nigeria: Transformative Practices, 21
97 (1936) 3 WACA 91

the woman who is barren or a man without an issue.[98] Under adoption processes a child adopted takes on the name and everything about the adopting family.

It is however established in some quarters that such adopted child cannot inherit in the estate of an intestate parent unless it extends to such adoptee *ex gratia*.[99]Although according Nwogugu, such a child is a legal child of the parents and should have a right to inherit from the adopter parents. According to Craig JSC, "a member of a family is not permitted to introduce a stranger into the family by the back door."[100] It has however been established that the right of an illegitimate child whose paternity has been acknowledged by the father or legitimated has a superior right to an adopted child[101]in inheritance matters. The Child Rights Act states that an adopted child is to be treated as a biological child in matters of inheritance and succession.[102]The Supreme Court in *Ogunbiyi v Ogunbiyi*[103] held that an adopted child has the same rights a biological child and is entitled to inherit from their adoptive parent's estate.

4.3. NOTABLE VARIATIONS TO THE CLASSES OF BENEFICIARIES UNDER YORUBA CUSTOMARY LAW

It is worthy to note that despite of the general rule that children are the successors to the estate of their intestate parents, there are some parts of Yoruba land with notable variations. In Abeokuta where the custom recognises the right of siblings of the deceased to have one third of his property while the remaining two thirds go to the children.[104] Another variation worthy of note is Ado Ekiti customary law which recognizes not just the children, but also wives and other relations. The sharing formula is one part each to the children, wives and other relations of the deceased.[105]

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98 Emiola, supra 200

99 Ogunbowale, in TK Adekunle, Proprietary Rights of Widows and Children Succession and Inheritance Law in Nigeria: Resolving the Discriminatory Proprietary rights of Widows and Children, 1 Prop L Rev 1

100 Emiola, p. 200

101 Onuoha, Reginald Akujobi, Law and Real Property in Nigeria: Essays in memory of Prof. J.A. Omotola (Revised ed.) (2008) pg. 240. In B. Oni supra, 39

102 Section 159 CR Act

103 (2010) 11NWLR (Pt 1201)

104 Sagay, supra, 263

105 Okunlolain Sagay at 263

It is however interesting to note the case of *Re Fajuyi.*[106] The president of the Grade B customary court gave advice as requested to the Administrator -General on his request on Ekiti customary law":

"having understood that the deceased died leaving three wives, six children, two parents, seven brothers and three sisters, and for the fact that the deceased was in his lifetime prop to his aged parents especially, and to his brothers, this court therefore decided to give the required information in the following terms:

(A) That one third of the balance estate be shared among the number of children connected, save in sharing the one third to the children preference is always given to the ages and seniority of the children

(B) That one third of the balance estate be shared equally among the numbers of wives concerned

(C) That one third of the balance of the estate be shared equally among the family of his brothers, sisters and parents."

The stance of Ado Ekiti native law and custom on devolution of property of an intestate is unique and peculiar to them though it is not in tandem with the general practice on Yoruba land.

A question however is, what happens to the one third given to parents and siblings of the deceased on the eventual demise of the beneficiaries in that category? Will the inheritance pass back to the children of Fajuyi or will be subsumed into the estate of the siblings for their own children to inherit? If some properties have been allocated to the parents, will it pass back to Fajuyi's children or it becomes family property to which the children of Fajuyi and the children of Fajuyi's siblings will share as family property? This is also a challenge facing customary succession in Ado Ekiti.

4.4. MODE OF DISTRIBUTION OF INTESTATE PROPERTIES UNDER YORUBA CUSTOMARY LAW

Under Yoruba custom, all the children of a deceased take equally from their father's estate, regardless of age or gender.[107] The eldest male child typically succeeds as the

106 (Unreported) Ado Ekiti Grade B Customary Court, 13 October 1967

107 Yusuff v Dada (1990)4 NWLR (Pt.146) 657, Amusan v Olawumi (Nigeria, Court of Appeal [2002] FWLR 1385

Dawodu. There are two major ways by which intestate properties are devolved to beneficiaries under Yoruba native law and customs viz Idi Igi; *per stirpes* or branches and Ori Ojori; *per capita*. According to Obilade,[108] Idi-igi custom whereby the property of the deceased is divided among his children per stripes (the property being first divided equally into the number of wives, the share attributable to each wife is then sub-divided equally among her own children).

This mode of distribution whereby the children inherit their father's estate by their respective branches is especially common for usage where the setting is polygamous in nature, as there are different wives with their children. Each child in a branch is settled from whatever accrues to their mothers (wives of deceased) in equal shares. According to Jibowu J. in *Damole v. Dawodu*[109] this method has been termed laudable, as there is not a place for a wife or some wives to feel cheated as they have equal shares devolving to their children.

However, as laudable as the Idi-igi mode is; it is harsh in situations where there is a wife without a child or where a wife has ten children and another has one child, and they have their shares equally by Idi- igi mode of distribution. According to Adefarasin J. in *Salako v. Salako*[110] having upheld the Idi-igi as the prevailing one stated "my personal view is that the distribution by the Idi-igi system is unfair and leads to great hardship! Nevertheless, it is the accepted Yoruba custom which applied in this case." This anomaly may somehow have engendered the adoption of *per capita* mode; Ori Ojori where the number of children inherits equally and nobody feels cheated.

5.0 RECOMMENDATIONS

The authors are of the view that where there is devolution of real properties, at the death of the parents of the deceased, the real properties should revert to the estate of the deceased which equally goes for those shared to siblings. For example, the

108 AO Obilade, Nigeria Legal System, (Revised Edition Sweet and Maxwell, London 1979) 86-87
109 Supra
110 Unreported, High Court of Lagos State, Suit No. M/160/62, decided 13th May 1965

situation of Ado Ekiti as discussed above, the Ado Ekiti variation can be taken to have imbibed the best interests of dependents principle. This requires that legislative or judicial actions taken with respect to customary law of intestate succession. The said action must consider the overall welfare of everyone maintained by the deceased person shortly before death.[111] Promotion of equal inheritance laws, provision of legal aid support especially in the rural areas.[112]

A question for further research here is, in a situation where a child was adopted by a childless wife into a family where the man has biological children from his other wives, and the child by the whims and caprices of the woman bears his name, he takes care of the child but he never took part in the adoption process (like signing the adoption papers) what will be the stand of the child in a situation where the man dies intestate? The authors are recommending that such a child though not the biological child of the man, having being adopted by the wife should only get benefits from the inheritance of the mother. There is the need to amend existing adoption laws of each State in Nigeria to make consent (signing of the adoption papers) to be mandatory for both adopting parties in a marriage.

Furthermore, the legal status of adoption and indeed succession of children of same sex couples needs to be given attention to via further academic research. However, unlike some other jurisdictions, same sex marriage is not legalised in Nigeria. It is important to note also that same sex marriage is not recognised under customary law in Nigeria.

6.0 CONCLUSION

From the foregoing it is apt to say that the diversities of customary practices in the administration of estate of a deceased who dies intestate and subject to customary law is as fluid as the numerous customs in the country. However, the practices still

111 Anthony Diala, 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa' (2014) AHRLJ 14633-654

112 Oshodi M.I., The Inheritance Rights of Women in Nigeria, International Association of Women Judges available at <https://www.iawj.org/> [Accessed 27 June 2024]

segregate between the male and female gender. Even though the courts have made pronouncements to arrest the discriminatory tendencies as seen in *Ukeje v. Ukeje, Mojekwu v. Mojekwu* and a plethora of cases, the people are yet to totally abide by such pronouncements especially in the largely patrilineal societies.

It is believed that as society continues to evolve, so also will the customs and practices evolve to reduce or eradicate disparities in intestate inheritance. Ultimately, it is better when the society advance to a point where making a Will becomes widespread to reduce animosities, discriminations and rivalries that bedevils intestate succession. This will require reducing the number of illiterate Nigerians and awareness creation among the populace which can be fostered through citizen's education by the National Orientation Agency, non-governmental organisations and faith- based organisations among others.

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THE CRIME OF FORCED STERILIZATION: TOWARDS UNVEILING THE EFFECTS ON VICTIMS IN INTERNATIONAL LAW

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THE CRIME OF FORCED STERILIZATION: TOWARDS UNVEILING THE EFFECTS ON VICTIMS IN INTERNATIONAL LAW

Nwaogu Dandy Chidiebere*

ABSTRACT

Forced sterilization of targeted group of women across the international community is considered a grave violation of fundamental human rights and medical ethics, it can be described as acts of torture, cruel, inhuman, and degrading treatment. Extant international and domestic instruments contain clear provisions prohibiting the practice of forced or involuntary sterilization of women under any guise whatsoever. Despite existing laws, there is still the continuing sterilization of individual women and girls without their free and full consent in most countries. The paper aims at examining the nature, incidences, and effects of forced sterilization across the international community. The paper urges national governments across the international community to strictly put measures in place to implement extant international, regional, and national laws on sterilization within their jurisdiction as a way of curbing further cases of forced sterilization as well as giving adequate compensations to identified victims of forced sterilization.

1.0 INTRODUCTION

Women across the world have been forced or coerced by medical personnel to submit to permanent and irreversible sterilization procedures.[1] Forced sterilization is a method of medical control of a woman's fertility without the consent or knowledge of the woman. This involves the violation of the woman's physical integrity and security. Forced sterilization also constitutes the

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1 Against Her Will: Forced and Coerced Sterilization of Women Worldwide available at <https://www.against-her-will-20111003(1).pdf> [Accessed 12th March 2024]

violation of the fundamental rights of the victims.[2] Although the International Community through the United Nations has condemned the crime, reports of forced sterilization exist around the globe in Europe, America, and Africa.[3]

The act of enforced sterilization often focuses on individuals with some form of disabilities such as persons having mental sickness, epilepsy,[4] including women living with HIV.[5] At other times, forced sterilization is targeted at women who hail from certain ethnic, religious, or racial minorities as a way of carrying out ethnic cleansing.[6] Women considered poor or stigmatized are often seen as "unworthy" to be considered for reproduction.

Force sterilization is a violation of the fundamental human rights of the victim, which takes place when some form of medical procedure is performed on the individual without her knowledge or informed consent. Sterilization renders a person permanently incapable of reproducing sexually.[7] Sometimes, forced sterilization of women often is induced by financial or other forms of benefits, inadequate information, or use of threats to force a person into sterilization. Women and girls with obvious disabilities are usually vulnerable to forced sterilizations carried out under the control of qualified medical care givers or obtaining the consent of others in the name of the victim. The crime therefore constitutes a serious violation of human rights and medical ethics and thus viewed as an act of torture, cruel and inhuman and degrading treatment.[8]

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2 Ibid at p. 2

3 Ibid

4 Priti Patel, "Forced Sterilization of Women as Discrimination" Public Health Reviews 14 July 2017, Available at <https://publichealthreviews.biomedcentral.com/> [Accessed March 10 2024]

5 Kudzai Bakare and Shelene Gentz, "Experiences of Forced Sterilization and Coercion to Sterilize among Women Living with HIV in Namibia: An analysis of the Psychological and Socio-Cultural Effects" (2020) Sexual and Reproductive Health Matters available at <https://doi.org/10.1080/26410397.2020.1758439> [Accessed 10th March 2024]

6 Priti supra at 3

7 Mosby" Medical Dictionary, 8th edition, 2009.

8 Against Her Will, "Forced Coerced Sterilization of Women Worldwide" available at <https://www.against-her-will-20111003(1).pdf> [Accessed 12th March 2024]

The crime of forced sterilization increasingly culminates in widespread deprivation of the rights of victims to enjoy their sexuality, maintain sexual intimacy, and raise their own families. In a number of international human rights treaties and instruments the right of a woman to enjoy bodily integrity and make an informed choice of her own reproduction are clearly provided for.[9] However, a number of women targeted for sterilization have been denied that right to freely determine their sexuality and reproduction in the bid to satisfying certain government agenda.[10] Sadly, Sterilization is a medical procedure that is irreversible having huge chances of causing physical and psychological effects on the victim.[11]

Although willful sterilization is a vital way of avoiding pregnancy in many countries, sterilization should only be carried out with the full, free, and informed consent of the individual involved.[12] It must be noted that both men and women could be subjected to forced sterilization; however, the overall impact of this practice is heavier on women across the globe.[13]

For proper elucidation of the subject matter, the paper is divided into nine (9) parts including the Introduction. Part II of the paper deals with the historical perspective on forced sterilization, while Part III focuses on the targeted groups for forced sterilization. Parts IV of the paper discusses incidences of forced sterilization in selected countries within the international community with high cases of the crime including some African countries such as South

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9 Article 23 of United Nations General Assembly, Convention on the Rights of persons with disabilities January 24th2007, A/RES/61/106., Articles (7 and 17) of the UN General Assembly, International Covenant on Civil and Political Rights, December 16th 1966, 2200A (XXI).

10 Brady. S, Briston J, and Grover, S, Sterilization of Girls and Young Women in Australia: Issues and Progress, available at <https://wwda.org.au/wpcontent/uploads/2013/12/WWDA_SUB_ALRC_IP44.pdf> [Accessed April 23 2024]

11 International Federation of Gynecology and Obstetrics, Contraceptive Sterilization Guidelines, Recommendation 5, available at <www.figo.org/files/figocorp/FIGO%20%contraceptivesterilization.pdf> [Accessed April 23 2024]

12 Dorozynski A, Sterilization of 14 mentally handicapped women challenged. MBJ, 2000, 321:721.

13 Mallet J, Kalambiv. Coerced and forced sterilization of HIV positive women in Namibia, HIV AIDS Policy Law Review, 2008. 13(2-3), pp. 77-78.

Africa, Namibia, and Nigeria. Part V on the other hand, discusses the effects of forced sterilization. Part VI discusses the legal instruments for combating the crime of forced stylization within the international community. Part VII X-rays the relevant Institutions in Prosecuting the crime of forced Sterilization such as the ICC and the ECOWAS Community Court of Justice. Lastly, Parts VIII and IX includes Recommendations and Concluding statements.

2.0 HISTORICAL PERSPECTIVE ON FORCED STERILIZATION

At the beginning of the 20th century, most of the states in America enacted laws authorizing the sterilization of women and girls diagnosed as having with mental illnesses, persons with disability, convicted criminals as well as the African-American women.[14] Between the periods of 1930s and 1980s countries such as Canada, Sweden, Norway, Finland, Switzerland, and Estonia made laws permitting the forced sterilization of persons who were mentally ill, alcoholics, minority populations together with other individuals with specific disabilities.[15]

In recent years, there have been documented cases of forced sterilization of women from ethnic minorities in Europe, South America, Kenya, India, Mexico, Namibia, USA, Hungary and Slovakia.[16] India in the early 1970's was persuaded as a result of the loans to her through the World Bank, USAD and the Swedish International Development Authority to enact a compulsory family planning policy. This family planning policy focused on the poor and the less privileged in the country.

Research study carried out in 2015 showed that about 4.5 million women were sterilized annually, and majority of the women did not give free consent.

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14 Perl TR, The Continuing Sterilization of undesirables in America New Jersey: Rutgers Race and L.R 2004;6;225

15 Priti Patel, Forced Sterilization of Women as Discrimination, (2017) 38:15. Patel Public Health Reviews,

16 Open Society Foundation, against her will: forced and coerced sterilization of women worldwide, (2011), Available at <www.opensocietyfoundation.org/publications/> [Accessed 27 April 27 2024]

China also in line with the state's "two child policy" enforced forced sterilization without the consent of the victims.[17] Between 1941 and 1945, sterilization was carried out by the Nazi regime in the concentration camps. During the Nazi regime, sterilization was adopted as a means of stopping women from reproduction. The aim of the sterilization in the camp was to exterminate present and future Jews; this took place within the period of the Second World War.[18]

In the case of *Buck v. Bell,*[19] the Plaintiff had a mental disorder and was operated upon and given a compulsory salpingectomy, in line with the laws of Virginia. The plaintiff challenged her forceful sterilization as a violation of her right to equality and due process under the American Constitution. The American Supreme Court gave judgement in favor of the State by holding that a state statute allowing mandatory sterilization of the unfit, including the intellectually disabled for the protection and health of the state did not in any way violate the American Constitution,[20] the author however contends that the decision of the court was unfair and insensitive to the condition of the mentally weak and disabled individuals within the American jurisdiction this is because even persons with disabilities as human being deserves the right to be consulted before being sterilized.

According to Priti in her article, forced sterilization in countries where they have been documented has majorly taken the following dimensions:

i) That the women's consent was usually obtained by force. Women and girls were asked to sign up consent forms when in Labor or were told that it was a different medical process that was applied like abortion or a caesarian section. They were deceived into sterilization.

17 Ibid

18 KD Askin War Crimes Against Women; "Prosecution in International War Crime" (1997) at 476

19 Buck v. Bell (1927), 274 US, 200

20 Ebenezer Durojaye, "Involuntary Sterilization as a Form of Violence against Women in Africa" (2018), Vol. 53 (5) Journal of Asian and African Studies, p. 723

ii) The consent from the women was invalid because women and girls were compelled to sign consent forms without giving them adequate full information as to the sterilization process.

iii) The women were never asked if they wanted sterilization, they only became aware that they have been sterilized at the point they wanted to have access to contraceptives.[21]

In the countries where forced sterilization has taken place, the following reasons have been adduced for it, mainly for the protection of public health; it has argued by medical practitioners that forced sterilization is important to address medical cases with hereditary diagnoses and to address issues of over population in the country.[22] The author hereby argues that coercing the weak and vulnerable set of individuals into sterilization without their full consent in other to protect and safeguard public interest is simply to undermine the fundamental rights of the individuals.[23]

According to Ebenezer Durpojaye, within the 20th century, most of the Asian countries as a matter of policy gave different kinds of incentives to family units to accept to carry out sterilization as a mode of population control.[24] For instance, the government of China initiated the one-child policy, wherein it offered attractive incentives to families to undergo sterilization so as to limit or control the population of the country.[25] Arguably, this kind of policy can be regarded cruel and inhuman, a situation where women are deceived through government policies and incentives to embark on the act of sterilization as a form of population control without her free consent. It is indeed the violation of the fundamental human rights of the victims including

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21 Priti Patel, "How Did We Get Here and Where to Now? The Coerced Sterilization of HIV-Positive Women in Namibia (2008) Vol. 22, Empowering Women for Gender Equity at pp 38-44

22 Stern AM, Sterilized in the name of public health; race, immigration, reproductive control in modern California, (2005), 96 (7), American Journal of Public Health, p. 1128.

23 Ibid

24 Ebenezer Durojaye, "Involuntary Sterilization as a Form of Violence against Women in Africa" (2018), Vol. 53 (5) Journal of Asian and African Studies, p. 722

25 Ibid

their rights to health, information, dignity, bodily integrity, privacy, and the right to determine the number of children to give birth to.[26]

3.0 TARGET GROUPS

Over the years and across the world, the following group of persons has been the major targets for forced sterilization:

3.1 RACIAL AND ETHNIC MINORITIES

Women belonging to certain indigenous population, racial and ethnic minorities are often targeted for forced sterilization. In Czech Republic, Hungary and Slovakia, members of the Roma minority were specifically identified and forcibly sterilized.[27] Many of the women were sterilized during cesarean section in which case the women were never consulted before the exercise took place. While in labor they were informed that sterilization was needed quickly and were given consent forms to complete and sign in a hurry even in an unfamiliar language.[28]

The author argues that the act of sterilization aimed at preventing or avoiding future pregnancy cannot in any way be considered a medical emergency, patients that approach medical facilities must be given adequate information on the type of medical procedure to be carried out on them and must also be given sufficient time to decide if they wish to go ahead with such exercise. In this regard, the UN Committee on the Elimination of Discrimination against Women (CEDAW) operating in the Czech Republic has recommended at least seven (7) days waiting duration between the time of notifying the patient about the sterilization exercise, its effects, its risks, available alternatives if any and the time the patient gives her free consent.[29]

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26 Ibid

27 Against Her Will, "Forced Coerced Sterilization of Women Worldwide" at p 3 available at <https://www.against-her-will-20111003(1).pdf> [Accessed 12th March 2024]

28 Ibid, See, also the European Roma Rights Centre, Center for Reproductive Rights, and NEKI, A.S v Hungary-Informed Consent: A Signature Is Not Enough (2008)

29 Against Her Will, "Forced Coerced Sterilization of Women Worldwide" at p 3 available at <https://www.against-her-will-20111003(1).pdf> [Accessed 12th March 2024]

3.2 WOMEN CONSIDERED POOR

In the year 2009, a woman from America sued a certain hospital management for sterilizing her during a cesarean section without her informed consent, in the cause of the legal proceedings so many members of her immediate community supported the doctor for sterilizing her, "saying she is deserving of the sterilization owing to her poor state.[30] This as it were represents that attitudinal behavior regarding poor women in different countries within the international community. However, often in most countries, when governments embark on population control programs their first target are women and family who are considered very poor.[31]

A Non-Governmental Organization in India which studied the "Uttar Pradesh Sterilization Camp" reported that the camp was put together by the government of India as part of family planning program with the assistance of the World Bank and the government of the United States. It was further observed by the NGO that poor and illiterate women were hurriedly taken through the process of information, and as such they were not given appropriate time to make decisions on the exercise.[32] They were simply asked to thumb print on specific parts of the form without allowing them time to read it.[33] A more recent report in India shows that as part of government program, doctors in private settings are paid for each of the sterilization exercise carried out by them, this as it were serve as further motivation for forced sterilization.[34]

3.3 Women Living with HIV

As a way of getting rid of the Human Immunodeficiency Virus (HIV) some countries have come up with policies aimed at forcibly sterilizing HIV-positive women in other to prevent the transmission of HIV from mother to child. Recently, there are documentary reports across the international community

30 Ibid at p. 4
31 ibid
32 Ibid at p. 4
33 ibid
34 ibid

showing that women suffering from HIV are compelled to go through the act of sterilization without informed consent.[35]

Countries such as Chile, Namibia, South Africa, and Botswana have recorded incidences of involuntary sterilization aided by health workers with no proper counseling or informed consent of women living with HIV, the situation for women living with HIV is further complicated when they are seen as poor and unable to raise and take care for a family.[36] In some countries, medical health workers would refuse to administer HIV drugs to women who are positive with HIV or even carry out abortion on them expect they first consent to sterilization.[37]

3.4 WOMEN LIVING WITH DISABILITIES

Often, women and other persons living with one form of disability, or the other are usually not given the opportunity to access their fundamental human rights. And worst still, medical health care givers most times do not obtain their consent before the act of sterilization or even abortion simply because they are of the view that persons living with disabilities do not have the rights to reject certain medical procedure carried out on them.

The author argues that the denial of informed consent from persons with disabilities is simply a violation of their fundamental human rights. Persons with disabilities often are subjected to abuse of rights for lack of guardians, and even when they have guardians, medical worker have a way of convincing the family to go for forced sterilization to void the accompanying stigma which comes with such disability. It must be noted that the laws of some countries allow for the sterilization of children having serious intellectual disabilities.[38]

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35 Ebenezer Durojaye, "Involuntary Sterilization as a form of Violence Against Women in Africa" Journal of Asian and African Studies, 53 (5) (2017) at p. 1, available at <http://dx.doi.org/10.1177/0021909617714637> [Accessed 19 March 2024]

36 Ibid

37 Open Society Foundations, AGAINST HER WILL: Forced and Coerced Sterilization of Women Worldwide at p. 5

38 ibid at p. 6, the National law in Spain permits the sterilization of minors who are found to be having severe mental disabilities.

Some states in the United States of America, creates gaps in their laws to allow for the sterilization of women and children having serious disabilities.[39] Other times, guardians and family relatives give their consent to sterilization without even seeking the consent of the individual with the disability. Women with intellectual disabilities are always treated as if they have no control or should not have control over their sexual and reproductive choices.[40] Other reasons advanced include menstrual management for women viewed as having problems with coping or managing menses.

It is also important to note that men with intellectual disabilities are similarly sterilized in the guise that it provides them with greater sexual freedom.[41] In the United States of America during the 20th century more than 70, 000 women were forcibly sterilized. The victims were sterilized following government directives, the targets for sterilization included but not limited to the mentally deficient, the deaf, blind, diseased, minorities, poor people and women considered as promiscuous.[42]

3.5 STERILIZATION AS PART OF POPULATION PLANNING

Human population planning is the deliberate act of artificially altering the level of growth of the population of a nation through policies.[43] Population planning has been carried out by reducing or limiting the population birth rate often following the government's directives, this is done having the following factors in mind, such as the level of poverty, environmental issues, overpopulation and sometimes for religious reasons.[44]

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39 Ibid, see also Center for Reproductive Rights and VIVO POSTIVO (2010) Dignity Denied, at 24

40 Compulsory Sterilization, available at <https://en.mwikipedia.org/wiki/Compulsory_sterilization> [Accessed April 9 2024]

41 Ibid at p. 2

42 The Supreme Court Ruling That Led to 70,000 Forced Sterilization, available at <https://www.npr.org/sections/health-shorts/2016/03/07/469478098/the-> [Accessed April 10, 2024]

43 Compulsory Sterilization, available at <https://en.m.wikipedia.org/wiki/Compulsory_sterilization> [Accessed 9 April 2024]

44 Ibid

While it is true that human population planning is aimed at improving the quality of lives of citizens, the author argues that national governments in doing so are in serious violation of international human right laws as well as the fundamental human rights of the victims for allowing women to be sterilized without their informed consent. These inalienable fundamental rights of the victims include but not limited to the right to find freedom from torture, cruel, inhuman, or degrading treatment or punishment, the right to attain the highest standard of physical and mental health, reproductive and sexual rights.[45]

In the early 1960s many forms of forced sterilization were carried out on citizen by governments across the world for the purpose of reducing population growth. In India vasectomies was proposed for men who already have three children[46] through government policy women were sterilized after the birth of their second or third child.[47] Birth control implants were administered to women as a form of long-term sterilization, thus, introducing a system which allots a certain number of children per woman.[48] Bangladesh in 1982 launched a two year mass sterilization program for Bangladeshi women and men, wherein about 3,000 women and men were proposed to be sterilized on the 16th of December 1982 the first day of the commencement of the sterilization program.[49] The program was part of the country's population control policy. Mainly poor women and men were targeted in the sterilization program of the government.[50] Financial incentives were thus offered by the government. 2,000 Bangladeshi Taka (US $18) was offered to women who were compelled to undergo tubal ligation, and for men who were persuaded to go through vasectomy.[51] At the same time, the referrer who persuades

45 Open Society Foundations, AGAINST HER WILL: Forced and Coerced Sterilization of Women Worldwide at p. 9

46 Compulsory Sterilization, available at <https://en.m.wikipedia.org/wiki/Compulsory_sterilization> [Accessed 9 April 2024]

47 Ibid

48 Ibid at p. 3

49 Rosenberg MJ, "Sterilization in Bangladesh: Mortality, Morbidity, and Risk Factors", available at <https://pubmed.ncbi.nlm.nih.gov/6127262/> [Accessed 9 April 2024]

50 Compulsory Sterilization, at p.4, available at <https://en.m.wikipedia.org/wiki/Compulsory_sterilization> [Accessed 9 April 2024]

51 Ibid

either the man or the woman to undergo sterilization was rewarded with 300 Bangladeshi Taka (US$ 2.70).[52]

4.0 SOME COUNTRIES WITH RECORDS OF FORCED STERILIZATION

This section of the paper reviews selected countries across Europe and Africa with documentary history of forced sterilization, it assesses the prevalence of the crime and at the same time tries to examine the different category of women within the countries that are targets of forced sterilization. Issues of justice and reparation for victims of forced sterilization are also discussed in this section, where such is available.

4.1 BRAZIL

In the early 70s and 80s, sterilization was considered illegal in Brazil. But then, it was the practice for women to often choose or opt for it as a reproductive healthcare formula to avoid future pregnancies to enable them plan effectively for their families. Many times, the decision to go for this type of contraception is informed by a lot of factors like poor economic conditions and lack of employment.[53]

However, in 2018 came the Sao Paulo case where a mother of eight children was coerced into sterilization after being arrested for drug trafficking. Her sterilization was however justified owing to her poverty, drug addiction and the obvious incapacity to take care of her children. The court gave judgement in favor of her sterilization, even though the sterilization was done without her consent.[54]

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52 Ibid

53 Compulsory Sterilization, at p. 8, available at <https://en.m.wikipedia.org/wiki/Compulsory_sterilization> [Accessed 10 April 2024]

54 Ibid

Scholars have argued, in analyzing the above case, that sterilization of women in Brazil is legal if considered necessary.[55] The question therefore is who determines when sterilization becomes necessary in the country. The author, therefore, argues that this form lacuna in the national law of a country opens the flood gate into the gross violation of fundamental human rights of individuals within the country.

4.2 CANADA

In 1928, Canada enacted the Alberta Sexual Sterilization Act; this was subsequently repealed in 1972. Within this this period, several persons from the Province of Alberta sued the state for forcing them to be sterilized without their permission and informed consent.[56] But after the case of Leilani Muir in 1995, the government of Alberta has tendered sincere apology for the forced sterilization of well over 2,000 persons, and at the same time more than 800 persons from Alberta which were sterilized in line with the Sexual Sterilization Act were compensated and awarded $142 Million as damages.

However, towards the 20th century, there was a great movement in Canada to use forced sterilization as a method of population control and family planning. And between 1960 and 1980, the birth rate in the country reduced drastically from 47% to 28%. In 2018, a lot of women spoke out to report cases of forced sterilization carried out on them thus leading to several cases in court initiated by several international organizations seeking justice for victims of coerced sterilization.[57]

4.3 CHINA

The Government of China, in 1978, became worried about the increased population of citizens being too much for the country to cater for, thus,

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55 Elisabeth Vieira, "Provision of Female Sterilization in Ribeirao Preto, Sao Paulo, Brazil" September- October 2004, available at <https://.scielo.br/j/csp/a/kgDZtvVTMyv5YRX7MnKGWtDP/?lang=en> [Accessed 10 April 2024]

56 Compulsory Sterilization, at p. 8, available at <https://en.m.wikipedia.org/wiki/Compulsory_sterilization> [Accessed 10 April 2024]

57 Ibid at p. 9

established the one-child policy to reduce the childbirth, placing huge emphases on population control and family planning.[58] Because of the importance of the one-child policy, the government saw the need to standardize it into a law in 2002, however, many human rights groups, including the Amnesty international criticized this policy as clear violation of the reproductive right of the people. Subsequently in 2016, the government of China relaxed the policy to allow parents have up to two children. This ultimately brought about a fall in the rate of national sterilization. However, between 2019 and 2020, reports emerged indicating high rate of cases involving forced sterilization of Xinjiang without informed consent.[59]

4.4 INDIA

India, in 1976, passed a Bill which would lead to the compulsory sterilization of men and women after three (3) children. However, as a result of call for new elections, the legislation was never passed into law. Yet, to lower the increasing population, the government came up with an incentive program which concentrated on the male citizens using monetary incentives to entice them into sterilization.[60] Men who consented to be sterilized were given land, housing, money, and loans. In the process, thousands of men were persuaded to receive vasectomies. Owing to mass protest and opposition, the government turned her attention to women as targets by force, withholding welfare and other important benefits, enticing women low-classed. The reason for switching to women was simply because they were perceived as more reluctant to protest for their rights.[61] It must therefore be noted that sterilization are still carried out in India targeting indigenous and low class women.[62]

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58 Compulsory Sterilization, at p. 9 available at <https://en.m.wikipedia.org/wiki/Compulsory_sterilization> [Accessed 10 April 2024]
59 Ibid at p. 10
60 Ibid at p. 12
61 Ibid at p. 13
62 Ibid

4.5 SWEDEN

In the year 2000, a report from the government of Sweden reveals that 21,000 women were forcibly sterilized, while a total of 6,000 were forced into voluntary sterilization. For the persons sterilization some of the reasons adduced for such includes the following: racial differences, mental slowness, anti-social behavior, promiscuous behavior, and other forms of behavior considered unfit and improper.[63]

However, later on in 2017, the government of Sweden set up a commission of inquiry to sort out the victims who were entitled to receive compensation for the trauma caused to them by the state,[64] subsequently paid a total sum of $22,000 as compensation to all the victims who were forcibly sterilized.[65] Africa is also not left out in the records and practice of forced sterilization. Within the African sub-region, the paper reviews incidences of the practice in South Africa, Namibia and Nigeria as countries having high cases of forced sterilization.

4.6 SOUTH AFRICA

It is important to note that sterilization generally within the African continent is not an attractive practice, owing to the irreversibility of the entire process.[66] However, South Africa has, in recent years, attracted the attention of both the media and scholars because of acts forced sterilization of women with HIV. In the bid to prevent mother-to-child HIV transmission, there has been a high increase of forced sterilization of women diagnosed to be HIV positive.[67] Women that are living with HIV may, on their own, opt for sterilization as a

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63 Compulsory Sterilization, available at <https://en.m.wikipedia.org.org/wiki/compulsory-sterilization> [Accessed April 24 2024]

64 Ibid at p. 19

65 Ibid

66 Sambo T, Nathaniel D, Rafat B, Francis O, Richard a, Teddy E, "Trends in female Sterilization in North central Nigeria, (2021) 9 (5), International Journal of Research in Medical Sciences at p. 1254 available at <https://dx.doi.org/10.18203/23206012.ijrms20211428> [Accessed March 13 2024]

67 McLaughlin LC, The price of failure of informed consent law; coercive sterilizations of HIV-positive women in South Africa, Law Inequal (2014), p. 32:69-93.

method of contraceptive.[68] There are reports that women living with HIV and Aids are forcefully sterilized without their full, free and informed consent.[69]

South Africa, in its Constitution makes provision for the right to free health care as well as reproductive health services, and at the same time, in a 1998 enactment, it out-laws the act of sterilization without the free consent of the individual involved. Irrespective of the laws, there has been a serious issue of enforcement of such laws in the country. Strode, in his South African study for Her Rights initiative, interviewed 22 women who were forcefully sterilized without their consent and without any form of legal compensations.[70] It was also reported that a good number of women in the provinces were forced into signing consent forms, in which their consent was believed to have been waived, thus protecting the medical personnel from responsibility.[71]

The author, therefore, argues that forced sterilization of women living with HIV must at all times be seen as violation of their right to autonomy as well as the doctrine of informed consent. Women living with HIV in South Africa and those with specific illnesses and disabilities are sterilized without their full, free consent or are forced to undergo the procedure in other to get food to eat or get medical care.[72]Victims of forced sterilization in South Africa are reported as suffering from some serious emotional distress, owing to the fact that they can no more give birth to children.[73]

Some forcibly sterilized women in the country going through depression and trauma are said to engage the use of anti-depressants, with heavy feelings of

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68 Oliveira F et al, "HIV-Positive women in northeast Brazil: tubal sterilization, medical recommendation and reproductive rights" (2007),19 (10), AIDS CARE, p. 1258-1265.

69 Nair P. Litigating against the forced sterilization of HIV-positive women: recent developments in Chile and Namibia, (2011) Harvard Human Rights Journal, p. 223-231.

70 Strode A, Mthembu S, 'She made up a choice for me' 22 HIV-positive women's experience of involuntary sterilization in two South African Provinces, Reproductive Health Matters (2012) 39, (Suppl), p. 61.

71 Ibid

72 Nair P. Litigating against the forced sterilization of HIV-positive women: recent developments in Chile and Namibia. Harvard Human Rights Journal (2010), p. 231.

73 Kudzai and Shelene supra note 2 at 336, available at <https://doi.org/10.1080/26410397.2020.1758439> [Accessed March 10 2024]

isolation and helplessness[74] some other women sterilized without their free consent suffered from mental and had strain in their relationships with their spouses who did not give their consent, and are often isolated from their immediate family and community.[75] Even after divorce and remarriage, many victims of forced sterilization still continue to have issues with their new spouses as a result of the inability to give birth to children, and this is because so many African men marry just to have children to bear their names and to keep up with the family heritage.[76]

In addition, South Africa has in place, a well drafted national constitution that regulates the lives and activities of the people as well as provide for the citizen's rights and obligations. For instance, Section 27 (1) of the South African Constitution 1996 clearly provides that everyone shall have the right of access to healthcare, including the right to reproductive healthcare. Section 12(2) in the same light, provides that everyone shall the right to bodily and psychological integrity, which include the making decision concerning reproduction, the right to security in and control over their body and not to be subjected to medical or scientific experiments without their informed consent. Again Section 9 of the South Africa Constitution makes provision for the right to equality and went ahead to enumerate the conditions upon which and individual should not be discriminated against, a look at list reveals HIV and Aids is not included in the Section. And a South African court has held that HIV can constitute a ground for discrimination.

Similarly, the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 was enacted in line with giving effect to Section 9 of the countries' constitution to end unfair discrimination. The promotion of Equality and Prevention of Unfair Discrimination Act stresses informed consent in the delivering of healthcare services in the country. It specifically

74 Ibid
75 Ibid
76 Ibid at p. 337

states that neither the state nor private individuals may unfairly discriminate against any person.

Section 6 of the National Health Act No. 6 of 2003 states that patients who turn up for treatments must have informed knowledge of their health status, including all diagnostic procedures, as well as the right to reject treatment. Furthermore, Section 7 of the National Health Act of South Africa stresses that patients must consent to treatment and that medical workers must obtain the consent of patients.

The author urgently calls on the government of South Africa to develop strong legal policies to prosecute promptly the perpetrators of this heinous crime, and at the same time put measures in place for effective protection of victims of force sterilization against stigma and discrimination, victims are also entitled to adequate justice and reparation.

4.7 NAMIBIA

Namibia is also another country reported to have been involved in forcefully sterilizing women and girls living with HIV and Aids, but there seem to be a whole lot of awareness and progress in the fight against forced sterilization in the country. The crime of forced sterilization first came to the spotlight 2008 when the Namibia Women's Health Network (NWHN) had a conference for young women on sexual and reproductive rights, during which a young woman disclosed how she was forcedly sterilized by the hospital management without her consent.[77]

After that, more cases of forced sterilization surfaced in the country. In this regard, a Namibia high court in 2012 gave a ruling in a case in which three women living with HIV brought a suit against the government for forcefully sterilizing them.[78] One of the women in this case stated that she went to the

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77 Ibid

78 L. M and Others V Government of Namibia, Case Nos. 1603/2008;3518/2008;3007/2008. (30 July 2012)

hospital while she was in labour, and was told by one of the medical staff that she would require a caesarean section, and soon after, she was given a consent forms to sign. The woman was not told the nature of form she was signing. It only came to her knowledge that she had been sterilized when she wanted contraceptive shortly after her delivery. Judgment was therefore given in her favour, for sterilizing her without her informed consent. When the matter went on appeal to the Namibian Supreme Court in 2014, the Supreme Court upheld the high court's ruling by stating that the medical staff at the government hospitals had forcefully sterilized all the three women living with HIV without their consent[79] The court further held that in taking the decision to undergo sterilization, it is the patient that should have the final say.[80]

Winning the battle of recognition and compensation for victims of forced sterilization in Namibia through litigation and judicial intervention in recent years, attention have now shifted to the provision of effective psychological, social and mental wellness of women who are mainly the victims of the crime of forced sterilization in the country,[81] knowing that the victims obviously suffer from traumatic stress disorder which could lead to a total mental breakdown. It must be stated that often, women who are victims of forced sterilization in Namibia are poor, which further complicates issues for them thereby increasing the chances of stigma and discrimination. As a result, many HIV women forcedly sterilized do not speak out because of the inherent negative social and cultural impact like low chances of finding a marriage partner, stigmatization, and social neglect.[82]

In the light of the above, the author strictly urges the national government of Namibia to put strong legislations in place to adequately protect women who

79 Smith AD, Namibia Court rules HIV-positive women sterilized without their consent, Guardian, July 2012, <www.theguardian.com/global-development/2012/> [Accessed 28 April 2024]

80 Chingore-Munazvo N. A win for victims of forced sterilization in Namibia. Open Society Foundations, December 17, 2014 available at <www.opensocietyfoundations.org/voices/win-victims-forced-sterilization-namibia> [Accessed April 29 2024]

81 Kudzai and Shelene supra note 2 at 337.

82 Ibid

are victims of forced sterilization from the identifiable effects of such heinous crime which includes but not limited to psychological stress-disorder, depression, stigmatization, rejection, isolation and feeling of suicide.

4.8 NIGERIA

The issues of forced sterilization of women are not a common occurrence in Nigeria. Nigeria as a country, is said to record very low acceptance and use of sterilization methods by women, and this is attributed to a few reasons including, but not limited to the fears of diverse kinds of risk associated with sterilization methods. Other reasons include cultural and religious peculiarities, quest for large family membership, lack of sophisticated medical facilities as well as lack of trained and efficient manpower.[83] Adolescent girls with intellectual disabilities are also forcefully sterilized to stop them from coming up with unwanted pregnancy which they are not capable of handling both intellectually and financially.

However, issues of forced sterilization often come up with the need to protect adolescent girls with intellectual disabilities from involuntary sterilization. This is because such young girls with intellectual disabilities are susceptible to forced sterilization in the country. Often times, adolescent girls are sterilized without their full, free, and informed consent or are ignorant of what it is all about. According to Ofuani, adolescent young girls with intellectual disabilities in Nigeria are more likely to undergo sterilization process than their male counterparts with other forms of disabilities. In her view, this is just not a gender issue, but rather an issue of discrimination and unequal treatment provoked by legal, traditional, and social values.[84] Forced

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83 Sambo T, Nathaniel D, Rafat B, Francis O, Richard a, Teddy E, "Trends in female Sterilization in North central Nigeria", (2021) 9 (5), International Journal of Research in Medical Sciences, p. 1254 available at <https://dx.doi.org/10.18203/> [Accessed March 13 2023]

84 Anwuli Ofuani, "Protecting Adolescent Girls with intellectual disabilities from involuntary sterilization in Nigeria: (2017) Vol. 17, No. 2 African Law Journal,

84 Miranda JJ, Yamin AE, Reproduction health without rights in Peru, Lancet, 2004, p. 68-69.

84 United Nations Secretary General. In-depth Lessons from the Convention on the Rights of Persons with Disabilities", African Human Rights Law Journal, Vol. 17, No. 2, (2017).

sterilization of girls with intellectual disabilities clearly violates their fundamental rights of equality and freedom of discrimination, therefore it is important for them to be protected by either enforcing extant legal instruments or adopt a legal review.

Furthermore, ethnic minorities and indigenous people are also subjected to forced sterilization.[85] It is also documented that forced sterilization practices against indigenous ethnic minorities especially young girls and women have been ongoing for a long time.[86] This form of practice linked with discrimination of often carried out on the grounds of gender, race, or ethnicity.[87]

There are a number of instruments in Nigeria which provide for the protection of persons with disabilities, for instance, Section (17) (2) of the 1999 Constitution guarantees the right to equality before the law for all citizens of Nigeria.[88] In the same regard, Nigerians with disabilities Act similarly makes available equal rights, responsibilities and prospects for all persons with disabilities. Following from the above, it provides that all citizens of Nigeria should be treated equally and this also includes young girls with intellectual disabilities.[89]

The African Charter on Human and Peoples Rights, which Nigeria has since ratified and domesticated, also provides for equality and equal protection of the law. Notwithstanding the above provisions, there are still indications that adolescent girls with intellectual disabilities undergo forced sterilization which are being led by their family and relatives. As Anwuli and Animashaun rightly pointed out, the forced sterilization of adolescent girls could be effected on the instructions of parents or guardians, where there is a serious disability

85 Miranda JJ, Yamin AE, Reproduction health without rights in Peru, Lancet, 2004, p. 68-69.

86 United Nations Secretary General. In-depth study on all forms of violence against women. New York, United Nations 2006 (UN Doc A/61/122/.

87 Zampas C, A Forced and coerced sterilization of HIV-positive women in Europe, International Journal of Gynecology and Obstetrics, 2011, 114, p. 163.

88 The Constitution of the Federal Republic of Nigeria 1999 Cap C. 34 LFN 2004, section 17 (2) (a).

89 The Nigerian with Disabilities Act 1993, section 1& 2 (a).

as to prevent effective parenthood, in the event of a hereditary challenge together with the presence of a low level of intelligence or a psychiatric illness.[90]

5.0 EFFECTS OF FORCED STERILIZATION ON VICTIMS

Forced Sterilization can have severe and long-lasting impacts on the victims this is both physical and psychological. Importantly, the impact of forced sterilization significantly varies in view of the context, the victim's personal circumstances and other specifics of such act of sterilization.[91]

5.1 PHYSICAL AND HEALTH EFFECTS

The procedures involved in sterilization are usually permanent and often irreversible, and many times options or attempts at reversal prove abortively unsuccessful.[92] In this circumstance, victims can hardly recover back their fertility. In addition, victims in the process suffer serious health complications particularly where the sterilization procedure was not properly carried out, and this can lead to serious infections and other kinds of physical health issues[93] including but not limited to menstrual bleeding, heavy abdominal pain, serious back pains, weakness and other similar health issues connected to the lower limbs of the victims.[94]

One of the victims in the Namibian experience identified as "Mrs. BB" narrates her ordeal thus,

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90 Anwuli O., Protecting adolescent Girls with intellectual disabilities from involuntary sterilization in Nigeria: Lessons from the Convention on the Rights of Persons with Disabilities, African Human Rights Law Journal, Vol. 17 No 2, (2017).

91 What impact does forced sterilization have on the victims? available at <http://www.quora.com/what-impact-does-forced-sterilization-have-on-victims> [Accessed April 18 2024]

92 Ibid

93 Ibid

94 Kudzai Bakare and Sheene Gentz, "Experiences of Forced Sterilization and Coercion to Sterilize among women living with HIV (WLHIV) in Namibia: An Analysis of the Psychological and Socio-Cultural Effects" Sexual and Reproductive Health Matters 2020: 28(1) at p. 340, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/> [Accessed April 22, 2024]

> "Since I was sterilized in 2007, until now, I am still having serious pain every month, am still having back pain and heavy bleeding, the bleeding takes about two weeks and I am not able to walk. I have been spending a lot of money on Pampers to curtail the bleeding and this has caused me a lot of financial problems."[95]

The effects of sterilization on women often require them to seek medical assistance, and usually as a result of poverty on the part of the women, they look up to government for assistance which they hardly get as at when due.[96] The author argues that even at the point of seeking for medical assistance victims also suffer worse effects like victimization and discrimination at government healthcare venues.[97]

5.2 PSYCHOLOGICAL AND EMOTIONAL EFFECTS

Forced sterilization leaves victims with serious traumatic experiences which can result in long lasting emotional injuries, victims usually live with feelings of violation, stigmatization, and other forms of negative emotional problems such as anger, shame, and grief. These usually degenerates into higher forms of mental health issues like depression, and anxiety.

On anxiety, a victim known as Ms. Delisle said "Forced Sterilization caused me to have anxiety; it caused me to go through early menopause."[98] Another victim, Ms. Mercredi who was sterilized at the age of 15 years narrates her experience thus,

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95 Ibid
96 Ibid
97 Ibid
98 The Scars That We Carry: Forced and Coerced Sterilization of Persons in Canada- Part 11, Report of the standing Senate committee on human Rights (2022) available at <https://sencanada.ca/en/info-page/parl-44-1> [Accessed April 22 2024]

> "I attempted to take my own life, I struggled with post- traumatic stress disorder and suicidal attempts,"[99] other effects includes a sense of powerlessness.[100]

The author further stressed that aside from the above identified psychological effects, other similar effects includes the follows; stress, fear, isolation, overthinking or ruminating, feelings of helplessness, feelings worthlessness, feelings of sadness, loss of interest over important issues of life, self-blame.[101] Owing to the magnitude and seriousness of these effects on the victims, all stakeholders must therefore, promptly and consistently, give all necessary assistance to the victims to help them recover within a reasonable timeframe.

5.3 SOCIAL AND ECONOMIC EFFECTS

In many cases, forced sterilization for some persons may alter their identity leading to identity crises. This is so especially where there is a connection to race, ethnicity, disability, or other similar factors. On the other hand, forced sterilization may also have serious economic implications. Poor and financially weak women have often been lured into unwanted sterilization through promise of financial incentives and other forms of economic rewards. Economically, sterilization can hamper on the ability of victims to fully participate in vital endeavors within society.[102] It could lead to a big hindrance for victims pursing their educational dreams and others.[103]

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99 Ibid

100 What impact does forced sterilization have on the victims? available at <http://www.quora.com/what-impact-does-forced-sterilization-have-on-victims> [Accessed April 22 2024]

101 Kudzai Bakare and Sheene Gentz, "Experiences of Forced Sterilization and Coercion to Sterilize among women living with HIV (WLHIV) in Namibia: An Analysis of the Psychological and Socio-Cultural Effects" Sexual and Reproductive Health Matters 2020: 28(1) at p. 340, available at <https://www.ncbi.nlm.nih.gov/pmc/articles> [Accessed April 22 2024]

102 What impact does forced sterilization have on the victims? available at <http://www.quora.com/what-impact-does-forced-sterilization-have-on-victims> [Accessed April 22, 2024]

103 Ibid

The author further contends that in other instances, victims spend a lot of their life earnings in treating themselves from the negative effects of forced sterilization, thus leading to set back for the victims in many areas of life.

5.4 EFFECTS ON INTERPERSONAL RELATIONSHIP

Victims of forced sterilization often encounter issues with intimate partners due to the inability to contribute or participate in having children. The victim may, because of physical injuries, be unable to enjoy sex with her husband. On some occasions, sterilized women have been divorced or separated from their spouses.[104] This has led husbands of victims to branch out of the marriage to look for other women who can give them children. Similarly, unmarried sterilized victims suffer issues of rejection from potential spouse at the point of disclosure; this can largely affect her chances of ever getting married in the future.

Aside from the personal negative impact of forced sterilization on the victims, similarly, forced sterilization affects the victim's family and community. The inability on the part of the victim to conceive and bear children often contributes to the end of many marriages and greatly affects marital relationships.[105]

Importantly, the author stresses the fact that forced sterilization often leads to the erasure of indigenous blood lineages. This is as a result of the inability to pass the family blood line to future generations and by extension reducing the number of persons in a particular lineage.[106] This, as it were, amounts to the crime of genocide, which of course can be prosecuted at the international

104 Kadzai and Sheene, supra at p. 343

105 The Scars That We Carry: Forced and Coerced Sterilization of Persons in Canada- Part 11, Report of the standing Senate committee on human Rights (2022) available at <https://sencanada.ca/en/info-page/parl-44-1> [Accessed April 23 2024]

106 Ibid at p. 24

criminal court under article 7 of the ICC statute as part of the crimes which make up the jurisdiction of the court.

5.5 DISCRIMINATION AND VICTIMIZATION

Victims of forced sterilization often suffer major issues of discrimination and victimization. Some victims in Namibia narrate that they were given poor healthcare services the moment they disclosed that they were sterilized. A victim said:

> "You don't have to mention about the issue of being sterilized, because you won't be helped well…if you mention anything to the nurse that you are sterilized, they will inform others that, that person should not be treated because she is one of those that wants to sue the government".[107]

Thus, in Namibia, as a result of the "Stop Forced Sterilization Campaign" wherein the government was sued through the Ministry of Health and Social Services, healthcare workers maltreat, victimize and insult the women who were sterilized when they seek medical assistance.[108] It is also important to note that forced sterilization affects the occupational functioning of the victims in that women who, before sterilization, were employed or do business, stay away from their occupation and spending more of their time in the hospital seeking for medical attention.[109] One victim stressed that due to her health problems such as heavy bleeding, back and leg pains, she is unable to do the causal jobs that give her money to take care of her children.[110]

The author argues that victims of forced sterilization across the international community require all the support they can get, to facilitate their recovery process, and this includes legal, medical, social, financial, material support

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107 Kudzai Bakare and Sheene Gentz, "Experiences of Forced Sterilization and Coercion to Sterilize among women living with HIV (WLHIV) in Namibia: An Analysis of the Psychological and Socio-Cultural Effects" Sexual and Reproductive Health Matters 2020: 28(1) at p. 343, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/> [Accessed April 23 2024]

108 Ibid

109 Ibid

110 Ibid

in form of sanitary pads and food, emotional support especially through counselling. The author further calls on all stake holders, government, NGOs and other support groups, spouses, intimate partners, law enforcement agencies, family members as well as the immediate community of the victims to rally support promptly and justly to ensure the speedy recovery and integration of the surviving victims back into society.

6.0 LEGAL INSTRUMENTS FOR COMBATING THE CRIME OF FORCED STERILIZATION

This segment of the paper discusses the various available international legal frameworks on forced sterilization, it also points out possible areas of amendments where a lacuna is identified in any of the laws.

6.1 CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Convention on the Rights of Persons with Disabilities contains very important provisions regarding forced sterilization. The important provisions are hereunder discussed. Article 23 of the Convention provides for the rights of persons with disabilities to maintain their own home and family as well as to retain their respective fertility on an equal basis with other individuals,[111] stressing the need for enforcement of the Convention by state parties to the Convention. The Committee on the Rights of Persons with Disabilities noted that forced sterilization violates the rights person with disabilities to retain their fertility and that policies which permit forced sterilization run contrary to Article 23 of the Convention in which case, such law or policy should either be done away with or amended.[112]

Article 12 of the Convention on the Rights of persons with Disabilities, in the same light, guarantees the right of persons with disabilities to be recognized everywhere they go as persons before the law and, at the same time, enjoy

111 Article 23 Convention on the Rights of Persons with Disabilities (CRPD), (2006), 46 ILM 443.

112 Committee on Persons with disabilities "Concluding Observations on the initial report of Hungary" UN Doc CRPD/C/HUN/CO/I, Para 38; CRPD.

legal capacity on equal ground with others together with access to the assistance they may require to enjoy that legal capacity. Article 25 of the Convention makes provision for free, full, and informed consent, which should be the ground for providing medical care. It is the nature of consent given by a person that determines whether the sterilization was involuntarily carried out or not. Where the consent to sterilize is obtained by force that can be termed involuntary sterilization.[113] Flowing from this, the Convention on the Rights of Persons with Disabilities demands that both persons with disabilities as well as persons living with HIV should be given the chance to provide free, full and informed consent in their own healthcare.[114] In the light of this, member states are enjoined to put measures in place to discourage discrimination on the issue of healthcare because of disability or illness. State parties must make efforts to include persons with specific disability or illness in the process of decision making regarding their own treatment and this must be done by free and full consent.

6.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The right to health is guaranteed under this instrument. Article 10 provides that bodily autonomy is an integral part of the right to health. The Committee on Economic Social and Cultural Rights has pointed out that right to health includes the right to control one's health and body, including sexual and reproductive freedom together with the right to be free from interference, like the right to be free from torture, non-consensual medical treatment, and experiments[115]

Article 7 of the International Covenant on Civil and political Rights prohibits forced sterilization, provides for the right to information which, among other things, includes the right to seek, receive and access information about them

113 Open Society Foundations "Against her will: Forced sterilization of women worldwide available at <www.opensocietyfoundations.org/sites> [Accessed 5 May 2024]

114 See Article 25 (d) of the Convention on the Rights of Persons with Disabilities.

115 Committee on Economic, Social and Cultural Rights. General comment: the right to the highest attainable standard of health, (Article 12), 2000.

regarding their health. In view of this, state parties are to ensure that information provided by health service providers are correct, and that information concerning the individual's health must not be withheld or is represented intentionally. In the case of *AS v. Hungary*, the CEDAW Committee held that the failure of the healthcare provider to provide the necessary information and free and informed consent to the victim violated her fundamental human rights[116]

6.3 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention seriously considered forced sterilization a violation of the fundamental right of a woman to free and informed consent, thus, taking away her right to human dignity including her physical and mental integrity.[117] The Committee on the Elimination of Discrimination recommended the prohibition by law, of full, sterilization of women and girls whether with a disability or illness without their free, full and informed consent, unless where there is a serious threat to life or health of the individual.

Article 16 of the CEDAW protects the woman's right to reproductive choice. The CEDAW Committee pointed out that the right to quality health care services includes an obligation on state parties to ensure that health services are accessible and acceptable.[118] An acceptable service is that service which gives room for choice of reproduction and are administered in a way that women freely and fully give their consent, ensure respect for her dignity, guarantees confidentiality for her and it is for her overall wellbeing.[119] The

116 Communication No.4/2004.CEDAW/C/36/D/4/2004.2006 available at <www.escrnet.org/sites/default/files/>". [Accessed May 5 2022]

117 Committee on the Elimination of Discrimination Against Women (CEDAW Committee)1999 General recommendation No. 24: Article 12 of the Convention (women and health), A/54/38/Rev. 1, chap. 1; para. 22.

118 Committee on the Elimination of Discrimination Against women (CEDAW), General Recommendation no. 24: Article 12 of the Convention (women and health).1999, available at <www.refworld.org/docid/453882a73.html> [Accessed May 6 2022]

119 Ibid

CEDAW Committee seriously warned that state parties must discourage the practice of forced sterilization.[120]

The committee also had the opportunity to look into the case of *AS v Hungary,* in which a Roma woman was forcefully sterilized. In this case, AS was taken to the hospital while pregnant, and was seriously bleeding. The doctor on duty saw that AS would need to be operated on in other to remove her baby which was already dead. While AS was at the operation room, she filled out a consent form for a caesarian section and sterilization. The doctor hand wrote the consent for sterilization for her. The CEDAW committee submitted that the forced sterilization of AS violated her right to health. The committee pointed out that AS should have been specifically informed about the sterilization as well as other alternative procedures available for family planning so she could freely make her choice.[121] The committee stressed that AS was not given all the necessary information in such a way that she could give free consent and therefore decided that her free consent was not secured before she was sterilized. The committee added that AS did not understand the Latin word for sterilization used in the consent form, coupled with the fact that the consent form was not handwritten and not clear enough.[122]

The right to non-discrimination and equality is also provided for in CEDAW as well as other international instruments. The discrimination against women in accessing healthcare is clearly prohibited by CEDAW, the Convention on the Rights of persons with disabilities equally prohibits discrimination on the grounds of disability and acknowledges the fact that women and girls with disabilities go through multiple discrimination. The ICESCR and the ICCPR both makes provision prohibiting discrimination on the grounds of gender, sex, health status or race.

120 Ibid

121 Communication no.4/2004.CEDAW/C/36/D/4/2004,2006. available at <www.escr-net.org/sites/default/files/CEDAW_committee_decision_0.pdf> [Accessed March 6 2023]

122 Ibid

Discrimination against women involves acts that induce physical, mental and sexual sufferings as well as the withdrawal of other liberty.[123] Furthermore, the right to be free from cruel, inhuman, and degrading treatment is provided in the ICCPR, as well as the Convention against Torture and other Cruel, inhuman or Degrading Treatment or punishment (CAT), the act of forced sterilization of individuals without their free, full and informed consent is a breach of this right.

It was the recommendation of the Committee against Torture that state parties to the Convention should take steps to promptly and thoroughly investigate and prosecute all reports of forced sterilization of women and girls and adequately punish perpetrators, and at the same time make available for the victims equitable and sufficient compensation.[124] The committee also stressed that the involuntary sterilization of women and girls make up torture or inhuman treatment.

According to Stephanie and Tobin, women diagnosed of HIV are stigmatized by a form of cultural assumption that they have involved themselves in deviant behavior, owing to the fact that women living with HIV are seen as not responsible and promiscuous thus resulting to members of her immediate community to isolating from them, and in most cases it leads to sterilization.[125] They further noted that in South Africa, there is an imbalanced medical culture between doctors and patients which negatively impacts on women. Therefore, as a result of this imbalance, doctors see women living with HIV to be irresponsible and not worthy to have children and therefor they are sterilized to avoid harm to public.[126]

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123 Committee on the Elimination of Discrimination against women. General recommendation no 19: violence against women. 1992 available at <www.refworld.org/docid/52d920c54.html> [Accessed March 6 2024]

124 United Nations Committee against Torture (CAT Committee), Concluding Observations; Slovakia, 2009 para 14, available at <www.refworld.org/publisher> [Accessed March 6 2024]

125 Stephanie B, Tobin K, Forced Sterilizations of -Positive Women: A Global Ethics and Policy Failure, American Medical Association Journal of Ethics (2015), Vol. 17, no. 10, pp 952-967

126 Ibid

In South Africa, forced sterilization results to stigma on the female victims which turns out to culturally affect their marriage negatively.[127] This is because when a woman is sterilized, she cannot be fertile to give birth to children for her husband. The moment a woman is sterilized, she is regarded as a social outcast and thus prevented from participating in family/community activities, and other social functions such as marriage ceremonies and burials.[128] To avoid being stigmatized most women who have been sterilized do not in any way mention such sterilization to their spouses and family members.[129] Quinn and Chaudoir, in their work, clearly stated that women living with HIV can be described as having a history of mental illness or sexual abuse, which seriously make up a 'concealable stigmatized identity' the effect of which could be depression, anxiety and trauma for the victim.

7.0 PROSECUTING THE CRIME OF FORCED STERILIZATION

This section of the paper examines the possible judicial institutions and avenues for prosecuting perpetrators of the crime of force sterilization and giving redress to the victims of the crime. The author points to the ECOWAS Community Court of Justice and the International Criminal Court as robust possible human rights courts where perpetrators of the crime of forced sterilization can be prosecuted, and calls on victims to take advantage of the courts to press for justice and adequate compensations.

There are not too many judicial decisions on cases involving forced or coerced sterilization of women across the world. However, two judicial institutions have taken the lead in recent times in giving decisions on cases challenging

127 McLanghlin LC, The price of failure of informed consent: coercive sterilization of HIV-positive women in South Africa, Law Inequal, (2014) Vol. 32, p. 69

128 Ibid

129 Quinn DM, Chaudoir SR, Living with a concealed stigmatized identity: The impact of anticipated stigma, Centrality, Silence, and Cultural Stigma on psychological distress and health, Pers Soc Psychol, (2009), Vol. 4, P. 634

the forced sterilization of women. These are the European Court of Human Rights (ECHR) and the Supreme Court of Namibia.[130]

In one of the three cases brought before the ECHR by Roma women, a Roma woman was sterilized in the cause of giving birth to her 2nd baby through a caesarean operation. When she fell into labour, her medical file showed that she asked for sterilization. Meanwhile, her consent signature was inconsistent, the woman claimed that during her labour, she was told by the doctor that she would die if she had another baby and therefore perceived she had to consent to sterilization.[131]

The same was the case in Namibia where three women living with HIV brought a suit against the government for forced sterilization without their consent. One of the women had visited the hospital while she was in labour and given a consent form to fill, she was not told the nature of form she was signing. She only knew that she had been sterilized when she needed contraception after her delivery.[132] Both the ECHR and the Namibia Supreme Court gave judgment in favour of the victims stressing that the forced and coerced sterilization of the women violated their fundamental human rights to private and family life as well as the right to be free from torture and inhuman or degrading treatment.[133]

7.1 THE ECOWAS COMMUNITY COURT OF JUSTICE

The ECOWAS Community Court of Justice[134] was established as part of the idea of integrating ECOWAS Member States into a single union like the European Union. At the inception of the court, it could only adjudicate on matters between States. Individuals were excluded from espousing a claim before the court unless the claim was brought by the individual's state of

130 Priti Patel, "Forced Sterilization of Women as Discrimination" (2017) 38 (15) Public Health Review p. 13 available at <https://publichealthreviews.biomedcentral.com/articles> [Accessed March 14 2023]
131 Ibid
132 Ibid at p. 14
133 Ibid
134 By Protocol A/P1/7/91 which entered into force on 5 November 1996.

nationality on behalf of the individual. Thus, in the cases of *Afolabi v Federal Republic of Nigeria*[135]*and Frank Ukor v. Rachad Lalaye*,[136] the court struck out the suits brought by the plaintiffs on the ground that the plaintiffs were not competent to appear before the court in their individual personal capacities. However, the jurisdiction of the court was expanded in 2005 to accommodate individuals and corporate bodies by an amendment through a Supplementary Protocol.

The human rights mandate of the ECOWAS Community Court of Justice represents a major practice of the African regional human rights mechanisms which victims of forced sterilization within the African sub-region can take advantage of, to seek redress. The power of the ECOWAS Community Court of Justice to hear cases of human rights violation is hinged on the provisions of Article 9(4) of the Supplementary Protocol 2005 of the court which amended Protocol (A/P17/91) relating to the Community Court of Justice. It provides that the court has jurisdiction to determine cases of violation of human rights that occur in any Member State.[137]

Therefore, it becomes clear that the 2005 Protocol of the Community court places obligation of the protection of the rights of persons within its jurisdiction on the Member States. This is however in acknowledgment of the long existing principle that States are the primary subjects of international law. The ECOWAS Community Court thus holds its member states accountable for any violation of human rights perpetrated within its territory either carried out directly or through the institutions of government.

In the cases of *Mamdu Tandja v. Gen. Salon*, as well as *Djibo v. Amor*, the ECOWAS court stressed that the member States have a responsibility to respect and protect the human rights and dignity of its citizens. The court further stated that the responsibility to respect and protect human rights

135 ECW/CCJ/APP/01/03.
136 No APP/01/04.
137 The Supplementary protocol 2005.

flows from the International Conventions and treaties which were accepted and ratified by member states. In this regard, the Community Court imbibes the principle of State Responsibility for internationally wrongful acts. It is now obvious that it is important for regional courts to have jurisdiction over human rights cases, most importantly in situations where the state is a perpetrator. The good thing about the court is that it gives citizens access to justice at the regional level, hence, citizens are not hindered by the challenges confronting domestic courts.

Other interesting characters of the human rights mandate of the ECOWAS Community Court of Justice are that it does not have a list or catalogue of rights which could be demanded for, and there is no requirement of exhaustion of domestic remedies. Under article 9 (4) of the court's protocol as amended, the court does not have a bill of rights or a catalogue of human rights, the protocol did not in any way indicate the class or type of human rights violations that could come before the court.

In the case of *Ugokwe v. Jerry Federal Republic of Nigeria,*[138] the court noted that in Article 9 and 10 of the Supplementary Protocol, there is no provision made for specification of various human rights, but that article 4(9) of the Revised Treaty of the Community makes provision for the recognition, promotion, and protection of human rights in line with the African Charter on human and Peoples' Rights.

Another major feature of the human rights mandate of the ECOWAS Court is that exhaustion of local remedies is not a necessary condition to bringing actions before the court. Article 10 (d) of the Supplementary Protocol states that access to the court is open to an individual on the application for relief for violation of their human rights on the condition that "the application is not anonymous nor be made while the same matter has been instituted before another international court for adjudication."

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138 Suit No: ECW/CCJ/APP/05/11 Judgement No. ECW/CCJ/OUD/10/12 of 11th June 2012, para 23.

In effect therefore, the non-requirement of exhaustion of local remedies now affords victims of human rights violation a choice of either directly approaching the ECOWAS Community Court of Justice or their national courts. The court further affirmed this position in *Sikiru Alade v. Federal Republic of Nigeria,* stating that Article 10 (d) of the Supplementary Protocol is clear in that access to court is not subject exhaustion of local remedies as it is practiced in customary international law.

This practice by ECOWAS Court have received commendations within the African sub region in the light of the undue delays victims of human rights violations are made to go through by their national courts. With these key human rights elements of the ECOWAS Court of Justice, victims, especially women living with HIV and Intellectual Disabilities who are being sterilized without their consent within the African sub region can take advantage of the ECOWAS Court of Justice to seek redress and other further reparations for the injury done to them.

7.2 THE INTERNATIONAL CRIMINAL COURT (ICC)

Forced sterilization was recognized by the statute establishing the ICC as constituting a war crime and crimes against humanity in articles 7 (g) and 8 (2) (viii),[139] committed as part of a widespread or systematic attack directed against any civilian population or as grave breaches of the Geneva Convention and other serious violation of the laws and customs which are applicable to international armed conflict or other forms of conflict not international in nature.[140] ICC, being a court of last resort having jurisdiction to investigate and prosecute the crime of forced sterilization, can come under the "complementarity principle" to prosecute perpetrators of this nature of crime either as a war crime or crime against humanity especially within countries that are signatories to the Rome Statute.

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139 Statute of the International Criminal Court, article 7(a-k), 8(2) (i-ix). 17 July 1989, U.N. Doc, A/Con./83/9 (Rome Statute).

140 Open Society Foundations: Fact Sheet for international crimes available at <www.opensocietyfoundation.org/sites/default/> [Accessed May 7 2022]

The complementarity principle entails that the ICC can investigate and prosecute core international crimes when national governments are unable or unwilling to genuinely do so. According to Oji, the principle recognizes that it is the state where such crime occurred that has the primary responsibility to investigate and prosecute it. States have since realized that in certain circumstances their national mechanism and internal legislation are inadequate to attend to crimes that undermine the most essential principles of humanity.[141] To preserve the fundamentals of justice and to avoid impunity, countries have accepted that their systems are not perfect and need new legal systems to complement them. However, states still play the major roles of investigation and prosecution, but if they fail in this responsibility or find it difficult perform that role or show lack of interest or bad faith, then the international criminal court can come in to insist that justice is done. This basically operates in situations where there are no chances that international criminals be tried in domestic courts.[142]

It is a principle of public international law that once a state has signed and ratified an international treaty; it is under a duty to keep its obligation and other responsibilities on the treaty. Therefore, African countries, being state parties, signing and ratifying to the Rome Statute of the ICC, have clearly recognized that forced sterilization in article 7 (1) (g) and article 8 (2) (xxii) constitutes both a war crime and crime against humanity. Thus, African countries are required to take serious steps in making law incorporating the important provisions of the Rome Statute into their national legal systems or amending its laws to reflect these provisions on forced sterilization as part of their national laws. It is important for states to foster cooperation with the ICC by domesticating the Rome Statute's provision of complementarity in their national legislation and prosecute international crimes committed within their territory.

141 Elizabeth Oji, Responsibility for Crimes Under International Law, (Odade Publishers 2013), p. 294.
142 Ibid

Nigeria signed the Rome Statute in 2000 and subsequently ratified it in September 2001 and since then, it has failed to domesticate provisions of the Rome Statute thereby making it difficult for citizens of the country to approach the court over certain crimes committed against them. In the same light, the parliament of South Africa adopted the Rome Statute Implementation Act no.27 of 2002 which came into effect on the 16th of August 2002 to give effect to the Rome Statute. Despite the domestication, women living with HIV in South Africa have still been subjected to forced sterilization without their free, full, and informed consent. The signing and ratification by Nigeria and its subsequent domestication by South Africa and other African countries grants jurisdiction to the international criminal court to step in to investigate and prosecute perpetrators of forced sterilization in these countries.

The author argues that Nigeria has shown disinterest and bad faith for failing to domesticate and introduce the provisions of the Rome Statute into its national legal system. Women living with HIV in South Africa and Namibia as well as young girls with intellectual disabilities in Nigeria being denied their fundamental rights to family life and reproductive choices can press for redress and reparation by lodging their case at the ICC especially where the act of forced sterilization is masterminded by the government.

The ICC basically is structured to operate in cases in which there is no prospect of international criminals being effectively tried in domestic courts. In countries like Nigeria, South Africa and Namibia, it could safely be asserted that they lack the political will power to prosecute the crime of forced sterilization. This is because the government of the day which ought to be in the fore front in the fight against forced sterilization are themselves the perpetrators of the crimes. This they achieve through national policies and legislative enactments aimed at enhancing population control and creating a decent society. The international criminal court, as the last hope of the international community, should, as a matter of urgency, acting under the

principle of complementarity in article 17 (1) (b) of the Rome Statute which deals with the "unwillingness" and "inability" of states, step in to ensure justice is done to the victims of forced sterilization, and at the same time, ensure that national governments and state parties acting in contravention of the Rome Statute are promptly and adequately prosecuted as this would serve as a deterrent to other countries which through national policies carry out the forced sterilization of women with HIV and young girls with intellectual disabilities.

8.0 RECOMMENDATIONS

The practice of forced sterilization constitutes a widespread violation of internationally recognized human rights. Forced sterilization of women with HIV and adolescent girls with intellectual disabilities is a serious global challenge as women are affected all over the world particularly in Africa. The author argues that it is primary responsibility of national governments to ensure that the rights of its citizens are protected, and this could be done by ensuring that enabling laws are enacted and taking deliberate steps to enforce extant human rights standards in the country.

There is the need to target the physical well- being of the women who are sterilized, the women need to be offered free medical examinations and treatment, and both national government and Civil Society Organizations need to collaborate to make available a comprehensive medical health care for sterilized women across the international community.

Additionally, Lawyers, legal bodies and NGOs needs to synergize at national levels to fight for financial compensation for victims of forced sterilization. It is through this act of litigation that survivors can get justice and adequate reparation.

There is the need for the enactment of anti-discrimination laws to protect the rights of women living with HIV and girls with intellectual disabilities in the

different countries under review, particularly their right not to be discriminated against in retaining their fertility. It is important to have national governments within the international community to have legislation in place in for instance, to prevent substitute decision making in providing consent to sterilization for women and young girls with disabilities. Healthcare workers must ensure that third party decisions are not the basis for sterilization of women and adolescent girls with intellectual disabilities. The laws should have stringent punishments meted out on violators, aside from punishments of fines and incarceration for a period of not less than 15 to 20 years, to serve as deterrent to prospective offenders. The author advocates that the medical license of violating medical practitioners should be suspended or revoked in the event that sterilization is performed without the free, full and informed consent of the victim as this would serve as good deterrent in putting a stop to the practice.[143]

Furthermore, it is imperative that healthcare providers should be adequately trained on how to provide clear information to patients at every stage of their treatment and promptly educate patients on the medical procedure to be adopted to enable them give free and informed consent. Women and adolescent girls that have suffered forced sterilization should be awarded adequate reparation to mitigate the social and psychological harm which they have suffered.[144]

Furthermore, there is the urgent need of awareness raising and enlightenment initiatives within all the countries across the international community by all relevant stakeholders to ensure that marginalized and vulnerable groups within society are fully abreast of their sex and reproductive rights, and that issues of forced sterilization are brought to a quick end.

143 McLaughlin LC, The price of failure of informed consent: coercive sterilizations of HIV-positive women in South Africa, Law inequal. (2014) Vol.32 at p.69

144 Ibid

National Governments within the African region are particularly called upon to put measures in place to implement Resolution 260 of the African Commission which is an important provision against the forced sterilization of women without their free consent as the violation of human rights, thus, national leaders and governments are to work hard to stop this wicked practice within their countries.[145] This can effectively be done by having sound law, effective enforcement mechanism and promptly prosecuting individuals who violate such national and international laws on sterilization.

9.0 CONCLUSION

The paper highlights that forced sterilization is a grave violation of human rights of the affected victims. It further discusses the nature and effects of forced sterilization on women across the international community. It similarly examined the historical perspective and the existing legal instruments available both at the national and international level for combating the crime of forced sterilization. Recent cases or judicial decisions on forced sterilization were also examined together with other possible judicial institutions that victims can approach to seek redress in the event of violation of their rights to free and full consent to their rights to family life and sexuality.

Women around the world have continued to be victims of forced or coerced sterilization, the paper therefore established that majority of these women are compelled to carry out sterilization because they are HIV positive or disabled for no fault of theirs. Sterilization, by all standards, ought to be carried out on a person with his or her full and free consent, but where an individual is sterilized without consent, that automatically qualifies as a violation of human rights thereby disregarding person's rights to autonomy, liberty and dignity, to have family and health.[146] The obvious acknowledgement that the crime of forced sterilization of women and girls is seriously considered a

145 Ibid

146 Ebenezer Durojaye, "Involuntary Sterilization as a Form of Violence against Women in Africa" (2018), Vol. 53 (5) Journal of Asian and African Studies at p. 730

breach or violation of their fundamental human rights to freely determine their reproductive health and family life is key to nipping the crime in the bud.

As a result of impunity and lack of political will on the part national leaders and governments, it becomes critical for the International Criminal Court to step in as a court of last resort to investigate and also prosecute cases of forced or coerced sterilization within the international community as a war crime and crime against humanity, this so because articles 7 (1) (g) and 8 (2) (xxiii) of the Rome Statute recognizes the forced sterilization of women as both a war crime and crime against humanity. Again, article 17 (1) (b) of the Rome Statute makes provision for the complementarity jurisdiction of the ICC empowering it to step in to ensure justice is done in any member country which has demonstrated the Rome Statute is unwilling and unable to investigate and prosecute such crimes through its national courts.

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TO HAVE OR NOT TO HAVE: GENETICALLY MODIFIED FOODS AND THEIR IMPLICATION ON THE RIGHT TO ADEQUATE FOOD.

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TO HAVE OR NOT TO HAVE: GENETICALLY MODIFIED FOODS AND THEIR IMPLICATION ON THE RIGHT TO ADEQUATE FOOD.

Rita Owach*

ABSTRACT

Genetically modified (GM) foods are a contentious global issue. Uganda, after 2007, has made significant strides but still lacks domestic legislation governing GMOs after failure by the President to the passed National Biotechnology and Biosafety Bill of 2012.In 2022, some Ugandan Members of Parliament departing from Kenya's legalization of GM crops at the time, argued that GMOs have no benefits and that proponents aim to control the nation's food production. And yet, the right to adequate food is crucial and linked to the realization of other human rights. In the foregoing, this article, by reviewing legal frameworks and some principles in decided cases, explores how GM foods impact the realization of this fundamental right and makes some key recommendations.

1.0 INTRODUCTION

Genetically modified foods are foods produced from or using genetically modified organisms.[1] Genetically modified organisms (GMOs), sometimes known as living modified organisms, are living organisms that possess a novel combination of genetic material obtained through the use of modern biotechnology.[2] They are organisms in which a gene or genes has/have been artificially inserted.[3] The earliest concept of modification –for domestication and consumption –of plants dates back 10,000 years when human ancestors practiced 'selective breeding' and 'artificial selection' –broadly referring to the

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1 World Health Organisation, 'Food, genetically modified' (*WHO*, 1 May 2014) <https://www.who.int/news-room/questions> [Accessed 24 July 2024]

2 Cartagena Protocol on Biosafety 2000. Article 3(g)

3 Ministry of Finance, Planning and Economic Development, *National Biotechnology and Biosafety Policy,* (April, 2008).

selection of parent organisms having desirable traits (for example hardier stems) and breeding them for their propagating traits.[4] The first GM plants – antibiotic-resistant tobacco and petunia – were successfully created in 1983.[5] In 1994, the Flavr Savr tomato (Celgenes, USA) became the first-ever Food and Drug Administration (FDA) approved GM plant for human consumption.[6]The first genetically modified crop to be commercialized was BT maize in 1996 in the U.S.A.[7] This number has since increased for example by 2006, the number had since increased to 25 within the European Union.[8]

Regionally, Kenya is leading in the development and application of modern biotechnology with several crops including GM cotton, maize, sweet potatoes, and cassava being developed and tested in confined field trials.[9] In 2011, a record 16.7 million farmers, up 1.3 million or 8% from 2010, grew biotech crops – notably over 90%, or 15 million, were small resource-poor farmers in developing countries.[10] Today, more than 17 million farmers are planting GM crops in 29 countries, and are reaping higher yields with reduced use of pesticides and better management of weeds among other benefits.[11] With the number of farmers growing biotech crops increasing, it is important to understand how these crops affect the right to adequate food.

The right to adequate food is a key right necessary for the well-being of human beings. It is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health,

4 Ruchir Raman, 'The impact of Genetically Modified (GM) crops in modern agriculture: A review' (2017 Oct 2) 8(4) PubMed <https://pubmed.ncbi.nlm.nih.gov/29235937/> [Accessed 23 September 2023]

5 Ibid.

6 Ibid. Also see A.S Bawa & K.R Anilakumar, 'Genetically modified foods: safety, risks and public concerns-a review' (2012 Dec 19) 50(6) NCBI <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3791249/> [Accessed 23 July 2023]

7 supra note 6

8 Ibid.

9 Supra note 6

10 Clive James, *Global Status of Commercialized Biotech/GM Crops: 2011* (ISAAA Brief 43, 2011)

11 Food and Agriculture Organisation of the United Nations, 'Genetically modified crops: Safety, benefits, risks and global status' (*FAO*, 2022) <https://www.fao.org/> [Accessed 27 July 2023]

education, work, and political participation.[12] This right is recognized when every man, woman, and child, alone or in a community with others, has physical and economic access at all times to adequate food or means for its procurement.[13] It is to be progressively realized and imposes obligations on state parties to respect, protect, and fulfil it.

2.0 GENETICALLY MODIFIED FOODS AND THE RIGHT TO ADEQUATE FOOD.

At its core, the right to adequate food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture as well as the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[14] The intersection between genetically modified foods and the right to adequate food provided for in various legal instruments[15] can be explored in terms of food availability and food security, food accessibility, and food sovereignty.

2.1 GMO foods and food availability

In terms of the right to adequate food, availability refers to the possibilities either of feeding oneself directly from productive land or other natural resources; or for well-functioning distribution, processing, and market systems that can move food from the site of production to where it is needed

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12 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,* [2001] (Comm. No. 155/96) African Commission on Human and People's Rights

13 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)* at paragraph 6 available at <https://www.refworld.org/docid/4538838c11.html> [Accessed 27 July 2023]

14 Ibid at paragraph 8.

15 The right to adequate food is provided for in Article 11 of the International Covenant on Economic, Social and Cultural Rights, Article 25(1) of the Universal Declaration of Human Rights, Article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 24(2)(c) and 27 of the Convention on the Rights of the Child. Uganda ratified the ICESCR on 21st January, 1987, the CEDAW on 22nd July, 1985 and the CRC on 17th August, 1990 (See United Nations Human Rights Treaty Bodies, 'Ratification Status for Uganda' (*OHCHR*) <https://tbinternet.ohchr.org/> [Accessed 25 July 2023]

by demand.[16] The right to adequate food requires the availability of food in a quality and quantity sufficient to meet the dietary needs of individuals. Genetically modified foods with improved resistance to pests and diseases contribute to increased availability of food in the quantity and quality needed to satisfy the dietary needs of individuals hence enhancing the realisation of the right to adequate food.

In terms of quantity, genetically modified crops resistant to biotic stress could lead to increased plant output.[17] Given that the genetically modified crops currently on the market are mainly aimed at an increased level of crop protection through the introduction of resistance against plant diseases caused by insects or viruses or through increased tolerance towards herbicides,[18] growing such foods could reduce the loss that would have resulted due to pests and diseases (biotic stress.)[19] This in turn leads to an increase in the quantity of food which can then be made available to the population hence facilitating the realisation of the right to adequate food. Additionally, genetically modified plants that are more resistant to abiotic stress could lead to an increase in the quantity of plant output, thereby

16 Supra note 16

17 N V Fedoroff, D S Battisti, R N Beachy, P J M Cooper, D A Fischhoff, C N Hodges, V C Knauf, D Lobell, B J Mazur, D Molden, M P Reynolds, P C Ronald, M W Rosegrant, P A Sanchez, A Vonshak, J-K Zhu, 'Radically Rethinking Agriculture for the 21st Century' (2010) 327(5967) PUBMED available at <https://pubmed.ncbi.nlm.nih.gov/20150494/> [Accessed 11 August, 2023] See also: Mark Tester, Peter Langridge, 'Breeding technologies to increase crop production in a changing world' (2010) 327(5967) PUBMED available at <https://pubmed.ncbi.nlm.nih.gov/20150489/> [Accessed 11 August 2023] cited in Matin Qaim, Shahzad Kouser, 'Genetically Modified Crops and Food Security' (2013) 5(8) PUBMED available at <https://pubmed.ncbi.nlm.nih.gov/23755155/> [Accessed 11 August 2023]

18 World Health Organisation, 'Food, genetically modified' (*WHO,* 1 May 2014) available at <https://www.who.int/news-room/> [Accessed 24 July 2024]

19 FAO estimates that annually up to 40 percent of global crop production is lost to pests while plant diseases cost the global economy over $220 billion, and invasive insects at least $70 billion. (See Food and Agriculture Organisation of the United Nations, 'Climate change fans spread of pests and threatens plants and crops, new FAO study' (*FAO,* 2 June, 2021*)* available at <https://www.fao.org/news/> [Accessed 11 August 2023] Also see United Nations, 'UN focus on plant health, crucial for boosting food security worldwide' (*UN,* 12 May, 2022) available at <https://news.un.org/en/story/> [Accessed 11 August 2023] where it was noted that up to 40% of food crops are lost due to plant pests and diseases.)

increasing the amount of food that could be made available to the population hence facilitating the realization of the right to adequate food.

Genetically modified foods also present an opportunity for improvement in the quality of foods consumed by individuals through bio fortification.[20] A case in point is the golden rice created by researchers in Germany and Switzerland and rich in vitamin A.[21] Given that approximately 140 million children in low-income groups in 118 countries, especially in Africa and South East Asia, are deficient in Vitamin A,[22] genetically modified foods like golden rice rich in vitamin A could be used to mitigate this challenge.

2.2 GMO foods and food accessibility

At its core, accessibility in terms of the right to adequate food includes both economic and physical accessibility. Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level whereby the attainment and satisfaction of other basic needs are not threatened or compromised.[23] Physical accessibility, on the other hand, implies that adequate food must be accessible to everyone, including physically vulnerable individuals such as infants and young children, elderly people, the physically disabled, the terminally ill, and persons with persistent medical problems including the terminally ill.[24]

Genetically modified crops contribute to increased economic accessibility of food. This is so especially for those crops that produce higher yields for

20 Biofortified crop varieties are those which have been nutritionally enhanced using conventional plant breeding or modern biotechnology, (including recombinant DNA techniques). (See HarvestPlus & FAO '*Biofortification: A food-systems solution to help end hidden hunger,*' [2019] at p 2 available at <https://www.fao.org/publications/> [Accessed 14 August 2023]

21 Kaiser Jamil (UN Chronicle), 'Biotechnology-A Solution to Hunger?' (*UN)* available at <https://www.un.org/en/chronicle/> [Accessed 14 August 2023]

22 Ibid

23 supra note 16

24 Ibid

example Bt cotton.[25] Higher yields translate into higher household income[26] which could lead to an increase in purchasing power for different items including food. On the flip side, the exorbitant prices of genetically modified seeds[27] could interfere with the accessibility of these seeds by farmers who are not able to afford them. This is detrimental to the realization of the right to seeds provided for in Article 19 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).

Additionally, in discussing accessibility, the right to adequate food implies accessibility of food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[28] The notion of sustainability implies food being accessible for both present and future generations.[29] For this to happen, biodiversity ought to be preserved. Such preservation contributes to a diverse range of plant genetic resources which could then be grown to make food available for consumption by the population. There are however arguments that genetically modified foods could interfere with biodiversity in cases where they interbreed with wild species in the area possibly

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25 JiKun Huang, JianWei Mi, Hai Lin, ZiJun Wang, RuiJian Chen, RuiFa Hu, Scott Rozelle, Carl Pray, 'A decade of Bt cotton in Chinese fields: assessing the direct effects and indirect externalities of Bt cotton adoption in China' (2010) 53(8) PUBMED available at <https://pubmed.ncbi.nlm.nih.gov/20821297/> [Accessed 15 August 2023] Also see Matin Qaim, 'The economics of genetically modified crops' (2009) 1:1 Annual Review of Resource Economics, 665–693 <https://www.annualreviews.org/> [Accessed 15 August 2023] cited in Matin Qaim, Shahzad Kouser, 'Genetically modified crops and food security' (2013) 8(6) NCBI available at <https://www.ncbi.nlm.nih.gov/> [Accessed 15 August 2023]

26 According to a study done in India, each additional hectare of Bt cotton produces 82% higher aggregate incomes than are obtained from conventional cotton, implying a remarkable gain in overall economic welfare through technology adoption in India. (See also: Matin Qaim, 'The economics of genetically modified crops' (2009) 1:1 Annual Review of Resource Economics, 665–693 at 674 available at <https://www.annualreviews.org/doi/10.1146/> [Accessed 15 August 2023] Moreover, Bt cotton farmers make an important additional profit, between 135 USD per ha (in India) and 470 USD per ha (in China). See Maria Lusser, Terri Raney, Pascal Tillie, Koen Dillen & Emilio Rodriguez Cerezo, *International workshop on socio-economic impacts of genetically modified crops co-organised by JRC-IPTS and FAO,* (Joint Research Centre of the European Commission, 2012) at page 25.

27 The issue of exorbitant prices of genetically modified seeds was an issue in Burkina Faso where farmers there abandoned the cultivation of BT cotton due to the high prices of BT cotton seed and its poor quality compared to their indigenous cotton seed. (See Claire Nasike, 'GMOs: A neo-colonial technology undermining food and seed sovereignty in Kenya' (*GREENPEACE* 13th October, 2022) available at <https://www.greenpeace.org/> [Accessed 15 August 2023]

28 Supra note 16

29 Ibid at paragraph 7.

outcompeting them and leading to their decline or possible extinction.[30] Genetically modified foods must therefore, be adopted only after risk assessments are performed concerning their effect on the conservation and sustainable use of biodiversity and it is proved that the benefits outweigh the risks.

Fortunately, there are already laws in place to help with this, for example, the Cartagena Protocol on Biosafety[31] which obligates parties to ensure that the development, handling, transport, use, transfer, and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.[32] The protocol, in Article 11, also lays down the procedure for living-modified organisms intended for direct use as food or feed or processing. It requires that risk assessments are carried out to evaluate and identify possible adverse effects of living-modified organisms on the conservation and sustainable use of biological diversity, also taking into account risks to human health.[33] Such laws ensure that even in the adoption and use of genetically modified foods, the conservation and sustainable use of biological diversity key contributor to the sustainability of food produced as discussed above remains a key consideration.

It is also important to ensure that in the adoption of genetically modified foods, the aspect of biosafety remains a key consideration. Genetically modified foods are associated with some biosafety risks for example

30 Young, Tomme, 'Genetically Modified Organisms and Biosafety: a background paper for decision-makers and others to assist in consideration of GMO issues' (*IUCN,* August 2004) available at <https://www.iucn.org/resources/> [Accessed 17 September 2023]

31 Uganda ratified the Cartagena Protocol on bio safety on 30th November, 2001. (See Convention on Biological Diversity, 'Parties to the Cartagena Protocol and its Supplementary Protocol on Liability and Redress: Status of Ratification and Entry into Force' (*CBD*) available at <https://bch.cbd.int/protocol/parties/> [Accessed 31 July 2023]

32 Cartagena Protocol on Biosafety 2000, Article 2(2)

33 Cartagena Protocol on Biosafety 2000, Article 25

allergenicity and toxicity.[34] Some countries have even imposed bans on genetically modified organisms.[35] To promote biosafety during the use of genetically modified organisms, the Cartagena Protocol on biosafety establishes a biosafety clearing house meant to inter alia, facilitate the exchange of scientific, technical, environmental, and legal information on, and experience with, living modified organisms.[36] This is useful in controlling and monitoring biosafety risks including those that could arise from genetically modified foods.

2.3 GMO foods and food sovereignty

Food sovereignty as a concept rests on six pillars: it focuses on food for the people, values food suppliers, localizes food systems, places control at the local level, promotes knowledge and skills, and works with nature.[37] The right to food sovereignty is recognized in international instruments for example in Article 15(4) of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)[38] where peasants and other people working in rural areas have a right to participate in decision-making processes on food and agriculture policy and the right to healthy and

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34 In terms of allergenicity, the proteins produced by any newly introduced genes have the potential to cause allergies. There are also concerns raised on the possibility of introducing new toxic substances or increasing the levels of those naturally occurring toxins which are harmful to human health with respect to GM foods. (See Motbaynor Terefe, 'Biosafety Issues of Genetically Modified Crops: Addressing the Potential Risks and the Status of GMO Crops in Ethiopia' (2018) 07(02) Cloning & Transgenesis available at <https://www.researchgate.net/publication/> [Accessed 31 July 2023]

35 Some of the countries that have banned GMOs include France, Germany, Austria, Greece, Hungary, the Netherlands, Latvia, Luthania, Luxembourg, Bulgaria, Poland, Denmark, Malta, Slovenia, Italy, Croatia, Algeria, Madagascar, Turkey, Kyrgyzstan, Bhutan, Saudi Arabia, Belize, Ecuador, Peru and Venezuela. (See World Population Review, 'Countries that Ban GMOs 2023' (*World population review)* available at <https://worldpopulationreview.com/> [Accessed 14 September 2023]

36 Cartagena Protocol on Biosafety 2000, Article 20(1)(a)

37 Gustavo Gordillo & Obed Mendez Jeronimo, *Food Security and Sovereignty,* (Food and Agriculture Organisation of the United Nations 2013) page 3. Also see Slow Food, 'Why we are against GMOs' (*Slow Food*) available at <https://www.slowfood.com/what-we-do/> [Accessed 13 September 2023]

38 The United Nations Declaration on the Rights of Peasants and Other People working in Rural Areas (UNDROP) provides for the rights of people working in rural areas and centres on the right to land, seeds and biodiversity as well as several 'collective rights' anchored in food sovereignty. (See FAO, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas ¬Book of Illustrations¬' (*FAO)* available at <https://www.fao.org/plant-treaty/> [Accessed 13 September 2023]

adequate food produced through ecologically sound and sustainable methods that respect their culture. Summarily, food sovereignty is the right of people to healthy and culturally appropriate food produced through ecologically sound and sustainable methods and their right to define their own food and agriculture systems.[39]

Genetically modified foods, however, negatively interfere with the right to food sovereignty. This occurs due to the control wielded by multinationals over seeds and the gradual abandonment of local seeds by rural communities as well as the loss of rural communities.[40] Moreover, genetically modified seeds could also threaten seed sovereignty by holding farmers in debt cycles due to the exorbitant prices of genetically modified seeds which could then reduce their ability to produce more food for consumption.[41] There are also arguments that many of the largest manufacturers of agrochemicals in the world are also among the largest seed companies in the world, and control the development of GM crops.[42] As such, allowing genetically modified crops is akin to relinquishing sovereignty and decision-making on the crucial aspect of seeds and putting it in the hands of a few transnational companies[43] whose sole motive is corporate control.

Concentrating seeds in the hands of a few is detrimental to the realization of the right to adequate food as it interferes with the ability of people to grow and access food if the seeds become too expensive to be afforded by everyone. It is also contrary to treaties like the International Treaty on Plant Genetic Resources for Food and Agriculture[44] which aims at the fair and equitable

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39 Bina Agarwal, 'Food sovereignty, Food Security and Democratic Choice: Critical Contradictions, Difficult Conciliations,' (2014) 41(6) The Journal of Peasant Studies available at <https://www.researchgate.net/> [Accessed 24 August 2023]

40 Slow Food, 'Slow Food Position Paper on Genetically Modified Organisms' (December 2016) at p 6 available at <https://www.slowfood.com/> [Accessed 24 August 2023]

41 Claire Nasike, 'GMOs: A neo-colonial technology undermining food and seed sovereignty in Kenya' (*GREENPEACE*, 13th October 2022) available at <https://www.greenpeace.org/africa/> [Accessed 13 September 2023]

42 Veronica Villa, 'Why Genetically Modified Crops Pose a Threat to Peasants, Food Sovereignty, Health and Biodiversity on the Planet,' (*etc GROUP*, 14 August, 2014) available at <https://www.etcgroup.org/content/> [Accessed 13 September 2023]

43 Ibid.

44 Uganda is a contracting party of this treaty which entered into force on 29th June, 2004. (FAO, 'International Treaty on Plant Genetic Resources for Food and

sharing of the benefits arising out of the use of plant genetic resources for food and agriculture, in harmony with the Convention on Biological Diversity, for Sustainable Agriculture and Food Security.[45] Under this treaty, one of the ways of fairly and equitably sharing the benefits of plant genetic resources is that these benefits shared under the multilateral system should flow primarily, directly and indirectly to farmers in all countries, especially in developing countries.[46] However, the concentration of genetically modified seeds in the hands of a few transnational companies may interfere with this in cases where the benefits do not flow down to the farmers but remain within the hands of the few transnational companies that control the seeds.

Additionally, when a small section of the population controls the seeds, the larger section of the population could lose their ability to determine their own food and agriculture systems and participate in the decision-making process on food policy which ultimately interferes with the right to food sovereignty recognized in Article 15(4) of the United Nations Declaration on the Rights of Peasants and Other People working in Rural Areas (UNDROP).

Genetically modified foods could also pose a risk to the food culture of a population. While the right to food also requires that the food is acceptable within a given culture,[47] genetically modified foods may threaten local food cultures and value systems connected to food consumption and production.[48] Given that they involve transferring new DNA into plant cells, they could be seen as a means of moving away from traditional agriculture and food practices which form an essential component of a people's identity and culture. Moreover, the stringent application of intellectual property protection systems on genetically modified seeds may threaten traditional farm practices

Agriculture, (*FAO)* available at <https://www.fao.org/plant-treaty/> [Accessed 24 July 2023]

45 International Treaty on Plant Genetic Resources for Food and Agriculture, Article 1.1

46 International Treaty on Plant Genetic Resources for Food and Agriculture, Article 13.3

47 supra note 16 at paragraph 8.

48 Mugwagwa, Julius T. and Rutivi, Cathy, 'Socio-economic impact of GMOs on African consumers' (2009) in Buntzel, Rudolf (ed), *Genetic Engineering and Food Sovereignty: Reader on Studies and Experiences.* (Bonn, Germany: Church Development Service (EED), pp. 55–66. at page 58.

of saving, reusing, sharing, exchanging, and selling farm-saved seeds.[49] This argument may however be countered on grounds that even other seeds like hybrid seeds (which have been around for some time) are still not saved and reused as buying new seeds each season may lead to increased yields.[50] As such, the argument that genetically modified seeds interfere with the saving and reusing of seeds due to the intellectual property rights of the producers may not be a plausible one.

3.0 RECOMMENDATIONS

Genetically modified foods can contribute to the realization of the right to adequate food. They could contribute to an increase in the quantity of food available due to increased plant output, especially for those genetically modified foods with improved resistance to biotic and abiotic stress. Genetically modified foods of improved quality for example golden rice rich in vitamin A could also help to solve nutrient challenges facing the population. On the flip side, these foods pose a risk of interfering with food sovereignty and the right to seeds. Controversy has also arisen concerning genetically modified foods about biosafety and their impact on the preservation and conservation of biodiversity. While these foods could be adopted due to their benefits regarding the realization of the right to adequate food discussed above, the risks associated with them must be considered and managed.

A good starting point would be the employment of the precautionary principle. This principle is provided for in laws such as the African Model Law on

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49 ibid. Intellectual property issues for example infringing on patents due to unauthorised saving and planting of genetically modified seeds was discussed in the case of *Monsanto Company v Schmeiser Enterprises Ltd* (2004) SCC 34 [2004] 1 SCR 902. In this case, when a farmer knowingly planted seed that had been saved from a field onto which genetically modified canolla pollen had blown, court held that he had wilfully violated the patent Monsanto owned on genetically modified seed.

50 Monitor, 'Farmer's Diary: Don't keep seeds form previous harvests' (*Monitor,* 20 November 2012 updated on 6 January 2021) available at <https://www.monitor.co.ug/uganda/> [Accessed 17 September 2023] Also see Alliance for Science, '10 Myths About GMOs' (*ALLIANCEFORSCIENCE)* available at <https://allianceforscience.org/> [Accessed 17 September 2023]

Biosafety, and involves regulating any undertaking for the import, transit, contained use, release, or placing on the market of genetically modified organisms and the products of genetically modified organisms.[51] Any person who wishes to import, transit, or place on the market a genetically modified organism or a product of a genetically modified organism intended for direct use as food feed, or processing must apply in writing to a competent authority[52] and applicants are to carry out a risk assessment for genetically modified organisms or products of genetically modified organisms for which they are applying.[53]

Domestically, the precautionary principle is upheld by bodies like the Uganda National Council for Science and Technology. This body is the designated competent authority for biotechnology and biosafety in Uganda.[54] The Council is also responsible for the implementation of the National Biotechnology and Biosafety Policy (April 2008) which provides a framework for the safe application of biotechnology to contribute to Uganda's economic growth and transformation.[55]

There should also be strict implementation of policies governing biosafety in the testing and evaluation of genetically modified crops for example the National Guidelines for Field Trials of Genetically Engineered Plants.[56] Strict

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51 See Model Law for Safety in Biotechnology for Africa, The Preamble accessible at Biosafety Information Centre, 'Model Law for Safety in Biotechnology for Africa' available at <*https://biosafety-info.net/articles/*> [Accessed 17 September 2023] This law was formally known as The Africa Model Law on Safety in Biotechnology and was adapted by the African Union in 2003. (See Haidee Swanby, *The Revised African Model Law on Biosafety and the African Biosafety Strategy* (African Centre for Biodiversity Briefing Paper No. 9. 2009) at page 4.

52 Model Law for Safety in Biotechnology for Africa, Article 4(4).

53 Model Law for Safety in Biotechnology for Africa, Article 8.

54 Uganda Biosciences Information Centre, 'Facts About Biosafety and Biotechnology in Uganda by 2016' (*FAO*) available at <https://www.fao.org/fileadmin/> [Accessed 15 September 2023]

55 supra note 6

56 The National Guidelines for Field Trials of Genetically Engineered Plants were formed by Uganda National Council for Science and Technology (UNCST) with the aim of ensuring biosafety in the testing and evaluation of GE plants, especially where testing is done in field situations; establishing a coherent system for regulating, executing and overseeing field trials of GE plants; and equipping regulators, authorized parties, and trial managers, with tools for risk assessment and management of field trials for GE plants. (See Uganda National Council for Science and Technology *National Guidelines for Field Trials of Genetically Engineered Plants* (UNCST 2011, Kampala.)

implementation of such policies ensures that the risks associated with genetically modified foods/crops are managed such that the modified crops result in more good than harm. There is also a need for increased capacity building of such regulatory bodies to facilitate the effective implementation of policies and guidelines governing genetically modified foods. Such capacity building could be through increased financing to support activities of such bodies and training of human resources to help in the implementation process.

Regulation in terms of express domestic legislation on genetically modified foods and genetically modified organisms is another key consideration. Despite previous attempts to finalize legislation on genetically modified organisms, there is still no express law on the same in Uganda.[57] There is a need to come up with clear domestic laws on genetically modified foods and genetically modified organisms. Caution must however be taken to ensure the legislation contains adequate safeguards concerning the risks that could arise from genetically modified foods and organisms.

The voice of local farmers should also be strengthened to ensure these farmers have a say in the food policy concerning genetically modified foods. This ultimately supports the tenet of food sovereignty which involves the right to participate in decision-making processes on food and agriculture policy.

4.0 CONCLUSION

With 24.9% of the Ugandan population facing moderate or severe food insecurity,[58] genetically modified foods offer a solution to this challenge. They

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57 The attempts to legislate on genetically modified foods have so far been unsuccessful with the National Biotechnology and Biosafety Bill of 2012 not being signed by the president in 2017 and 2021. In 2022, there was a move by a section of Members of Parliament to introduce a bill prohibiting genetically modified foods in Uganda. (See supra note 3).

58 FAO, IFAD, UNICEF, WFP & WHO, *The State of Food Security and Nutrition in the World Urbanization, agrifood systems transformation, and healthy diets across the rural–urban continuum* (Rome, FAO 2023) page 150 available at <https://www.fao.org/> [Accessed 15 September 2023]

enhance the realization of the right to adequate food by contributing to an increase in the quality and quantity of food available to meet the dietary needs of individuals. These foods may however pose a threat to food sovereignty, seed rights, and biodiversity. As such, caution must be taken while regulating genetically modified foods. These foods should only be adopted after rigorous risk assessments have been conducted to evaluate their impact on biosafety and biodiversity. Furthermore, these foods should be embraced only when a comprehensive understanding of their advantages and disadvantages confirms that the benefits outweigh the drawbacks.

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CRYPTOCURRENCY AS A SECURITY ASSET: ANALYZING THE ROLES OF VARIOUS STAKEHOLDERS IN THE ADOPTION OF VIRTUAL ASSETS UNDER THE CAPITAL MARKETS AUTHORITY (AMENDMENT) BILL, 2023

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CRYPTOCURRENCY AS A SECURITY ASSET: ANALYZING THE ROLES OF VARIOUS STAKEHOLDERS IN THE ADOPTION OF VIRTUAL ASSETS UNDER THE CAPITAL MARKETS AUTHORITY (AMENDMENT) BILL, 2023

Aggrey Bazirake*

ABSTRACT

The Fourth Industrial Revolution has ushered in blockchain and virtual assets develop and significantly impact social, economic, and political spheres, including Uganda's financial ecosystem. However, Uganda Securities Exchange has yet to adopt these technologies. Hon. Nathan Igeme's Capital Markets Authority (Amendment) Bill 2022 seeks to amend the Capital Markets Authority Act to regulate virtual assets like cryptocurrencies and licensed operators, rather than just products and activities. This article explores the potential consequences of this regulatory development and the measures that need to be taken to seamlessly integrate it into Uganda's securities framework and stock exchange. It examines the roles of various stakeholders and identifies vulnerabilities that could compromise the system's efficacy.

1.0. INTRODUCTION

The concept of the 'Fourth Industrial Revolution' originated from to a team of scientists who developed a high-tech strategy for the German government, in an article published by the Foreign Affairs.[1]The term 'Fourth Industrial Revolution' was coined by Klaus Schwab,[2]to describe a world in which individuals seamlessly transition between digital domains and offline reality,

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1 Schwab, Klaus (12 December 2015). The Fourth Industrial Revolution, Foreign Affairs. Accessed on June 29, 2023

2 Founder and Executive chairman of the World Economic Forum

leveraging connected technology to enhance and manage their lives.[3]This concept emerged in Germany between 2011 and 2015 with a primary focus on the practical application, and implementation of digital technologies.[4]
This revolution has been characterized by the advent of artificial intelligence, the Internet of Things,[5] the potential of quantum computing, and the utilization of distributed ledger systems.[6] It represents a phase in the digital transformation of the manufacturing sector, driven by disruptive trends through enhanced connectivity, human-machine interaction and improvement in robotics. Consequently, this has presented unprecedented opportunities for individuals, industries, and nations worldwide through application of blockchain technology, artificial intelligence, virtual reality, and robotics.

Blockchain is the cornerstone of the fourth industrial revolution, operating a decentralized system in the form of a digital ledger that stores and chains together encrypted blocks of digital assets.[7] Virtual assets, such as cryptocurrencies, leverage blockchain technology and, due to their decentralized nature, are not reliant on any centralized point of authority, including central banks or commercial bank, for their operation and validation.

Apparently, Uganda lacks a legal framework governing the use of cryptocurrencies, as there is no legislation permitting or prohibiting their use or trade.[8] On 29th April, 2022, the Bank of Uganda issued a circular

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3 Hassoun, A, Ait-Kaddour, Abu-Mahfouz, A.M Rathod, N.B Bader, F Barbra, F.J & Regenstein. J (2023) The Fourth industrial revolution in the food industry- Part 1: Industry 4.0 technologies. Critical Reviews in Food Science and Nutrition 63, no. 23 (2023) 6547-6563

4 Journal of International Affairs, Vol 72, No. 1

5 This describes a network of connected devices and technology embedded with sensors, software for purposes of connecting, and exchanging data with other devices over the internet. These include LAN, LPWAN, and Mesh Protocols.

6 Chou, S. Y. (2018). The fourth industrial revolution. Journal of International Affairs, 72(1), 107-120.

7 A blockchain works in form of a distributed ledger system where data used in transactions are stored in a publicly available blocks containing a digital signature and timestamp for them to be individually immutable chain of blocks hence blockchain

8 Silver Kayondo v Bank of Uganda (Miscellaneous Cause No. 109 of 2022) UGHCCD 113 (24 April 2023)

cautioning licensed financial institutions and payment merchants, including mobile money operators, against trading and engaging in cryptocurrency transactions, citing the risks associated with this technology.

In a correspondence between the Capital Markets Authority and Binance Limited, the latter had submitted a request to operate a crypto asset exchange. However, in a letter dated 15th August, 2018, the Capital Markets Authority declined this request, citing that it fell outside its regulatory purview. The Capital Markets Authority relied on the fact that Binance Limited was engaged in the in exchange of securities or securities related assets. However, although there's currently no regulatory framework governing virtual assets, they nonetheless continue to exist and operate within Uganda's jurisdiction.[9]

This article examines the move by Hon. Igeme Nabeta to table a Private Member's Bill, the Capital Markets Authority (Amendment) Bill. The proposed legislation seeks to regulate the transfer of virtual assets by specifying the due diligence requirements for service providers to facilitate asset tokenization on the blockchain.[10] It establishes a nexus between blockchain technology and virtual assets, such as crypto currencies, while considering the roles and responsibilities of various stakeholders in achieving its objectives.

2.0. BLOCKCHAIN AND CRYPTO ASSETS

2.1. BLOCKCHAIN

A blockchain is a decentralized, distributed database that is replicated across a network of computers or nodes, each containing identical information. Each node is linked to all preceding blocks, tracing back to the inaugural block, known as *the genesis block*. A node may be designated as a miner when it proposes, validates, and confirms transactions, and performing mining

9 Regulatory Options for Crypto Assets in Uganda Final.pdf available at <https://cmauganda.co.ug/wp-content/> [Accessed on 18 September 2023]

10 This refers to the process of representing ownership of an asset as a digital token on the blockchain network. It allows for the asset to be stored, transferred, and traded in a secure, transparent, and decentralized manner. Tokenization is a process of creating a digital representation of an asset, called a token, which is stored on the blockchain.

operations to achieve consensus, thereby securing the blockchain. This blockchain technology can facilitate various functions, including simple payment verification, among others, depending on the specific blockchain implementation.

Blockchain technology is predicated on a decentralized network, functioning as a peer-to-peer network rather than a centralized authority, such as a bank. It maintains a distributed database of transaction records, validated and upheld by a global network of computers. The integrity of these records is ensured by a vast community of supervisors, precluding any single individual from exerting control, thereby rendering the information tamper-proof. Furthermore, the decentralized nature of the network makes it impossible to pinpoint the specific location of any particular data element.[11]

More to the above, a blockchain is a decentralized ledger of distributed database of records, or public ledger of all transactions that have been executed and shared among participating parties. This decentralized ledger shares and replicates database, synchronized across the network, maintaining a permanent and tamper-proof record of transactions among the participants. The decentralized nature of blockchain technology renders it resilient to interference from any individual, entity, or system. The inherent characteristic enables the network to mitigate common challenges in the financial markets such as counterfeiting, forgery and double transactions. The utilization of advanced cryptographic techniques ensure that these systems are completely immune against fraud and counterfeiting, providing a secure and tamper-proof environment for transactions.

Satoshi Nakamoto is widely regarded as the inventor of blockchain technology, which was first introduced in the 2008 Bitcoin whitepaper, titled '*Peer-to-Peer Electronic Cash System.*'[12]Nakamotos' primary objective was to facilitate direct online payments between two parties without relying on

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11 The bitcoin big bang; the economics of digital currencies 165-168 (2016)

12 Bitcoin: A Peer-to-Peer Electronic Cash System; available at <https://bitcoin.org/en/bitcoin-paper> [Accessed on 16 September 2023]

intermediaries, such as central banks, governments, or financial institutions. The Bitcoin whitepaper, published in 2008, was made publicly available via a cryptography mailing list. The white paper described a novel electronic currency system, although subsequent use cases have emerged, including the utilization of smart contract technology. Notably, the data recorded on a blockchain is immutable and verifiable, ensuring the integrity and transparency of the network.[13]

Illegal Ponzi schemes have found fertile ground in Uganda to steal money from, and lure mostly the youth, and the wider unsuspecting ignorant population into schemes where they have ended up losing their money. Certain Ugandan individuals have fallen victim to fraudulent schemes and Ponzi scams perpetrated by entities purporting to operate in the cryptocurrency sector. This phenomenon can be attributed to the absence of clear regulatory frameworks governing the crypto market in Uganda. A notable example is the case of Capital Chicken that defrauded Ugandans over 8 billion shillings, BLQ, One coin, D9, Dutch World International, FX trade, Reilang investments, Cashmulla, Cowe, among others, which defrauded Ugandans of billions of monies between the years 2020-2023.[14]
Dunamis coins Resources Limited, which allegedly defrauded approximately $2.7 million from around5000 individuals in areas of Kampala, Masaka and Mbarara in 2019.[15] This scam served as a wake-up call, prompting the involvement of the law enforcement agencies and government intervention, which ultimately became a crucial catalyst for the development of cryptocurrency regulations in Uganda.

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13 Nakamoto, S. Blockchain: A peer to peer electronic cash system, 2008 available at <https://bitcoin.org/bitcoin.pdf> [Accessed on 16 September 2023]

14 Police hunt for Capital Chicken directors who conned Shs 1.6B from Ugandans. available at <https://www.newvision.co.ug/category/news/capital-chicken-directors> [Accessed on 6 October 2023]

15 Clients lose Shs 10b in cryptocurrency scam available at <https://www.monitor.co.ug/uganda/news/national/clients-lose-shs10b> [Accessed on 16 September 2023]

2.2. CRYPTO ASSETS

A crypto asset is a digital representation of value that can be digitally traded, can serve as a medium of exchange, and a unit of account or a store of value.[16]While often referred to as tokens, crypto assets are categorized based on their economic functions, including payment tokens (cryptocurrencies), utility tokens, and security tokens. This article primarily focuses on payment tokens (cryptocurrencies) due to their distinctive characteristics.

Cryptocurrencies are intangible digital assets created through the utilization of distributed ledger technology or a similar technology, distributed and transmitted via digital networks.[17] They can be generated through a process known as mining, which employs computational power to produce coins, or acquired directly from brokers through peer-to-peer transactions. Furthermore, cryptocurrencies can be stored securely using cryptographic wallets. Cryptographic wallets, available in both software and hardware forms, enable users to securely store and utilize cryptocurrencies. The wallets employ cryptographic algorithms, utilizing a private key to facilitate the user's ability to send and access cryptocurrency coins, while a public key can be shared with third parties to receive cryptocurrency.

Consequently, the decentralized nature of crypto currencies enables the facilitation of electronic payments through peer-to-peer transactions, without necessarily of involving the Central Bank of Uganda, or any licensed financial institution. For instance, crypto assets like bitcoins can be utilized for payment purposes, issued within a scope of a blockchain project.[18] In essence, these cryptocurrencies can serve as a medium of exchange for goods and services, or as a means of value transfer.[19]

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16 Abu Dhabi Financial Services Regulatory Authority. (June 2018). Guidance- Regulation of crypto asset activities in Abu Dhabi Global Market.

17 European Union's Directive, Markets in crypto assets and Amending directive (EU) 2019/1937

18 Ibid

19 Swiss Financial Market Supervisory Authority. Guidelines for enquires regarding the regulatory framework for Initial Coin Offerings (ICOs)

The International Financing Reporting Standards Interpretations Committee (IFRSIC) defined cryptocurrencies based on three key characteristics, namely:[20]

i) a digital currency recorded on a public ledger, utilizing cryptography for security purposes;
ii) It does not give rise to a contractual relationship between the holder and another party;
iii) It is not issued by a jurisdictional authority or any other party.

These characteristics provide a clear definition of cryptocurrencies, distinguishing them from traditional fiat currencies and other financial instruments. Consequently, cryptocurrencies are regarded as an investment by some individuals, while others view them as a commodity or property. Notwithstanding their lack of physical substance, cryptocurrencies may be considered intangible assets, possessing value and transferable rights.[21]

As mentioned earlier, certain cryptocurrencies, such as Bitcoin, have been recognized as legal tender in various countries due to their transformative impact on traditional monetary systems. Notably, El Salvador has been hailed as the first country to adopt Bitcoin as legal tender, alongside the US dollar, and this pioneering move has inspired other countries, including those in Africa, such as Central African Republic and Botswana, to follow suit.[22] However, as this article will demonstrate, the utility of virtual assets extends beyond their use as legal tender, as they can also be traded as security assets on the stock market, as exemplified by cryptocurrencies like Ripple in the

20 This committee comprises of members representing the best available combination of technical expertise and diversity of international business of international business and market experience in the practical application of International Financing Reporting Standards.

21 Are Cryptocurrencies considered assets? available at <https://wisaccountancy.co.uk/are-cryptocurrencies-considered-assets/> [Accessed on 16 September 2023]

22 El Salvador becomes first country to adopt bitcoin as legal tender; available on <https://www.theguardian.com/world/2021/jun/09> [Accessed on 16 September 2023]

United States.[23]

Crypto currencies are a form of digital currency that utilizes cryptography and blockchain technology.[24] They are a quintessential application in the blockchain ecosystem, were digital payment systems exist solely as digital entries in an online database, recording specific transactions.[25] These cryptocurrencies are stored in a virtual wallet, comprising a combination of private and public keys, which facilitate use for purchases and transfers through peer-to-peer transactions.[26]

Unlike cryptocurrencies which are decentralized, fiat currency is government-controlled money and serves as legal tender. The governments control over fiat currency provides policymakers with a platform to regulate and manage the money supply in response to economic dynamics. In contrast, cryptocurrencies constitute a medium of exchange between parties and a store of value. Moreover, cryptocurrencies utilize a cryptographic computer networking technology known as blockchain, which fosters efficiency and minimizes corruption in monetary systems. This innovation represents a significant revolution in the financial sector, as digital currency can be sent and received by anyone, anywhere in the world, without government intervention.

Some individuals fail to draw a distinction between blockchain and cryptocurrency due to the complex technical terminology associated with this emerging technology. However, a clear distinction exists between the two: blockchain is a decentralized, digital ledger that records all transactions, updated and maintained by a network of cryptocurrency users in real-time.

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23 Virtual assets refer to any digital representation of value that can be digitally traded, transferred or used for payment. And do not include digital representation of fiat currencies.

24 Ntamugambwe Victor and Joshua Kingdom (2021), "The Legal Risks of cryptocurrency on state sovereignty; A case study of Uganda" volume 18 Issue 3, Makerere Law Journal pp 118-152

25 When crypto currencies are transferred, the transactions are recorded in a public ledger and stored in digital wallets

26 Joseph J. Paul R. Blockchain A practical guide to developing business law and technology solutions Mc Grow-Hill Education 2018 at p 18

In contrast, cryptocurrencies are digital assets whose value is determined solely by market forces, namely supply and demand, due to their decentralized nature, unlike government-backed fiat currency. This system circumvents centralized government systems and traditional intermediaries, such as central banks. Consequently, crypto currencies are digital coins that require owners to use private keys to digitally sign and authenticate transactions by appending a unique hash.[27] To use crypto currency, individuals must possess a blockchain wallet, which enables them to receive, store, and transmit their digital coins. The wallets can either be hot wallets or cold wallets.[28]

Crypto currencies may be considered as a type of property, asset, financial instrument, investment, a commodity depending on whether they meet the definition of such in that jurisdiction.[29] Notably, cryptocurrencies are incorporeal in nature, being intangible and unable to be stored on physical servers due to their distributed data structure. Furthermore, cryptocurrencies are highly volatile and susceptible to cyber-attacks. In the case of Uganda, they are not denominated in the local currency.

In the United States of America, crypto currencies like Bitcoin are classified as assets, akin to property, by the Internal Revenue Service (IRS) and are subject to taxation accordingly. Tax payers in the US are required to report transactions for tax purposes. Consequently, retail transactions involving Bitcoin such as purchases or sales of goods, are subject to capital gains tax. The Government of Uganda may consider benchmarking and conducting further research on the success of this approach, should it contemplate adopting and benefiting from such advancements.

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27 A hash is an encrypted record of transactions connected to each other to form a blockchain

28 Both are means of storing cryptocurrency and token private keys. Hot wallets are cryptocurrency wallets with a software that stores private keys on a device connected to the internet and they can be accessible from internet-based devices, such as mobile phones, tablets, and laptops. However, cold wallets do not have a connection to another device or the internet, and are in form of USB sticks. Cold wallets are entirely offline.

29 Central African Republic adopted Bitcoin as a legal tender on 23rd April 2022 as well as El Salvador on 9th June 2021

3.0. UGANDA'S LEGAL FRAMEWORK ON CRYPTOCURRENCIES

The existing legal framework in Uganda does not specifically address crypto currencies, despite the Electronic Transactions Act providing a general regulatory framework for electronic transactions.[30] The decentralized nature of virtual assets has hindered the government and majority of Ugandans from embracing and adopting this technological innovation, and advancement, primarily due to concerns regarding its volatility and potential uncertainties. The inherent characteristics of virtual assets pose significant law enforcement challenges, due to their ability to rapidly transcend national borders and their anonymity resulting from their encryption.

Notwithstanding the risks and lack of clear regulations, some crypto currency traders and companies continue to operate in the industry. However, the Ministry of Finance, Planning and Economic Development cautioned the public about the risks associated with trading in cryptocurrencies. Significantly, the Ministry of Finance, Planning and Economic Development did not declare cryptocurrencies illegal in Uganda. Meanwhile, the Bank of Uganda in exercising its regulatory mandate over currency and payment systems, has issued statements cautioning financial institutions, particularly mobile money operators regulated under the Financial Institutions Act, against facilitating cryptocurrencies transactions.[31]Nevertheless, it is evident that the world is moving towards digitalization, and some members of the public continue to trade in cryptocurrencies.[32]

The Financial Institutions Act, 2020, primarily enacted to regulate financial institutions, defines a financial institution as a company licensed conduct financial institution business in Uganda, as classified by the central bank.[33] Financial operators regulated under the National Payment System Act, 2022,

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30 Act 8 of 2011

31 Article 162 of the 1995 Constitution of the Republic of Uganda, sections 4, 19 and 20 of the National Payment Systems Act, 2020

32 Bank of Uganda Circular reference number NPSD 306 dated 29th April, 2022, barring all entities licensed under the National Payment Systems Act, 2020 from facilitating cryptocurrency transactions.

33 Section 1(n)

were cautioned against trading in cryptocurrency, citing the risks posed by the technology. In its statement, the Bank of Uganda noted:

> *"Bank of Uganda has noted press reports and adverts advising the public that they can convert cryptocurrencies into mobile money and vice-versa. We are also aware that such a conversion cannot happen without the participation of payment service providers and or payment system operators,"*[34]

The advent of 5G technology and the Meta verse presents an opportunity for Uganda to embrace these technological advancements and reap from their benefits. It would be better for the Ministry of ICT to encourage tech companies and blockchain traders to explore safe and legal ways to participate in this emerging field, particularly among the youth. While Uganda may not have the capacity to regulate decentralized systems, it can consider introducing a centrally issued and regulated digital coin as a starting point.

On 1st June, 2022, the Bank of Uganda opened up to the idea of considering the idea of the cryptocurrency businesses in its ***Regulatory sandbox***. The National Payment Systems Act, 2020 under section 6 and the National Payment Systems (Sandbox) Regulations gives powers to the Bank of Uganda to establish a Regulatory Sandbox Framework. This framework allows innovative financial solutions in the payments eco system to be tested in a live environment with regulatory oversight though subject to particular safeguards.[35] This move was welcomed by the blockchain Association of Uganda as a step in the right direction. This was an acknowledgment of the existence of cryptocurrencies in the market. Efforts have been made to engage policy-making for the crypto market, including public consultations.

Notably, the first policy makers' workshop in Uganda took place in July 2018, with the aim of soliciting public proposals on multi sectoral approaches to

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34 Bank of Uganda Website available at <https://www.bou.or.ug/bou/bouwebsite/Supervision/Circulars.html> [Accessed on 18 September 2023]

35 Bank of Uganda grants approval to Culipa limited and Absa Bank Uganda Limited to test innovations under the regulatory sandbox; BOU gives green light to more financial payment solutions available at <https://www.independent.co.ug/bou-more-financial-payment-solutions/> [Accessed on 19 September 2023]

policy making, and development. This marked another step towards advocating for the regulation of crypto currencies and the blockchain in Uganda. Consequently, all stakeholders in the cryptocurrency market should continue to push for either adoption or regulation of the cryptocurrencies, while also educating those interested on how to trade safely. Self-regulation could be the starting point, involving the reporting of fraudulent activities and scammers to law enforcement agencies.

In the application for judicial review in Silver Kayondo v Bank of Uganda, the applicant contended that the Bank of Uganda lacked the powers to regulate or ban crypto assets in Uganda.[36] This assertion was made in response to the circular by the Bank of Uganda, which prohibited all financial institutions regulated under the Financial Institutions Act from dealing and liquidating cryptocurrencies. However, in his judgement, Justice Ssekaana primarily relied on the characterization of crypto assets as a mode of payment, concluding that they could not be used as a legal means of payment. The judgement appeared to have overlooked the substantive issues raised in the petition and instead attempted to reframe the issue and resolve it.[37]

The decision in the Silver Kayondo case leaves market players operating in an uncertain and unsafe business environment, exposing them to scams without recourse, resulting in significant financial losses, and potentially facilitating money laundering. However, this outcome also underscores the need for regulatory clarity in Uganda's jurisdiction, highlighting the imperative for regulations to address these issues. Moreover, the case emphasized that while crypto assets are not considered payment instruments under the National Payment System (NPS) Act, the Act does not explicitly prohibit the use and trading of cryptocurrencies in Uganda.

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36 Miscellaneous Cause no. 109 of 2022

37 The applicant sought for a declaration that crypto assets and cryptocurrencies are legitimate digital assets tradable in the digital economy and can be liquidated/cashed out via mobile money and other payment systems in settlement for Uganda Shillings (UGX) which is the legally recognized legal tender of the Republic of Uganda at the prevailing free-floating exchange rates established by the global and national market forces of demand and supply.

4.0. CRYPTOCURRENCIES AS SECURITY ASSETS

The Capital Markets Authority Act of 1996 defines 'securities' to mean; bonds, stock, warrants, options, futures, and any other instrument commonly known as securities.[38] Securities are commonly associated with stocks, bonds, and similar instruments, which refer to fungible, negotiable financial instruments that represent a monetary value. These instruments are used to raise capital in both public and private markets.

In Uganda, the public sale of securities is regulated by the Capital Markets Authority (CMA),[39] the statutory body responsible for regulating and promoting the development of capital markets in Uganda. This Authority is responsible for licensing, investigating, and inspecting the operations of capital markets in Uganda. It is through the sale of securities, that companies generate money from the public for further investment purposes. Pursuant to the Capital Markets Authority Act, any entity seeking to offer investment contracts to the public must publish the offerings to the public.[40]

Securities in Uganda are listed on the Uganda Securities Exchange, where the public can access listings and trade. These securities are issued through an initial public offer (IPO), or private placement.[41]As public offerings are regulated by the Uganda Securities Exchange, stock trading is facilitated through licensed brokers regulated by the Capital Markets Authority. Consequently, the Capital Markets Authority has oversight over listings on the securities exchange. In this context, if the Capital Markets Authority is to recognize cryptocurrencies as an asset class, it would need to exercise its mandate accordingly.

Uganda is yet to follow the lead of countries like Botswana and Mauritius, which have already regulated virtual assets. In 2015, the then governor of

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38 Section 1(hh)

39 The Capital Markets Authority was established in 1996 by the CMA Act Cap 84 to monitor approval of prospectus, ensure development of capital markets, protection of investors, management of the investor compensation fund, among others

40 Section 5.1(a) and Section 90(G) of the Capital Markets Authority Act.

41 Under Private placement, the entity that offers security's (issuer) may restrict them to a qualified group (investors).

the Bank of Kenya cautioned banks against trading in crypto currencies. However, the court in the case of *Wiseman Talent Ventures v Capital Markets Authority* emphasized the need to protect investors in the course of their dealings.[42] Kenya has a pending Bill seeking to amend the Capital Markets Act to include virtual assets, specifically blockchain, cryptocurrency, and other digital currencies.

On 16th November, 2023, Hon Nathan Nabeta Igeme[43] was granted leave by parliament to introduce a Private Members Bill titled the Capital Markets Authority (Amendment) Bill. Uganda's Capital Markets (Amendment) Bill seeks to amend the Capital Market Authority Act by regulating the transfer of virtual assets, specifically by stipulating the required due diligence measures. The due diligence measures that service providers should undertake to facilitate asset tokenization on the blockchain include segregating clients' assets from those held by the custodian on behalf of their clients.[44] This marks the first regulatory effort in Uganda to govern virtual assets, paving the way to unlock the potential of blockchain technology and virtual assets in the country.

Most importantly, Parliament and the Capital Markets Authority must be aware that virtual assets, given their decentralized nature, can lead to an influx of crypto assets that may fall outside the Authority's mandate and scope. It should also be noted that these emerging virtual assets bring both benefits and challenges in the long run, including potential security lapses and increased hacking attempts. However, this should not hinder technological advancement; rather, it should be embraced with modifications to ensure a seamless integration into Uganda's fintech ecosystem.

However, the future of this Bill remains uncertain due to the majority of the parliamentarians' lack of understanding regarding the operation of virtual

42 [2019] KLR

43 Member of Parliament, Jinja South East Division.

44 As per schedule five, for a token to be issued, it should be accompanied by a white paper similar to a prospectus of a company that's yet to issue shares on the stock market.

assets and blockchain technology in the broadest context. The complexity of crypto currencies, as evident from aforementioned context, stems from the specialized terminologies and operational procedures involved. Indeed, it is challenging to regulate what one does not comprehend. Uganda has yet to establish a technical team to address such developments; therefore, it is imperative for the parliament to collaborate with associations, and entities currently engaged in cryptocurrency transactions during the drafting process of this Bill.

In determining whether crypto assets are securities, the United States Securities and Exchanges Commission(SEC) has consistently relied on the landmark decision of the U.S. Supreme Court in *Securities and Exchange Commission v W. J. Howey Co.*[45]The SEC regulates the stock market in the United States under the Securities Act of 1933, which provides the framework for determining what constitutes a security..[46] In the Howey case, the court held that 'an investment of money in a common enterprise with profits to come solely from the efforts of others' constitutes a type of security called an investment contract'. In contrast to other assets, such as commodities, crypto assets should be strictly regulated and require detailed disclosures to inform investors of the potential risks involved.

Securities can be categorized into three main types:

1) Equity securities, which represent ownership rights to shareholders in an entity, realized through capital stock, and generate dividends after a specified period of time. Shareholders can as well sell their securities for profits in case there has been an increase in their value.
2) Debt securities, typically issued for a fixed term, such as government treasury bills and bonds. These instruments essentially represent loans, repaid through periodic payments.

45 328 U.S. 293 (1946)

46 It was founded in 1934 at the height of the Great Depression aiming at protecting investors, maintain fair, orderly, and efficient markets, and facilitating capital formation available at <https://www.sec.gov/about/mission> [Accessed on 17 September 2023]

3) Hybrids securities, which combine elements of both equity and debt securities.

In the landmark case of Howey v SEC,[47]the court laid down the following test to determine whether an investment can be regulated as a security:

- There is an investment of money;
- The investment is made into a common enterprise;
- The investors expect to make a profit from their investment; and
- Any expected profits or returns are due to the actions of a third party or promoter.

The Howey test intended to effectuate the statutory policy of providing comprehensive protection to investors in the United States, protection that is not to be undermined by unrealistic and irrelevant formulae.[48]The Howey test requires a holistic examination of the parties' understandings and expectations, analyzing and evaluating the transaction based on the content of the relevant instruments, the purposes to be achieved, and the overall factual context.[49]The Howey decision and its subsequent interpretations have established that a wide range of tangible and intangible assets can be subject of an investment contract.[50]Consequently, the presence of a speculative motive on the part of the purchaser or seller does not necessarily indicate the existence of an investment contract. However, trading in crypto currencies, which is driven by an expectation of profits and returns from service providers, satisfies the essential elements of an investment contract.

Furthermore, as evident in the case of *Ripples v SEC*[51], programmable sales are not considered securities because investors do not anticipate profits from the token issuers. In contrast, institutional sales constitute an investment contract or security asset due to an expectation of profits from investments made with the issuers. Consequently, crypto currencies that merely function

47 328 U.S. 293 (1946)
48 SECs V Ripple 1:20-cv-10832 District Court, S.D. New York
49 Marine Bank V Weaver 455 U.S 551(1982)
50 Securities Exchange Commission v Howey Co. 328 U.S. 293 (1946)
51 20 Civ. 10832 (AT)

as substitutes for traditional fiat currency are classified as commodities rather than securities within this context.[52]

The parliament of Uganda may consider benchmarking from countries that have classified crypto currencies as security assets and those that have implemented policies to regulated virtual assets. A notable example is the Capital Markets Authority (Amendment) Bill, 2023 of Kenya. This presents a significant step towards regulating cryptocurrencies or virtual assets before they are introduced to the public and the stock market. This will also inform the Authority on the procedures to be followed before a company is listed on stock exchange, including registration with the issuance of licenses by the Capital Markets Authority, thereby ensuring a robust regulatory framework.

5.0 INSTITUTIONAL AND INDUSTRY RESPONSIBILITIES: ROLEOF GOVERNMENT AND INDUSTRY PLAYERS

The government, through the collaborative efforts of the Ministry of Information and Communications Technology, Uganda Communications Commission, and National Information Technology Authority (NITA-U) of Uganda, jointly coordinated the drafting of the Data Protection and Privacy Act, 2019.[53] The government should take the lead in ensuring enhanced protection and privacy for Ugandans. Since most crypto currency operators acquire access to clients' private information during registration, it is essential for individuals to be informed about the purposes, timing, and manner in which their personal data is utilized.

Crypto currencies should be acquired by companies, vetted by the Uganda Securities Exchange, and listed or traded on the stock exchange, subject to regulation by the Capital markets Authority. This framework would enable the public to trade with confidence, investing in the crypto assets and generating returns. Moreover, when held as assets, cryptocurrencies can

52 From a statement by the United States Securities and Exchange Commission Jay Clayton to the CNBC in 2018

53 This Act protects the privacy of an individual and of personal data by regulating the collection and processing and disclosure of Ugandans.

contribute to the income tax base of the country through taxation, similar to other stocks and securities, thereby increasing government revenue.

The Ministry of finance is forfeiting Billions in revenue due to an unregulated cryptocurrency transaction that remain untaxed. Many officials at the Finance Ministry have failed to invest into understanding the concept of asset tokenization, and how using blockchain technology could help the government deepen its bond market, and widening the revenue tax base to finance the development of Uganda.[54]Once regulations are put in place, Uganda Revenue Authority will be able to amend its tax laws to collect capital gains and withholding tax on transfers of cryptocurrencies. Through a comprehensive tax policy, cryptocurrencies can be taxed as security assets on the Uganda Securities Exchange, falling under existing laws on income tax, capital gains tax, or value added tax. It is the governments mandate to ensure that individuals comply with their tax obligations, grounded on a moral duty to contribute to the tax system.

The Capital markets Authority can regulate the activities of cryptocurrency and Electronic Fungible Token brokers. The Authority can establish a policy requiring cryptocurrency brokers to acquire these holdings and offer them to the public for trading under the supervision of the Capital Markets authority. This will enable stock market investors to diversify their portfolios by investing in an additional asset class, potentially increasing tax revenues for the treasury. Adoption of virtual assets by the Capital Markets Authority of Uganda will usher Uganda into the new dawn of the internet age of asset management in the capital markets, called Web 3.0. The Web 3.0 entails use of virtual assets and blockchain technology thus owning and managing the settlement of real-world tokenized assets.

Most importantly, the government should register market players who have gone through scrutiny and verification. These market players must be willing

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54 Ministry of Finance's incompetence frustrates Hon. Nathan Nabetas Capital Markets Authority Bill, 2023 available at <https://strikemachine.net/ministry-of-finances-incompetence/> [Accessed on March 11, 2024]

to comply with the Know your customer requirements, which will also help to combat money laundering, acts to finance terrorism, acts of treason, and other high crime offences. A robust legal and regulatory framework can also enable regulators to identify and eliminate criminal elements or illegal schemes through the Know Your Customer (KYC) requirements for virtual asset service providers and traders when trading in these assets.

The prevailing knowledge gap regarding blockchain technology among both the public and private sectors has led to misinformation about crypto currencies and their potential to be used as security assets. To address this, current market players in the blockchain industry should nationwide awareness strategies and programmes. Key areas of focus should include information security, bridging the skills gap in utilizing of cryptocurrencies as security assets, and developing a comprehensive cross-sectoral training policy to alleviate the market's skills shortage.

6.0 RECOMMENDATION

The government, through the central bank, has a duty and mandate to regulate the financial sector for an effective economic development. Due to lack of regulations, numerous Ugandans have lost billions of money, although some victims have not come forward to expose themselves as having been scammed. Therefore, there is a need to protect Ugandans who have adopted technological developments and advancements. To this end, the government, through the Capital Markets Authority, should undertake the regulation of the emerging virtual assets.

The government may enter into Memoranda of Understanding (MOU) with traders and companies dealing in cryptocurrencies to foster harmonized engagement and political will among stakeholders. Furthermore, the Capital Markets Authority may engage with global companies trading in cryptocurrencies to establish a memorandum outlining how to operate as separate entities in Uganda, district from their global markets, under regulations adopted by the Authority. This will facilitate monitoring and regulation of their activities in Uganda, thereby protecting Ugandans from

scams. Additionally, these entities may be required to operate a protective depository to compensate cryptocurrency investments in event of any fraud.

The Government, through the bank of Uganda and Capital Markets Authority, may consider investing in crypto equity by acquiring shares from companies engaged in crypto mining and exchange. This investment can help build public trust and confidence in virtual assets, paving the way for their adoption by the Capital Markets Authority. Meanwhile, the Bank of Uganda can utilize its regulatory sandbox to test the operation of crypto currencies, assessing their viability and sustainability within the economy.[55] This should be accompanied by the creation of a conducive environment for local investors who have embraced blockchain and crypto currency to educate and train local individuals, thereby empowering them to invest in these technologies and ultimately boost the economy.

7.0 CONCLUSION

The increasing global shift towards digitalization suggests that the future of crypto currencies as security assets in Uganda will be significantly influenced by international trends. As cryptocurrencies gain wider acceptance worldwide, their adoption in Uganda is likely to follow suit. Inherent to their decentralized nature, cryptocurrencies are characterized by high volatility and operate independently of any central authority's control.

Therefore, the government, under the auspices of the Capital Market authority, should harness the potential of blockchain technology in cryptocurrencies to capitalize on the opportunities that come with it. By implementing reasonable measures to regulate the market players in the virtual assets, the Authority can position itself to generate revenue through tracing transactions on the blockchain, while also streamlining businesses if done judiciously.

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55 This is a framework set by a regulator allowing Fintech startups and other innovators to conduct live experiments in a controlled environment under the regulator's supervision.

Lastly, the authorities should establish a clear regulatory framework for the operation of virtual assets. While virtual assets, such as cryptocurrencies, may be integrated into Uganda's financial system, regulators must prioritise financial stability and consumer protection. This is crucial because virtual assets can potentially trigger inflation and be exploited for illicit activities, including money laundering, corruption, and terrorism financing.

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HOW THE JUSTICE SYSTEM PERPTUATES VIOLENCE AGAINST WOMEN: A SOLUTION, OR A PART OF THE PROBLEM?

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HOW THE JUSTICE SYSTEM PERPTUATES VIOLENCE AGAINST WOMEN: A SOLUTION, OR A PART OF THE PROBLEM?

Cindy Karunga*

ABSTRACT

The justice system, traditionally regarded as a shield against violence targeting women, can inadvertently become an accomplice in perpetuating the suffering. This paper scrutinizes the deficiencies within the police, judiciary, and legal frameworks, revealing how they often fall short in safeguarding women from harm. Delving into the grueling journey of victims seeking justice, it highlights the formidable challenges they confront. The paper passionately contends that a paradigm shift is imperative – a victim-centered approach that places the well-being of victims at the forefront. Additionally, it emphasizes the necessity of establishing specialized systems, including dedicated police units and judicial courts, to handle gender-based violence cases with the expertise and sensitivity they require. This combined approach is essential for transforming the justice system, offering a ray of hope to countless women facing violence and injustice.

1.0 INTRODUCTION

1.1. BACKGROUND AND CONTEXT

In every society, the justice system is a fundamental pillar tasked with the solemn duty of upholding the principles of fairness, equity, and accountability. However, when it comes to addressing the pervasive issue of violence against women, a troubling question arises; does the system designed to safeguard justice inadvertently perpetuate harm against women, or can it serve as a

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solution to this deep-rooted problem? This question lies at the heart of the inquiry of this paper as we embark on a critical examination of the justice system's role in perpetuating violence against women, and its potential as a channel for lasting change.

Violence against women is one of the most frequent human rights violations. The World Bank has referred to it as a global pandemic,[1] that impacts women and girls from all socio-economic backgrounds in society with an estimated 1 in 3 women experiencing physical or sexual violence in their lifetimes.[2] The consequences of violence against women are profound and multifaceted, greatly affecting their physical, psychological, social, and economic well-being. The ripple effect extends to entire communities, further underscoring the urgency of addressing this pervasive crisis. Uganda, in particular, presents a deeply concerning case study, with a staggering 51% of women facing violence at some point in their lives.[3] This alarming figure surpasses the regional and global averages, portraying Uganda as one of the most dangerous places to exist as a woman. Paradoxically, crimes of this nature are plagued by some of the lowest conviction rates, with only 19 out of 1519 reported cases leading to convictions last year.[4]

This epidemic of violence against women, though widespread and devastating, is often concealed behind the closed doors of homes, and shielded from public discourse. It is frequently treated as a private matter, shrouded in silence, rather than recognized as a crime that warrants open and resolute discussion.

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1 The World Bank, 'Gender-Based Violence (Violence Against Women and Girls) The World Bank Bank Brief (25the September 2019) available at <https://www.worldbank.org/en/topic/socialsustainability/brief/> [Accessed 29 June 2023]

2 World Health Organization, 'Violence Against Women Fact Sheet' available at <https://www.who.int/health-topics/violence-against-women> [Accessed 29 June 2023]

3 'Uganda Gender Based Violence: None in Three Survey Report for Uganda' available at <https://www.noneinthree.org/uganda/policy-hub/> [Accessed 27 June 2023]

4 Rape, Abuse and Incest National Network (RAINN), 'Uganda' available at <https://www.rainn.org/africa/uganda> [Accessed 1 July 2023]

Violence against women encompasses a wide spectrum of abusive behaviors, categorized as physical, sexual, and psychological violence, which can manifest within familial and community contexts. This definition includes but is not limited to domestic abuse, sexual violence affecting both women and children, dowry-related violence, marital rape, female genital mutilation, and various other traditional practices that detrimentally affect women's wellbeing. Furthermore, it extends to non-spousal violence, violence linked to exploitation, sexual harassment, intimidation in workplaces, educational institutions, and other settings, as well as human trafficking and forced prostitution.[5]

In Uganda, five distinct types of violence against women have been identified as particularly prevalent: sexual violence, physical violence, emotional and psychological abuse, harmful cultural practices, and socio-economic violence.[6] Among these, physical and sexual violence stand out as the most commonly reported forms of abuse,[7] underscoring the urgent need for concerted efforts to address these deeply entrenched issues in Ugandan society.

Gender-based violence (GBV) is violence directed against an individual on the basis of their gender. While GBV is experienced by both women and men, the majority of the victims are women and girls.[8] "Gender-based violence" and "violence against women" are terms often used interchangeably as it has been widely acknowledged that most gender-based violence is often inflicted on women and girls primarily by men.[9]

Renowned scholar, Zain, succinctly defines GBV as an extreme manifestation of gender inequity, often targeting women and girls because of their vulnerable

5 UN General Assembly, Declaration on the Elimination of Violence Against Women (20 December 1993) UN Doc A/RES/48/104, Articles 1 and 2.

6 Peter Ocheme, Shajobi-Ibikunle Gloria, and Namaganda Zuwena, 'A Critical Overview of Gender-Based Violence in Uganda' (2012) [2020] Journal Title [8] Issue.1

7 Ibid

8 European Institute for Gender Equality, 'What is Gender-based Violence?' available at <https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence?> [Accessed 28 July 2023]

9 Ibid

position in society, which is reinforced and perpetuated by patriarchy.[10] The sobering fact emerges that women aged 15 to 44 years are at a higher risk of experiencing rape and domestic violence than of encountering cancer, motor accidents, war, or malaria.[11]

The purpose of the criminal justice system is, among others, to prevent crime by deterring potential criminals. The deterrence argument posits that successful prosecution of gender-based violence cases will lower the incidence of violence against women.[12] When perpetrators of such crimes are held accountable and face legal consequences for their actions, it sends a clear message that such behavior will not be tolerated. Therefore, a robust and efficient criminal justice system plays a crucial role not only in holding perpetrators accountable but also discouraging future instances of such violence, thereby contributing to the safety and security of women and society as a whole.

In Uganda, most incidents of violence against women go unpunished. The Directorate of Public Prosecution's (DPP) performance data for the year 2013-14 paints a disheartening picture of the justice system's response to cases of rape and defilement in Uganda. During that year, a staggering 19,091 cases of rape and defilement were registered. However, only 186 of these cases culminated in convictions by the end of that year, constituting less than 1% of the reported cases. Furthermore, by year-end, 903 cases were still under investigation, and 2,627 had not even reached the stage of being heard,[13] illustrating the profound challenges and systemic delays in addressing these critical issues of sexual violence within the legal framework. These statistics highlight a glaring gap in

10 Zain, Z. M., 'The Awareness on Gender-Based Violence among Students in the Higher Learning Institutions' (2012) Social and Behavioural Sciences 38, 132–140.

11 Heise, L. et al., 'Ending Violence Against Women' (1999) Issues in World Health XXVI (4).; See also UN Department of Information, 'UN Factsheet on Violence Against Women' (2008) DPI/2498.7hy.

12 Miller, J., '21st Century Criminology: A Reference Handbook' (2009) (London: Sage) 5.

13 Susan Okalany (A/A/DPP), 'Presentation at Training Workshop for Regional Officers' (9 September 2015).

justice and a pressing need for reforms and enhanced efforts to provide justice and support for survivors.

Violence against women stems from oppressive systems such as patriarchy.[14] Male domination and power are not only inherent in physical strength but are also embedded in the structures and institutions of society.[15] Therefore, the failure of the criminal justice system to effectively protect and support women who are victims of abuse is a reflection of the patriarchal system which reinforces gender-based violence.[16] The women who have the courage to report are met by a criminal justice system that is inherently rigged against them and provides no substantive access to justice.[17] The legal process of attaining justice after a violation is pervaded with various obstacles that begin from the reporting stage all the way to the trial. These hurdles hinder the path to justice and, in many instances, compound the suffering and trauma experienced by victims. Recognizing these systemic challenges is a critical step towards dismantling the patriarchal structures that perpetuate gender-based violence and ultimately creating a more just and equitable society.

2.0 GENDER-BASED VIOLENCE IN UGANDA

Within the Ugandan society, there exists a troubling attitude of acceptance and even justification for violence against women. This deeply ingrained mindset has perpetuated gender-based abuse and discrimination. The Ugandan government has taken action to stop these widespread abuses by creating laws that forbid violence against women and girls. These laws cover domestic violence, marriage and divorce, sexual offenses, and human trafficking. For instance, the Sexual

14 Dobash, R. E., & Dobash, R. P., 'Violence against Wives: A Case against Patriarchy' (1979) (New York: Free Press).

15 Bograd, M., 'Feminist Perspectives on Wife Abuse' in K. Yllo & M. Bograd (eds), 'An Introduction to Feminist Perspectives on Wife Abuse' (1988) (California: Sage).

16 Uganda Gender Based Violence: None in Three Survey Report.

17 Caroline Adoch, 'Access to Gender Justice in Uganda: A Feminist Analysis of the Experiences of Rape Victims in the Reporting and Prosecution Processes' available at <http://makir.mak.ac.ug/handle/10570/10486> [Accessed on 27 September 2023]

Offences Bill of 2019 represents a significant legislative effort to introduce reforms addressing violence against women. However, despite its presentation to parliament several years ago, these reforms have yet to become official legislation.[18]

Notwithstanding its efforts on the legislative front, the state's response to gender-based violence falls short of its international responsibilities to prevent violence against women and to protect women's access to justice.[19] This shortfall has allowed perpetrators to abuse women with impunity. As a result, women are left with distressingly limited options; they must either resign themselves to the painful reality of abuse, enduring trauma while their abusers go unpunished, or they pursue justice in a system riddled with various obstacles including inadequate or dismissive responses by police, medical and judicial personnel.[20] This stark reality underscores the urgent need for comprehensive reform and support structures to ensure that women are not left to bear the burden of abuse in silence and isolation.

3.0 LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 INTERNATIONAL INSTITUTIONAL FRAMEWORK

Under international law, states bear the responsibility for human rights violations and acts of violence against women, whether these transgressions are committed by state actors or non-state actors. This duty extends beyond positive state actions and encompasses the failure of a state to proactively safeguard women's rights.[21] Uganda, as a signatory to the Convention on the Elimination of All Forms of Violence Against Women (CEDAW), is obligated to take effective

18 Ibid
19 Ibid
20 Ibid
21 CEDAW, 'Article 2(e)'.

measures to prevent, investigate, and penalize non-state actors involved in acts of violence against women, ensuring justice for the victims.[22]

In 2002, the CEDAW Committee expressed profound concerns about the pervasive violence against women in Uganda, including domestic violence, rape (even within marriage), incest, workplace sexual harassment, and various other forms of sexual abuse.[23] The Committee urged the Ugandan government to confront deep-rooted challenges, emphasizing the need to challenge patriarchal behaviors and harmful stereotypes that affect women's roles in both domestic and societal contexts.[24] This clarion call from the international community underscores the imperative of transformative action to safeguard the rights and dignity of women in Uganda.

Uganda is party to several other international treaties relevant to the rights of women and girls. One of these is the African Charter on Human and People's Rights Protocol on the Rights of Women in Africa, (the Maputo Protocol),[25] a treaty that guarantees a wide spectrum of rights for women and girls. These rights include the rights to integrity and security as well as access to justice, among others.[26] States are required to take a wide range of measures to prevent violence against women, which includes not only legal sanctions but also preventive actions such as public information and education programs and protective measures, including support services for victims of violence.[27]

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22 Committee on the Elimination of Discrimination against Women, 'General Recommendation 19, Article 24 (i); Note 15, Article 4 (d)'.

23 CEDAW,'CEDAW/C/UGA/7' available <http://www2.ohchr.org/english/bodies/cedaw/> [Accessed on 27 September 2023]

24 Ibid, Para. 132, which refers to the CEDAW Concluding Observations on Uganda's third period report, Para 135

25 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

26 Ibid

27 Amnesty International, 'Uganda: "I Can't Afford Justice" Violence Against Women in Uganda Continues Unchecked and Unpunished' available at <https://www.amnesty.org/en/documents/afr59/001/2010/en/> [Accessed on 27 September 2023]

The prevalence of incidents of violence against women serves as a stark indicator of the government's failure to fulfill its duty to protect women and hold perpetrators accountable. For as long as violence against women remains widespread and the state response continues to be disproportionately inadequate, Uganda will continue to fall short of its international legal obligations.[28] Addressing this issue is not only a matter of legal duty but a moral imperative for creating a more just and equitable society where women can live free from the scourge of gender-based violence.

3.2 Domestic legal framework

We live in a patriarchal society that exalts men over women and because of this, violence against women is perpetuated not only by individuals but also structurally.[29] The justice system involves many different actors, including the executive and legislative branches of government, the police, prosecution, judiciary, prisons, and probation and parole officers, as well as civil society and Non-Governmental Organizations (NGOs) in some circumstances. However, in practice, these structures often fail to fulfill their intended purpose, inadvertently shielding abusers and further victimizing the survivors. This systemic failure has created a culture of fear and silence, pushing many victims to suffer in silence, reluctant to report their ordeals. Even when they do muster the courage to step forward, the justice system's response is frequently inadequate, leaving them without the justice they deserve.

Women have the right to be accorded full and equal dignity with men according to Article 33(1) of the Constitution of Uganda. Article 33 (2) further provides that “the state shall provide the facilities and opportunities necessary to enhance the welfare of the women to enable them to realize their full potential and advancement.”

28 Ibid
29 Ibid

Under the Penal Code Act, acts of sexual violence in Uganda are classified under the category of crimes related to morality or honor rather than being recognized as crimes of assault against women and girls.[30] This historical classification can be traced back to common law principles where rape was perceived as a property crime, rather than a crime against an individual's bodily integrity. In this archaic framework, women and girls were often considered the property of their husbands or fathers, and rape was seen as an offense against the honor of another man, rather than an act of violence against the woman herself.[31]

In the historical context, rape was criminalized not primarily because it was a violation of a woman's body autonomy and integrity, but because it diminished her value in relation to the men in her life.[32] Essentially, the physical and emotional pain of a woman held little intrinsic value, and were only quantified in terms of the social harm they caused to a man.[33] The primary goal of the criminal justice was to punish men for violating other men's property and to deter other men from doing the same.[34] Men's control over women's sexuality and freedom was euphemized as male 'honor'.[35]

The Victorian perception of rape, deeply rooted in historical Western legal traditions, was introduced into Ugandan law through the 1902 Order in Council, which extended the applicability of the Indian Penal Code Act Cap 106 to Uganda.[36] Unfortunately, this incorporation of common law principles did not consider or accurately represent the traditional beliefs and practices prevalent in Ugandan society.

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30 Chapter XIV of the Penal Code Act Cap.120.

31 Smith, D.M., 'ENCYCLOPEDIA OF RAPE' (2004) (California: Greenwood Publishing Group) 186.

32 Adoch, 'Access to Gender Justice in Uganda' Supra

33 Ibid

34 Ibid

35 Sharma, K., 'Understanding the Concept of Honor Killing within the Social Paradigm: Theoretical Perspectives' (2016) IOSR Journal of Humanities and Social Science 21(9) 27.

36 Morris, H. F., 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935' (1974) Journal of African Law 18(1) 6–23.

Studies and historical accounts reveal that, traditionally, many African societies regarded rape as one of the most serious crimes, and it was dealt with severely in cultural courts.[37] In these traditional settings, the punishment often involved compensating the woman and her family, with restitution being seen as a way to restore her dignity and honor. In some instances, the punishments were particularly harsh, including castration or even enslavement of the perpetrator.[38] These practices, while rooted in the historical cultural norms of the region, were not adequately considered when Western legal principles were introduced.

Placing definitions of crimes such as rape and defilement within the section of "Offences Against Morality" indeed has the effect of misrepresenting the true nature of these offenses. This classification tends to frame the issue as a matter of "moral" versus "immoral" sexual conduct, rather than recognizing the fundamental violation of an individual's right to bodily autonomy and the absence of consent in sexual acts.[39]

Prior to the era of colonization, various communities in Uganda operated with their own unique rules and norms for dealing with crimes. These customary systems lacked codified, one-size-fits-all procedures and instead emphasized community-focused justice. The primary objective was to reintegrate the victim into the community rather than solely punishing the offender. Crimes were perceived as wrongs against the specific individual affected, rather than abstract entities representative of the community at large.[40]

In contrast, the common law justice system introduced during colonial rule diverges from this approach. Common law tends to place the state at the center of criminal proceedings, with crimes considered as offenses against the state, rather than against individuals. In this framework, the entire judicial process is primarily concentrated on the roles of the defense and the prosecutor, while the

37 Ibid
38 Ibid
39 Amnesty International, 'Uganda: "I Can't Afford Justice" Supra
40 Adoch, 'Access to Gender Justice in Uganda' Supra

victim is relegated to the status of a mere witness in the case. Victims typically have limited control over the proceedings and, by law, are not mandated to actively participate in criminal proceedings as they lack legal standing. [41]

This historical and legal distinction underscores the need for a more victim-centered approach to the criminal justice system in Uganda. Acknowledging the historical customary practices that prioritize reintegration and the needs of the victim can serve as a powerful guide for shaping future reforms, aimed at enhancing support for survivors and better addressing the issue of gender-based violence.

Studies have shown that women who report incidents of abuse and pursue criminal justice tend to take longer to heal from their trauma than those who do not report.[42] This is because the justice system is pervaded with numerous obstacles which frustrate and some re-traumatize the victim. This explains why most women who suffer abuse do not attempt to report it, resulting in the perpetrators facing no consequences. This not only breeds impunity, but also allows violent and abusive men to live their lives freely, making them more likely to re-offend, and increasing the vulnerability of all women in their communities.[43]

Throughout the criminal justice process, the accused person is afforded a range of rights and protections, including provisions for a timely trial and, in some instances, access to state-provided legal representation.[44] However, the system often fails to adequately consider the distinct interests of the victim, despite having experienced direct harm from the crime.[45] A rape or domestic violence trial is a harrowing experience for victims as they face peculiar challenges not

41 Ibid

42 A Gentleman, 'Prosecuting Sexual Assault: "Raped All Over Again,"' (2013), available at <https://www.theguardian.com/society/2013/apr/13/> [Accessed 12 October 2023]

43 Ibid

44 See articles 24 and 28 of the 1995 Constitution of Uganda

45 Adoch, 'Access to Gender Justice in Uganda' Supra

faced by victims of other crimes.[46] In spite of this, the criminal justice system does not acknowledge or address their unique needs. This lack of recognition and support compounds the trauma and difficulty experienced by these survivors.

Some countries have taken significant steps to modify their legal systems to formally recognize and protect the rights of victims. For instance, the European Union's Directive 2012/29/EU has established clear criteria for upholding victims' rights, providing support, and ensuring their protection. The primary aim is to guarantee that individuals who have suffered harm due to criminal acts are identified, treated with respect, and receive the necessary protection, support, and access to justice.

The directive defines a victim as any natural person who has experienced harm, whether it's physical or mental injury, emotional suffering, or economic loss, directly resulting from acts or omissions that contravene the criminal laws of a Member State. This definition includes individuals irrespective of whether the offender is identified or not, and regardless of any familial relationship between the victim and the offender.[47]

Furthermore, the United Nations (UN) adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. [48] This declaration emphasizes a compassionate and dignified treatment of victims, asserting their right to prompt reparation for the harm they have endured. It also underscores the importance of providing victims with information about their role in legal proceedings, the nature, and status of their cases and ensuring that the legal and administrative systems are responsive to their unique needs. The declaration advocates for assistance to victims during the judicial process,

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46 K. T. Selinger et al., 'The Investigation and Prosecution of Sexual Violence' (A Working Paper of the Sexual Violence and Accountability Project) (2011) (Berkley: Human Rights Center, University of California) available at <https://www.law.berkeley.edu/wp-content/uploads/2015/04/> [Accessed on 20 August 2023]

47 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012.

48 General Assembly Resolution 40/34 of 19 November 1985.

protection of their privacy, avoidance of unnecessary delays in case resolution, and the effective execution of rulings or decrees providing compensation to victims.

These legal measures and declarations reflect a growing global recognition of the rights and needs of victims, emphasizing a more compassionate and supportive approach within the criminal justice system.

4.0 DOMESTIC INSTITUTIONAL FRAMEWORK OF THE CRIMINAL JUSTICE SYSTEM

4.1 THE POLICE

While strict laws against GBV are important, they cannot guarantee justice on their own if the institutions responsible for their enforcement are inefficient. Considering this, the police station being the very first entry point of the criminal justice system is a crucial institution for preventing GBV.[49] Ideally, the police should be the primary source of help and support for victims, creating an environment where those seeking justice and protection from abuse feel heard, secure, and satisfied with the police response to GBV.[50]

Police involvement in GBV cases is crucial for holding perpetrators accountable and preventing impunity.[51] It not only offers support to victims but also plays a significant role in breaking the cycle of abuse by imposing punitive measures that deter potential offenders.[52]

The police institution has been recognized as one of the world's most masculinized occupations, constructed on demeaning sexist views and

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49 Abilasha Sahay and Basit Abdallah, 'Summer 2020 Fellow: Police Attitudes Towards Gender-Based Violence' (Sigur Centre for Asian Studies, October 11, 2021) available at <https://sigur.elliott.gwu.edu/2021/10/11/summer-2020> [Accessed on 27 August 2023]

50 Ibid

51 Karmen, A, 'Crime Victims: An Introduction to Victimology' (6th ed, Thompson Wadsworth, 2007).

52 Effah-Chukwuma, J. & Asiwaju, O, 'Responding to Gender-Based Violence: A Tool Kit' (CLEEN Foundation, Lagos, 2006).

practices.[53] This masculinization is closely associated with the traditional traits and characteristics often associated with hegemonic masculinity, such as aggression, force, dominance, and physical strength.[54] Policing has traditionally been seen as a masculine profession where these masculinized traits are not just upheld but celebrated.[55] This global phenomenon is evident in the underrepresentation of female police officers, making it a predominantly male-dominated occupation.[56] In Uganda, only 18.3% of police officers are female,[57] primarily due to the patriarchal sex-stereotyped roles associated with the role.[58]

The deeply rooted masculinity within the police force has serious consequences. It promotes harmful gender stereotypes that shape how officers view and handle gender-based violence.[59]

It is also critical to note that police masculinization is not confined solely to the workplace; it can extend into officers' personal relationships.[60] Research reveals that police officers are perpetrators of domestic violence at a rate significantly higher than that of the general population.[61] When the very individuals tasked

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53 Paoline, E. A., 'Taking Stock: Toward a Richer Understanding of Police Culture' (2003) 31(3) Journal of Criminal Justice 199–214 available at <https://doi.org/10.1016/> [Accessed on 27 August 2023]

54 Connell, R. W, 'Gender and Power' (Polity, Oxford, 1987). Connell, R, 'Glass Ceilings or Gendered Institutions? Mapping the Gender Regimes of Public Sector Worksites' (2006) 66(6) Public Administration Review 837–849 available at <https://doi.org/10.1111/> [Accessed on 27 August 2024]

55 Abena Asefuaba Yalley and Molatokunbo Seunfunmi Olutayo, 'Gender, Masculinity and Policing: An Analysis of the Implications of Police Masculinized Culture on Policing Domestic Violence in Southern Ghana and Lagos, Nigeria'.

56 Ibid

57 'Why GBV Prosecution Remains a Challenge' (Monday, Daily Monitor, 4th December 2017 - updated on 1st February 2021).

58 M. Silvestri, 'Police Culture and Gender: Revisiting the "Cult of Masculinity"' (2017) 11(3) Policing (Oxford) 289–300 available at <https://doi.org/10.1093/police/paw052> [Accessed on 27 August 2023] see also E. Stark & A. H. Flitcraft, 'Women at Risk: Domestic Violence and Women's Health' (Sage, California, 1996).

59 Rabe-Hemp, 'Police Women or Policewomen? Doing Gender and Police Work' (2008) 4 Feminist Criminology 114–129 available at <https://doi.org/10.1177/1557085108327659> [Accessed on 29 August 2023]

60 Yalley et al., 'Gender, Masculinity and Policing'.

61 Blumenstein, L, 'Link Between Traditional Police Subculture and Domestic Violence Among Police' (University of South Florida, ETD No. 1862) available at <https://digitalcommons.usf.edu/etd/1862/> [Accessed on 29 August 2024]

with protecting women from violence are, in some cases, perpetrators themselves, it raises serious concerns about where women can turn for help and safety. It is not surprising that there may be instances where police officers protect abusers if they themselves are abusers, underscoring the urgent need for comprehensive reform within the police force to address these deeply rooted issues.

Regrettably, a significant challenge facing women in Uganda is their diminished confidence in the justice system, a trust eroded by repeated disappointments. The data paints a disheartening picture: less than 1 in 10 women who endure violence opt to seek assistance from the police. Even more disheartening is the fact that the reported cases seldom lead to convictions.[62] This pervasive lack of trust discourages many women from reporting incidents of abuse in the first place, as they fear their grievances will not be taken seriously.

The investigation procedure required for the prosecution of sex offenses is often described by victims of sexual assault as the final ordeal in a long series of injustices. For many, navigating a rape trial can be as agonizing as enduring a second violation.[63] In addition to having to publicly recount a deeply traumatic experience, victims frequently encounter skepticism, judgment, and disbelief from law enforcement, compounding the shame and embarrassment they already feel about reporting rape.[64]

The attitudes of law enforcement officers, the intrusiveness of physical examinations, the intensity of questioning, and the lengthy duration between making an allegation and reaching trial can drain the determination and resilience of even the most determined survivors.[65] It is crucial to acknowledge

62 UN Women, 'Strengthening Police Responses to Gender-Based Violence Crucial in Lead up to Generation Equality Forum in Paris' (Date: Tuesday 25th May 2021)
63 Ibid.
64 I. Bacik et al., 'The Legal Process and Victims of Rape' (Cahill, Dublin, UK, 1998) 31.
65 Adoch, 'Access to Gender Justice in Uganda'

the immense emotional and psychological toll this process takes on victims and prioritize their well-being throughout each stage of the legal journey.

The response of law enforcement agencies to incidents of gender-based violence has been deeply inadequate. Regrettably, it often starts with an initial disbelief in the victim's complaint, which not only discourages her from pursuing justice but compounds the trauma she's already experienced. This disbelief is often accompanied by aggressive and sexist questioning, unwarranted delays in medical examinations, and the trivialization of domestic cases.[66]

The negative and victim-blaming attitude displayed by some police officers further dissuades victims from reporting GBV incidents, leading to significant underreporting.[67] Many women who seek help for violence against them find themselves on the defensive instead of the perpetrator. They face inappropriate questions like "What were you wearing?" or "What did you do to provoke him?" These questions not only perpetuate victim-blaming but are also entirely irrelevant to the fact of the violation at hand.

One of the primary reasons women hesitate to report gender-based violence is the fear of being ostracized by the police.[68] In Uganda, a country where 82% of police officers are male,[69] insensitivity toward victims of gender-based violence is a concerning issue. This insensitivity often stems from internalized misogyny and deep-seated stereotypes about women. Their line of questioning is often unhelpful, unfairly scrutinizing the victim's actions and causing immense frustration, often causing cases to stagnate or go unreported. It is no surprise that only half of the 10,907 gender-based violence cases reported in 2016 reached the office of the Director of Public Prosecution (DPP).[70]

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66 Dr. Poornima Advani, 'Need for Gender Sensitization in Police' (Member National Commission for Women).

67 Ibid

68 Ibid

69 'Women in the Uganda Police Force: Barriers to Women in Operational Policing' (African Policing Civilian Oversight Forum)

70 'Why GBV Prosecution Remains a Challenge' (Monday, Daily Monitor, 4th December 2017 - updated on 1st February 2021).

In far too many instances, the "preservation of the family unit" is prioritized over the safety and justice for victims. [71] Victims are often pressured to forgive their abusers thereby perpetuating the vicious cycle of abuse, since perpetrators are aware that there are rarely any substantial consequences for their actions. This leaves women feeling trapped, compelled to reconcile with their abusers, even when it places their lives and well-being in grave danger. To truly support victims, we must prioritize professionalism for all officers, regardless of their gender. While having more female officers can help, the key is to ensure all officers receive thorough training and are held accountable. This is crucial for delivering the justice and support that victims desperately need.

Compounding this issue is the financial burden placed on victims when they seek justice. Some victims have reported that when they visit police stations to report abuse, they are asked to cover the costs of various expenses, including transportation for arresting the accused, forensic examination fees, and other investigative costs.[72] The financial strain of these expenses can be overwhelming for many victims, causing them to prematurely abandon their cases.

The high financial barriers associated with reporting and prosecuting gender-based violence cases make the criminal justice system inaccessible to some victims. Not only do they bear the emotional and physical costs of their experiences, but they are also burdened with the direct financial costs of seeking justice. This can lead some women to reluctantly give up on their cases, and in some instances, even forego essential support services and medical care, with potentially devastating consequences for their well-being.[73]

Addressing these issues necessitates systemic changes to ensure that victims are not financially burdened when seeking justice. Removing financial barriers

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71 Amnesty International, 'Uganda: Victims of Rape and Sexual Violence Denied Justice' (Amnesty International press release) available at <https://www.amnesty.org/en/latest/press-release/2010/04/> [Accessed on 29 August 2024]

72 Ibid

73 Ibid

and providing comprehensive support to victims is essential to fostering a just and safe environment where they can come forward without fear and access the help they need and deserve.

4.2 THE REPORTING PROCESS

Under the provisions of the Criminal Procedure Code Act,[74] all crimes are supposed to be reported to the police. After reporting a crime, it becomes the responsibility of the police to conduct investigations under the guidance of the Director of Public Prosecutions (DPP).[75] This includes gender-based violence, which can be reported by the victim or any witness. However, the current process often poses significant challenges, particularly during the initial reporting phase.

Victims or witnesses are typically directed to the reception desk when they first arrive at the police station.[76] Unfortunately, these reception areas are often bustling with activity and noise, which creates an environment that is far from ideal for individuals who are already experiencing distress. It is at this stage that some victims encounter unnecessary humiliation. Instead of being swiftly directed to the appropriate office, police officers at the reception occasionally engage in what can be likened to a "mini-interrogation." They delve into the specifics of the case without guiding the victim to the right office, often attracting the attention of passersby and adding to the victim's embarrassment.[77]

For example, one rape victim recounted her experience when she informed the policeman at the reception that she wanted to report a rape case. He loudly called his colleague, commenting, "...the issues of the vaginas again."[78]

Following their initial complaint at the reception desk, the victim is referred to the sexual and gender-based violence desk (SGBV) desk. At this point, a case file is opened, and the victim is presented with two options: they can either provide

74 Criminal Procedure Act, Cap 116
75 Article 120, 1995 Constitution
76 Adoch, 'Access to Gender Justice in Uganda' Supra
77 Ibid
78 Ibid

a detailed statement or receive a Police Form 3A (PF3A) for evidence collection. However, the current PF3A used for this purpose is considered outdated and lacking in depth. It typically consists of 10-12 standard questions that require simple "yes" or "no" answers, making it inadequate for gathering the comprehensive information needed to address cases of sexual assault adequately.[79]

Guidelines provided by the International Association of Chiefs of Police (IACP) emphasize the importance of conducting police interviews in a private setting whenever possible, with only those individuals present whom the victim has explicitly allowed to be there. [80] Unfortunately, in many instances, privacy is not adequately provided during these interviews. Interviews sometimes occur at the front desk in the presence of numerous people, and even when conducted in an office setting, the privacy of the victim is often not given due consideration. Some victims have reported that during these interviews, multiple police officers were present, and they sometimes interjected as the victim recounted their ordeal.[81] The lack of privacy and the presence of multiple individuals can be distressing, and the victim, who is compelled to provide highly intimate details of the violence they endured, may feel exposed and vulnerable.

This breach of privacy is further exacerbated by the fact that victims are subjected to what they describe as humiliating interrogations by police officers and defense attorneys regarding their personal lives and previous sexual behavior.[82]

The decision to report an incident of gender-based violence is never an easy one, often driven by the trauma and fear experienced by the victim. Consequently, it is crucial that throughout the reporting process, the victim is treated with the

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79 Interview, Gender-Based Violence Clinic, Mulago Hospital, 'I Can't Afford Justice: Violence Against Women in Uganda Unchecked and Unpunished' available at <https://www.amnesty.org/en/documents/afr59/001/2010/en/> [Accessed on 27 September 2023]

80 Ibid

81 Adoch, 'Access to Gender Justice in Uganda' Supra

82 Ibid

utmost care and respect, with a focus on making them feel comfortable, heard, and supported without any judgment.

To provide a more compassionate and respectful experience for survivors, it is essential that interviews occur in private settings, with a genuine effort made to create an environment where victims feel safe, heard, and supported throughout the process.[83]

Following the filing of a report, if the suspect can be identified, they are arrested and undergo a physical examination and testing.[84] The primary government body responsible for forensic evidence analysis is the Directorate of Government Analytical Laboratory (DGAL). However, after the medical examination, there can be significant delays in completing and returning the PF3A.[85] Unfortunately, the DGAL is grappling with a substantial backlog of samples, as it faces severe understaffing and inadequate funding. These challenges inevitably lead to delays in case resolution and extend the entire prosecution process, as vital evidence required for case resolution is not provided in a timely manner.[86]

As a result of these challenges, it could take up to six months to conclude an investigation and produce a report after the samples have been submitted to the DGAL.[87] This lengthy timeline is particularly concerning in cases of rape, where the gravity of the offense demands expedited action.

Furthermore, there is no legal obligation for the police to provide updates to the victim about the status of the investigation after it has been reported, leaving victims in a state of uncertainty, and potentially exacerbating their distress.[88]

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83 N. J. Westera, M. R. Kebbell, & B. Milne, 'Want a Better Criminal Justice Response to Rape? Improve Police Interviews with Complainants and Suspects' (2016) Violence Against Women, 22(14), 1748–1769.

84 Adoch, 'Access to Gender Justice in Uganda' Supra

85 Ibid

86 Parliament of Uganda, 'Report of the Committee on Defense and Internal Affairs on the Oversight Visit to the Regional Forensic Analytical Government Laboratory in Eastern Uganda, Mbale' (2018) Office of the Clerk to Parliament, Kampala.

87 Adoch, 'Access to Gender Justice in Uganda'

88 Ibid

Addressing these issues requires significant reforms to improve the efficiency and effectiveness of forensic evidence analysis. Adequate funding and staffing for the DGAL are essential to reduce backlogs and expedite the resolution of cases.

Once the police investigations are concluded, the case file is submitted to the Director of Public Prosecutions (DPP), who then has the discretion to either approve the file for prosecution or provide guidance to the police on how to proceed further. This guidance may involve closing the file or continuing investigations to gather additional evidence. The DPP's decision is based on an evaluation of the strength of the evidence, considering whether the facts reveal an offense and whether there is sufficient evidence to support the claims, justifying the initiation of criminal proceedings.[89]

At this stage, a strong legal defense would typically consist of the victim's and any other witnesses' testimony, the results of the medical examination, and any statements made by the perpetrator.[90] However, it is important to note that the DPP is not obligated to provide the victim with updates about the progress of their case, and the interests of the victim are not necessarily a primary consideration during this phase. Victims must rely on the discretion of the police officer to inform them of the DPP's decision. Predicting and providing the victim with accurate timeframes for the prosecution of the case can be challenging for the police since they have limited control over the process once the DPP approves the file and it is brought before a judge.[91]

To establish a rape as a crime, one crucial requirement is proving that the accused committed the rape.[92] However, a significant challenge arises when the accused remains unidentified. The police contend that they are unable to take action unless the perpetrator has been identified. While forensic and DNA

89 Ibid
90 Ibid
91 Ibid
92 Section 123 and 124 of the Penal Code Act and see cases of Uganda Vs Nakoupuet (Criminal Case No. 109 of 2016) and Uganda v Yiga Hamidu & Ors (Criminal Session Case 005 of 2002).

evidence theoretically should aid in locating the perpetrator, police surgeons and law enforcement claim that even if the offender's DNA is collected, there is no existing DNA database against which it can be checked to identify the criminal. As a result, DNA evidence becomes useful only in situations where there is already a suspect or a small pool of potential suspects. [93]

While there is the possibility that a fingerprint-linked national ID database could be a valuable resource, it has not been utilized or officially recognized in suspect identification because it is a relatively new system. In situations where the suspect remains unidentified, the pursuit of justice for the victim essentially comes to a halt.[94] Due to this police policy, a victim's case cannot progress unless they can establish that all the elements of the crime were present at least *prima facie*. This places a significant burden on the victim to construct their case, effectively excluding women who are unable to do so from accessing justice.[95]

Addressing this issue requires a fundamental overhaul of the approach to GBV cases and the utilization of available forensic and DNA evidence. Establishing a DNA database and using advanced identification methods can significantly improve the likelihood of identifying perpetrators and delivering justice for victims. Additionally, policies should be designed to support survivors and ensure that the burden of proof does not unfairly fall on the shoulders of victims. Furthermore, improved communication with victims, including regular updates on the status of investigations, is vital to ensure that victims are informed and engaged throughout the process. These reforms are essential for enhancing access to justice and addressing cases of gender-based violence more effectively.

4.3 THE JUDICIARY

The Judiciary in Uganda faces several challenges in dealing with cases of gender-based violence, particularly sexual offenses. Some feminists argue that the legal

93 Adoch, 'Access to Gender Justice in Uganda' Supra
94 Ibid
95 Ibid

system is biased against victims, making it extremely difficult to secure convictions except in specific circumstances.[96] These conditions typically necessitate the presence of compelling corroborative evidence, such as credible witnesses, forensic or video/audio evidence. Regrettably, these circumstances are not commonly available to most victims, thus constituting a substantial barrier to the successful prosecution of such cases.

Courts often rely on standardized or predefined accounts, and those that do not align with these specific frameworks are often dismissed.[97] This demonstrates how the legal system can reject alternative accounts simply because they do not fit neatly within established parameters.[98] An illustrative case is *Uganda v Apai Stephen,*[99] where an elderly rape victim chose to describe her story in abstract terms rather than giving graphic details in open court.[100] She simply said; “he made me his wife and he worked on me”. The use of this euphemism to describe rape was most likely due to the societal stigma and humiliation associated with rape.[101] The judge described her statement as “vague and meaningless” and acquitted the accused for lack of compelling evidence: The judge noted that "there is nothing on record to shed light on what actually took place" and also criticized the victim for not providing more explicit details.

In this case, the Court failed to consider specific factors such as the victim's age, cultural context, and the trauma she had experienced, which led her to employ euphemisms in describing the sexual assault.[102] The Court also failed to explore

96 J.D. Giacopassi & R. K. Wilkinson, 'Rape and the Devalued Victim' (1985) Law and Human Behavior, 9(4), 368
97 Adoch, 'Access to Gender Justice in Uganda' Supra
98 C. Smart, 'Feminism and the Power of Law' (1989) (London and New York: Routledge) 11.
99 Criminal Session Case No. 23/94
100 Ibid
101 Adoch, 'Access to Gender Justice in Uganda' Supra
102 Ibid

ways to provide substantive justice to the victim,[103] using its discretion to hear her evidence on camera, thus protecting her privacy and emotional well-being.[104]

Another significant challenge in the Ugandan criminal justice system is the slow rate at which gender-based violence cases are resolved. The low conviction rates and the significant backlog of cases indicate a systemic issue.[105] These challenges underscore the urgent need for reforms that ensure fairness and effectiveness in addressing gender-based violence cases.

5.0 RECOMMENDATIONS

5.1 ADOPTING A VICTIM-CENTERED APPROACH

To truly make a difference in the fight against Gender-Based Violence, we must place the survivors at the heart of our efforts. A victim-centered approach is all about recognizing the rights, needs, and dignity of those who have experienced GBV.[106] It revolves around empowering survivors, recognizing that each survivor's experience is unique and deserving of respect. It offers survivors control over their recovery and justice-seeking processes, ensuring they are not further victimized by a system that may disregard their voices.

Currently, the justice system often lacks the flexibility needed to accommodate the distinctive circumstances and needs of individual victims. GBV survivors have diverse needs influenced by factors like age, culture, disability, and personal circumstances. A victim-centered approach acknowledges this diversity and tailors support services accordingly.

During the initial police interview, it is imperative to give victims the opportunity to articulate their expectations and perceptions of justice for their case. These

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103 Article 28(2) of the 1995 Constitution and Section 137(1) of the Trial on Indictments Act grants the court discretion to exclude the public from judicial proceedings on various grounds.

104 Adoch, 'Access to Gender Justice in Uganda' Supra

105 Ibid

106 Inter-Agency Standing Committee, 'Definition and Principles of a Victim/Survivor Centered Approach'.

expectations should be acknowledged and addressed, and where applicable, referrals to other services and service providers who can meet their unique needs should be made.[107]

The justice system must adapt to accommodate the diverse needs of individual victims as GBV cases are not one-size-fits-all. Survivors may seek different forms of justice, such as protective orders, healthcare or emotional support before pursuing criminal justice.[108]

Adopting a victim-centered approach entails providing essential support services to victims, such as counseling, ensuring the safety of women at risk of abuse, and empowering women with skills and financial resources to foster their independence. These comprehensive measures are crucial in enabling victims to break free from abusive relationships, where they might otherwise feel compelled to stay due to a lack of viable alternatives.

5.2 SPECIAL POLICE UNITS/DESIGNATED OFFICERS

Specialized police units or designated officers should be established to handle cases of violence against women. The U.N. Handbook for Legislation on Violence Against Women recommends that laws should designate and strengthen "specialized police units ... on violence against women, and provide adequate funding for their work and specialized training of their staff."[109] Violence against women is often complex and requires special skills in recognizing the gendered aspects of crime patterns, working with victims and their families, dealing with perpetrators and coordinating with multiple agencies. Developing these skills requires specialized education, experience and training.[110] In Brazil, there are

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107 Adoch, 'Access to Gender Justice in Uganda' Supra

108 International Commission of Jurists, 'Women's Access to Justice for Gender-Based Violence: A Practitioners' Guide No. 12' (2016) (Geneva: International Commission of Jurists) 3.

109 United Nations, 'Handbook for Legislation on Violence Against Women' (UN Handbook, section 3.2.4).

110 "Eugene Ntaganda, 'Exploring the Special Responses to SGBV: Best Practices, Challenges and Guidelines in the Great Lakes Region' (Discussion Paper, International Conference on the Great Lakes Region, July 2012).

over 250 women's police stations with the authority to investigate crimes of violence against women such as rape, sexual assault and domestic violence.[111] The assistance to women is carried out in a private room, preferably by female police officers. The police officers responsible for the assistance should receive adequate training to allow for the handling of the victims in a humanitarian manner. [112] Implementing specialized police units for handling cases of violence against women will significantly enhance the effectiveness and sensitivity of the response to such cases, ultimately providing better support and justice for survivor

5.3 SPECIAL INVESTIGATIVE AND OTHER PROCEDURES

To ensure that gender-based violence (GBV) cases are investigated thoroughly and consistently, mandatory special investigative procedures must be established. The way the police handle and document these cases significantly influences the effectiveness of the overall law enforcement response and the support provided by other agencies and the community. Therefore, clear protocols need to be put in place, either mandated by law or developed as essential policies to guide the investigative process across the system.[113]

For example, in Saint Paul, Minnesota, legislative funding enabled the creation of the "Blueprint for Safety," a comprehensive guide designed to enhance the criminal justice response to domestic violence. This foundational document offers specific instructions for criminal justice agencies, detailing procedures to ensure victim safety, define agency responsibilities, and hold offenders accountable. It provides clear protocols for police interactions in various

111 Cecilia MacDowell Santos, Women's Police Stations: Gender, Violence and Justice in São Paulo, Brazil (Palgrave Macmillan 2005).

112 Library of Congress, 'Brazil: New Law Creates Specialized Police Stations for Women' (Global Legal Monitor, 28 April 2023) available at <https://www.loc.gov/item/global-legal-monitor/2023-04-28> [Accessed 31 July 2024]

113 Eugene Ntaganda, 'Exploring the Special Responses to SGBV' Supra (n 1)

domestic violence scenarios, including cases involving children and situations where the offender is not present at the scene.[114]

Similarly, Uganda should establish and implement a standardized investigative procedure for GBV cases. This procedure should address various abuse scenarios to ensure that investigations are thorough, victims' diverse needs are considered, and perpetrators are held accountable.

5.4 IMPROVING JUDICIAL EFFICIENCY AND ACCOUNTABILITY

To tackle the pressing backlog of gender-based violence (GBV) cases and ensure timely justice, Uganda should establish specialized courts dedicated exclusively to these cases, which represent at least 50% of the criminal caseload.[115] By setting up such courts, Uganda can emulate the successful outcomes observed in countries like Brazil, Nepal, and Spain, where specialized SGBV courts have proven effective.[116]

These specialized courts would offer several significant benefits. Firstly, they would allow judges and court staff to build expertise in the complexities unique to GBV cases, leading to more informed and empathetic adjudication. Streamlining the legal process within these courts would reduce delays and backlogs, thereby accelerating the resolution of cases and lessening the emotional and psychological burden on survivors.[117] Additionally, a dedicated focus on GBV would ensure consistent adherence to best practices, help combat stigma, and foster a supportive environment for survivors. This specialized approach could also encourage more survivors to come forward, confident that their cases will be handled with the sensitivity and expertise they deserve.

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114 Ibid

115 United Nations Population Fund, 'Special Courts in Uganda: Enabling Access to Justice for Survivors of Gender-Based Violence' (Issue Brief A, September 2018)

116 Ibid

117 Eugene Ntaganda, 'Exploring the Special Responses to SGBV' Supra

5.5 INCREASING TRANSPARENCY IN THE JUDICIARY

To enhance trust and support for survivors, the judiciary should implement comprehensive transparency measures. This includes establishing online case tracking systems, similar to the ones used in Canada, to allow survivors to securely monitor the progress of their cases.[118] Protocols for regular communication via phone calls, emails, or text messages should also be put in place to provide timely updates to survivors. Additionally, publicly accessible reports detailing the status and outcomes of GBV cases would promote transparency, hold the judicial system accountable, and encourage better performance.[119] These measures not only help survivors feel more in control and reassured that their cases are being handled with the seriousness they deserve but also promote their active participation and satisfaction throughout the legal process.

5.6 SPECIALIZED TRAINING OF JUDICIAL OFFICERS FOR GBV CASES

To handle gender-based violence (GBV) cases effectively, judicial officers must be thoroughly trained. Comprehensive training programs for judges, prosecutors, and other court staff should be developed and made mandatory.[120] These programs should cover the dynamics of GBV, the impact on survivors, relevant legal frameworks, and best practices for case management. For instance, the UK's extensive training for judicial officers on GBV sensitivity has led to more informed and empathetic case handling.[121] Continuous education is also crucial; staying updated on new research, laws, and methods ensures that officers remain well-informed. Partnering with organizations that specialize in GBV can further enhance these training efforts. When judicial officers are well-trained, they handle GBV cases with greater sensitivity and professionalism.[122] This not

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118 Emily Buehlow, 'Victim Services' Implementation of Mobile Tracking Systems for Victims of High-Risk Gender-Based Violence Cases in Ontario' (University of Waterloo).

119 Transparency International, 'Enhancing Judicial Transparency' (Position Paper 01/1007).

120 Eugene Ntaganda, 'Exploring the Special Responses to SGBV Supra

121 OECD, 'Gender Sensitive Practices in the Judiciary' available at <https://doi.org/10.1787/c951c33e-en> [Accessed 31 July 2024]

122 Eugene Ntaganda, 'Exploring the Special Responses to SGBV' Supra

only leads to fairer outcomes and reduces the re-traumatization of survivors but also strengthens the judicial process in supporting the needs and rights of victims.

5.7 REMEDIES AND REPARATIONS

Gender-based violence leaves lasting physical and psychological scars on survivors. To address this, compensation is crucial. Reparations include financial redress but are more than that; they acknowledge profound injustices and trauma. Victims often face medical bills, therapy costs, and lost income due to their ordeals, making compensation a practical necessity.

Every act of violence against women is a breach of human rights, and states must provide an appropriate remedy[123], which includes restitution, accountability, and prevention of future harm[124], as was affirmed in the case of Tshitenge Muteba v Zaire, [125] However, despite the Ugandan Constitution's emphasis on reconciliation and adequate compensation, these principles are notably absent in Uganda's current criminal justice system.[126]

In Uganda, a GBV case is considered concluded once a verdict is rendered, which fails to provide financial compensation for the harm endured.[127] GBV inflicts lifelong consequences on victims, including early pregnancies, abandonment of education, and forced marriages. For women with disabilities, the aftermath includes unintended pregnancies, financial burdens, and profound emotional distress.[128]

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123 Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR).
124 UN Human Rights Committee (HRC), 'General Comment No. 31'.
125 Communication No. 124/1982 (25 March 1983), U.N. Doc. Supp. No. 40 (A/39/40) at 182 (1984).
126 Article 126(2) of the 1995 Constitution
127 Adoch, 'Access to Gender Justice in Uganda' Supra
128 Ibid

Reparations for GBV victims go beyond financial redress; they are a moral and ethical imperative. They empower survivors, promote healing, and contribute to ending GBV. Reparations represent a crucial step towards restorative justice, sending a powerful message of societal support for survivors, condemnation of violence, and upholding of their rights.

5.8 BALANCING RETRIBUTION AND RESTORATION: THE NEED FOR ALTERNATIVE APPROACHES IN GBV JUSTICE

The traditional criminal justice system, focused on punitive measures, may not always align with the diverse needs of GBV survivors. Often, the perpetrator is known to the survivor, complicating the pursuit of justice. While some survivors seek punishment, others may prioritize healing or reconciliation. Studies have shown that women think marital rape is terrible and that offenders should be punished, but they do not necessarily believe imprisonment is the best solution. This mismatch often discourages survivors from pursuing justice.[129]

Incorporating restorative justice principles into GBV cases offers a valuable path for healing. This approach emphasizes dialogue, empathy, and understanding, aiming to repair harm and restore relationships. For survivors, it provides a chance to be heard, find closure, and regain a sense of agency.

Alternative justice forms that integrate retribution and restoration can address the limitations of the adversarial system, rooted in colonization. The current system's rigidity in accommodating diverse justice perspectives presents a challenge, necessitating a reevaluation of responses to gender-based violence and the consideration of alternative approaches.

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129 E. Porter 'Justice and Rape on the Periphery: The Supremacy of the Space between Local Solutions and Formal Judicial Systems in Northern Uganda' (2012) Journal of East African Studies 6:1,86

5.9 ENHANCING SAFETY AND SUPPORT OF THE VICTIM THROUGH SAFE SHELTERS

Ensuring the safety and support of GBV survivors is a moral imperative that requires immediate action. A victim-centered approach prioritizes the safety of survivors, involving inquiries about their sense of safety, available shelter, and needed support.[130]

When women and girls report GBV incidents, they often face increased risks of further violence and retaliation from their perpetrators.[131] The shortage of safe shelters exacerbates this problem, forcing survivors to endure dangerous environments.

In Uganda, there are no state-run shelters, and existing shelters run by charitable organizations are insufficient to meet the demand. The glaring shortage leaves countless women with no choice but to endure abusive conditions, perpetuating the cycle of violence.[132]

Safe shelters are crucial for both physical security and emotional healing. Establishing these shelters is an ethical obligation and practical necessity. The Ugandan government must establish new shelters and increase funding for existing ones. This will provide GBV survivors with safety, support, and the empowerment needed to rebuild their lives.

6.0 CONCLUSION

This paper has illuminated how the justice system, encompassing both the police and judiciary, often perpetuates rather than resolves violence against women. The systemic issues, including insensitivity, lack of privacy, and insufficient

130 "USAID's Collective Action to Reduce Gender-Based Violence (CARE-GBV), 'How to Implement a Survivor-Centered Approach in GBV Programming' (Note No. 3 in a Series, December 2021)."

131 Ibid

132 Ibid

recognition of individual victim needs, have led to an environment where survivors frequently feel unsupported and marginalized. Addressing these deep-seated problems requires a transformative approach.

Central to this transformation is the establishment of specialized systems designed specifically to handle gender-based violence (GBV). This includes creating dedicated police units and judicial courts that focus solely on GBV cases, ensuring that these specialized mechanisms are equipped with the necessary resources and training. By instituting these specialized systems, we can enhance the effectiveness of the justice response and ensure that cases are handled with the expertise and sensitivity they demand.

Equally vital is adopting a victim-centered approach. This approach recognizes the unique experiences and needs of each survivor, placing their safety, dignity, and autonomy at the core of the justice process. It empowers victims to define justice on their terms and provides tailored support that respects their individual circumstances. Only by integrating this victim-centered perspective can we ensure that the justice system not only holds perpetrators accountable but also supports survivors in their journey towards healing and empowerment.

Combining specialized systems with a victim-centered approach represents a comprehensive strategy for addressing GBV. This dual focus will not only rectify current deficiencies but also foster a justice system that truly serves and supports survivors, creating a meaningful and lasting impact in the fight against gender-based violence.

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YOU CANNOT CHANGE THE WORLD ON TWITTER: WEIGHING THE SOCIAL PLATFORM AGAINST THE PROMISE TO ENHANCE DISCOURSE AND DEMONSTRATIONS

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YOU CANNOT CHANGE THE WORLD ON TWITTER: WEIGHING THE SOCIAL PLATFORM AGAINST THE PROMISE TO ENHANCE DISCOURSE AND DEMONSTRATIONS

Joshua Kingdom*

ABSTRACT

This paper concerns itself with the contentious debate surrounding Twitter's role in shaping discourse and demonstrations. Is it a powerful tool for social change, or a mere façade that masks its limitations? The paper examines the platform's rhetoric, its impact on governance, and the real-world consequences of its policies. From the Arab Spring to the Black Lives Matter movement, Twitter has been at the centre of major social upheavals. Yet, its effectiveness in achieving lasting change remains a subject of intense scrutiny. Is it time to re-evaluate Twitter's potential, or should we abandon the illusion that online activism can truly transform the world? Whether Twitter is genuine about this venture or not is difficult to deduce, what the facts show however, is that either someone at the company has discovered a route perfect to do marketing or the intended project has failed miserably.

1.0 INTRODUCTION

In his *You are Not a Gadget*, Microsoft engineer Jaron Lanier argues that whether for good or worse, technology is always changing human behaviour.[1] The illustration he uses is that of Jeremy Baileson who has in his experiments with virtual reality shown that changing the height of a person's avatar such that it

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* The author is a former student of Makerere University School of Law.
For the one with big round eyes and thick brows; Namata Nicter Kaweesi. Her support to me has been even bigger and thicker. For my brother Gospel. And for a brother in crime; Victor Ntamugabumwe.

1 Lanier, J. (2011), *You are not a gadget: a manifesto*, 1st Vintage Books ed. New York, Vintage Books.

appears taller than her height in real life can boost their self-esteem. Being alive to this fact then, Lanier suggests that we can avoid distorting life as we go about inventing things.

To the above, I would add that the bigger the promise, the more careful we should tread. In the case of Twitter, the platform set-off to spread out the wings of democracy a pledge that is grand indeed. Like Lanier, my fear is that what we are seeing instead is a locking-in. Lock-in refers to the establishment of an invention on grounds of "what is politically feasible, what is fashionable, or what is created by chance" only for society to adjust making the technology look more sophisticated than it actually is.

The present linkage of Twitter and democracy has its genesis in the years that immediately followed 2010. Convinced that the Arab Spring was an online driven revolution,[2] pundits were eager to see where the wave extended next. It was being said for example, that social media had reversed the cycle of top-bottom governance.[3] Notably, Alec Rose would declare the internet the "Che Guevara of the 21st-Century" in 2011.[4]

Driven by this inspiration, several individuals across the world took to all kinds of actions in a bid to correct for what they felt was wrong. Famously, *Anonymous Africa* hacked into the websites of Zimbabwe's Ministry of Defence and South Africa's biggest political party– Africa National Congress.[5]
While starting as a platform on which subscribers texted messages to 40404 in order to broadcast to their friends, Twitter found itself amidst a moment that would

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2 The Arab Spring were a series of pro-democracy protests that sprung up in 2011 in numerous Islamic countries not least Libya, Tunisia, and Egypt. See, https://www.history.com/topics/middle-east/arab-spring [Accessed October 16th, 2023]

3 Brian S. Krueger: Comparison of Conventional and Internet Political Mobilization, American Politics Research.

4 Paolo Gerbaudo, *Tweets and the Streets; Social Media and Contemporary Activism*, Pluto Press, London, 2012.

5 BBC News, 'Zimbabwe hackers hit ANC website' < http://www.bbc.com/news/world-africa > [Accessed October 16th, 2023]

change its course forever.[6] The Department of State in the United States of America took the social media company's position so seriously that they asked that it holds on with a scheduled maintenance which was set to coincide with students protests in Iran. The worry was that should anything happen, the critical moment would be lost.[7]

Amusingly, what the internet and Twitter in particular could do was not only being talked about by activists and those who rallied behind them but their foes too. Several despotic regimes thus came out with a smear campaign in retaliation as they are known to do with anything they are weary of. The Speaker of the Cameroonian Parliament for example is reported to have referred to social media as "a new form of terrorism" in 2016.[8] Similarly, while appearing at the UN General Assembly in 2016, late Ethiopian Premier Hailemariam Desalegn suggested that the new media "spread…hate and bigotry without any inhibition".[9]

Despite a history of mixed contribution by various digital enterprises however, only Twitter emerged in the aftermath as championing democracy. Not many will know for instance, that following a heavy crackdown in 2009, Iranian protesters mobilized each other via email to carry out actions that did not require them to be out in the streets one of them being plugging energy consuming appliances in their sockets at once so as to cause a blackout.[10] Moreover, the assumed spirit behind the application has inspired several new ones aiming to better what Twitter pioneered. These include Bluesky, Truth Social, Mastodon, and most recently

6 Scandal and Betrayal: The Story of How Twitter Started. <https://youtu.be/p8N0xN0> [Accessed October 16th, 2023]

7 Malcolm Gladwell, 'Small Change; Why the Revolution will not be retweeted.' <https://www.newyorker.small-change-malcolm-gladwell> [Accessed October 16th, 2023]

8 Cameroonian Government Launches Campaign Against Social Media, Calls it "A New Form of Terrorism". < https://advox.Cameroonian-government-launches-campaign-against-social-media/amp/> [Accessed October 13th, 2023]

9 Paul Schemm, 'In Ethiopia's war against social media, the truth is the main casualty.' <*https://www.washingtonpost.com/-ethiopias-war-against-social-media-the-truth-is-the-main-causality*> [Accessed October 13th, 2023]

10 The Call to Prayers Could be a Call to Arms for Iranian Opposition Groups, The Irish Times.

Threads.[11] Elon Musk too voiced his belief in the fact that Twitter is a model for freedom of speech prior to his purchase of the company late last year.[12] Should there be criticism against how far the web can go in influencing governance therefore, a thorough review of the failings of Twitter should go a long way.

Twitter's official brochures now even carry apparent guidelines on how best users can harness the said potential to contribute to the democratic process. One such document published in 2019 targeting civil society, encourages them to utilize physical avenues like printing T-shirts with an account's username to boost their online activity.[13] Whether Twitter is genuine about this adventure or not is difficult to deduce, what the facts show however, is that either someone at the company has discovered a perfect route to do marketing or the intended project has failed miserably. We shall steel-man the intentions in this article by showing how it is that the latter is true.

There are concerns to be raised about the well-being of Twitter users[14] but to achieve the objectives of this paper I will stick to answering the question of whether Twitter has the potential to change the world. Again, even in a democratic sense, there are a couple of ways in which one can think about what it is to create impact.[15] Accordingly, I will reduce my criticism to two values; discourse and demonstrations. From my point of view, proving that none of them can be realized on the site is enough to show that the enthusiasm around it is misplaced.

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11 Threads very much resembles X even in its appearance. < https://castbox.fm/x/id65 > [Accessed October 16th, 2023]

12 A Timeline of Elon Musk's takeover of Twitter,<https://www.nbcnews.com/business/business-news-/twitter-elon-musk-timeline-what-happened-so-far-rcna57532 > [Accessed October 13th, 2023]

13 Campaigning on Twitter; The Handbook for NGOs, Politics & Public Service.

14 Korean movie actress Choi Jin-sil for example, committed suicide over Twitter trolls. <https://www.koreaboo.com/stories/tragic-life-death-choi-jin-sil-nation%E2%80%B2s-actress-south-korea/> [Accessed October 16th, 2023]

15 Saudi teen who tweeted plight is granted asylum, arrives in Canada.<https://www.cnet.com/tech/services-and-software/saudi-teen-who-tweeted-plight-granted-asylum-arrives-in-canada/> [Accessed October 16th, 2023]

Suffice it to say, my assessment is limited to the political aspect of Twitter. For example, I concede to the fact that one can approach the platform with a business mind and they would succeed.[16] Additionally, the research only review's events up to Mr. Musk's takeover since it is difficult to establish a holistic picture of Twitter thereafter now that the new administration has been introducing sweeping reforms up to the time of writing.[17] It is because of this fact that I employ 'Twitter' even when there has been a rebranding to 'X'.

That said Mr. Musk's purchase of Twitter makes this article of much relevance. As his team goes about with introducing what to them are the improvements requisite to achieving the medium's dream, we can weigh the same against the findings herein to see how much of it is potent. The article therefore concludes with suggestions that could aid the said process. These reasons are also important in understanding Meta's Threads. As for the case of Uganda, there is a recently awakened spirit around online demonstrations also popularly referred to as 'exhibitions'.[18] It will be important to know moving forward whether the efforts of Dr. Spire Ssentongo, Godwin Toko, Agather Atuhaire and other activists will not be yet another struggle by Ugandans to crash hope as first as they reinvigorated it.[19]

The article is divided into four chapters. The first chapter is about introducing and laying a background for the topic at hand. In chapter two, I take a closer look at the nature of both discourse and demonstrations by defining each of them and laying down their essential features. Chapter three is a critique of whether Twitter can embody the features outlined prior, later on introduce better ones. I conclude

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16 @WOLF_Financial is one of the accounts I have come across that are doing this very successfully. See, https://x.com/WOLF_Financial?t=byk8IIGnDxZlFEgiwCQW9g&s=09 [Accessed October 16th, 2023]

17 Famously, Mr. Musk was recorded in a video carrying a sink at Twitter's headquarters soon after he had purchased. The act was an extension of his words; "let that sink in". <https://m.economictimes.com/cms> [Accessed October 16th, 2023]

18 Patience Atuhaire, 'Ugandans rage over roads: 'Not a pothole but a pond'. <https://www.bbc.co.uk/news/world-africa-65311847.amp > [Accessed October 16th, 2023]

19 The enthusiasm around the exhibits has already earned recognition to their organizers. <https://nilepost.co.ug/news/182132/cartoonist-spire-ssentongo-wins-human-rights-defenders-award > [Accessed February 11th, 2024]

the paper by suggesting ways in which the platform could be improved as well as sharing practical recommendations for the reader.

A comment on my personal relationship with Twitter as I wind up here; one word for it would be love-hate. I joined the platform rather late for one believing the narrative that I am setting off to debunk in this work and also being an 'intellectual'. It was always clear to me even then though, that soon or later I would find a home in Twitter. As soon as I created an account, I started on tweeting there and then. With time however, I found myself forced to tailor my message in a particular way (say attaching pictures in my posts) and having to put up or leave out certain information because of my anticipation of how it would be received. It amazed me how the prediction versus outcomes pattern played out, though I would I would also grow to wonder whether that was the way conversations were supposed to be held.

The platform has at the same time enabled me host a Twitter Space show for over a year now. I love JKSS as it allows me to share my thoughts in long audio format having been severally frustrated before by the misunderstandings that WhatsApp status updates can mean to occasion. I have also been able to talk to many young people that I admire about both topics that we share interests as well as those that I know little.[20]

This research is therefore my contribution towards an area that remains grey in many respects as much as it is a personal expedition into a place where I hope to return from with answers to questions that have troubled me for a while.

[20] That is the program's short form. The full name is the Joshua Kingdom Space Series.

2.0 THE NATURE OF DISCOURSE AND DEMONSTRATIONS

2.1 DEFINITIONS

The Britannica dictionary defines a demonstration to be "an event in which people gather together in order to show that they support or oppose something or someone".[21] Essentially, a demonstration is a protest.[22] Dawn Brancati makes clarifications between what he calls "democratic protests" (demonstrations whose specific purpose is to demand that election results are respected) and "anti-government protests" (these call for governments to resign usually citing incompetence) among other categories.[23] For our purposes here however, any demonstration applies. It is enough that the individuals protesting are rallying around a similar cause.[24]

Other related words are "strikes", and then "riots". These have key distinguishing features though. Strikes include the participants refraining from engaging in an activity that they would otherwise have done. In 2012 for example, the opposition in Togo asked women not to have sex for a week following the initial attempts by President Faure Gnassingbé to remove term limits from the country's constitution.[25]

Riots are criminal as they involve the use of violence either on people or property. An example is when during the *Black Lives Matter* protests that swept America after the death of George Floyd some of the protestors broke into shops and stole merchandise.[26] Neither riots nor strikes are considered in my analysis.

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21 Britannica Dictionary <https://www.dictionary.com/browse/demonstration> [Accessed October 16th, 2023]

22 The same dictionary defines a protest in precisely the same terms. See, <https://www.britannica.com/dictionary/protest> [Accessed October 16th, 2023] .

23 Dawn Brancati, 'Democracy Protests: Origins, Features, and Significance,' Cambridge University Press, 2017.

24 Crozier, Michael, Samuel P. Huntington, and Joji Watanuki. 1975. The Crisis of Democracy:Report on the Governability of Democracies to the Trilateral Commission. New York: New York University Press/Gurr, Ted. 1970. Why Men Rebel. Princeton, NJ: Princeton University Press.

25 Togo Women Plan Sex Strike Against President, <https://www.hurriyetdailynews.com/amp/togo-women-plan-sex-strike-against-president-28630> [Accessed October 16th, 2023]

26 See, <https://castbox.fm/x/id65> [Accessed October 16th, 2023]

Demonstrations are an important aspect of democratic governance because they serve as a form of checks on the elected leaders.[27] It is because of this that they are guaranteed by Article 20 of the Universal Declaration of Human Rights which provides for freedom of assembly.

Going by Brancati's definition, 310 democratic protests occurred across 92 countries from 1989 to 2011.[28] Most recently, the people of Armenia have been out on the streets to express their discontent in their government for what they considered an abandonment of ethnic Armenians who had up to September 2023 settled in the Nagorno Karabakh. The region is internationally recognized as belonging to Azerbaijan but has been under the leadership of an Armenian breakaway government all this while.[29] A month earlier, Syrians had been demonstrating over "deteriorating economic conditions".[30]

Protests at times succeed as in the case of the Seoul students in 1988 when young men and women pressured their government into implementing major institutional reforms ahead of the Olympics tournament that was hosted in their country later that year.[31] Unfortunately, this is not always the case. The 2014 umbrella demonstrations in Hong Kong did not only fail but also saw China reverse some of the freedoms that the city's dwellers enjoyed above inhabitants of mainland China. It is for this reason that an invention that holds out as guaranteeing a win for the people would be revolutionary.

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27 It is no surprise then that demonstrations are often started by little known people e.g. Mohamed Bouazizi (a fruit vendor in Tunisia) sparked off the Arab Spring whereas Camila Vallejo a student in Chille started the strikes that demanded the end of profit education.

28 Supra note 23.

29 Felix Light, 'Armenian protestors demand Pashinyan ouster,' <https://www.reuters.com/world/asia-pacific/> [Accessed October 16th, 2023]

30 William Christou, 'Protests against declining living conditions spread across Syria,' <https://www.newarab.com/news/protests-against-living-conditions-spread-across-syria?amp> [Accessed October 13th, 2024]

31 In South Korea, Riots Flare Again. See, <https://www.nytimes.com/1988/11/04/world/in-south-korea-riots-flare-again.html> [Accessed October 16th, 2023]

As for discourse, it best fits the claim that has severally been made equating Twitter to a public square.[32] The importance of communication cannot be overstated. The pre-colonial Mexican leader Montezuma lost his very life over a conjecture of language that signaled surrender to the Spanish explorer Hernan Cortes Aztec at their first encounter in real time even when Montezuma meant the very opposite thanks to poor interpretation.[33] Thus far however, the forms of conversation that we seem to know how to use are constrained by the fact that they are one way and sometimes understood to be manipulative too e.g., long audio and public speech.[34] The hope with Twitter then, was that it would fill these gaps. Unfortunately, the evidence thus far shows otherwise. In fact, the platform has been mentioned among social media outlets that cause violence by spreading conspiracy theories.[35] Twitter enables this by amplifying emotional (and therefore often negative) content thereby causing users to view those with whom they disagree politically in bad light. We shall get into the specifics of how this comes to be in Chapter three but for now, we will discuss the nature of both discourse and demonstrations.

2.2 THE NATURE OF DISCOURSE

In an article titled *Ethics and political discourse in democracy*,[36] Thanos Lipowatz views 'struggle' as a constant in governance. Subsequently, he encourages us to embrace it rather than shun it. Discourse is one way that allows for an admission of difference between views a notion that Lipowatz refers to as 'impossible harmony'. At the same time however, he argues that the impossibility still brings about a 'splitted unity' (sic). The latter comes about by placing all individuals

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32 Oliver Darcy, 'Twitter is the world's digital public square. What happens if it dies?' <https://amp.cnn.com/cnn/2022/11/18/tech/what-if-twitter-dies/index.html> [Accessed October 16th, 2023]

33 Malcolm Gladwell: Talking to Strangers; What we should know about the people we don't know, Little Brown and Company, New York Boston London.

34 < https://youtu.be/o2nG7-eXxko?si=MNPCQAR1b0rpcgfa> [Accessed October 16th, 2023]

35 J. Bandy and N. Diakopoulos, 'Curating Quality? How Twitter's Timeline Algorithm Treats Different Types of News,' <https://journals.sagepub.com/doi/10.1177/20563051211041648> [Accessed October 16th, 2023]

36 Fil. vest./Acta Phil., XVI (2/1995), 135-143.

agreeing to disagree in the camp of the 'democratic'. Those who take their critiques for foes then fall within the undemocratic bracket.

Jews, Christians, socialists, liberals etc. therefore can still belong to the first description of people while religious fundamentalists, sectarians, and populists automatically fall in the other category. This is important because when individuals fail to express difference in opinion through conversations, then they resort to more degenerate models an example of which is war. Further, Lipowatz points out that discourse should be aided by reason and law. This means that factors such as family loyalties and individual positioning in society ought to be put aside and in their place logic and scientific facts welcomed. The role of the law is to ensure that the exchanges happen in an atmosphere that is as indulging as much as possible yet respectful of the rights of the participants.[37]

In defense of these virtues, we are warned against coming up with myths even when the inventors are convinced that the same is in service of democracy. The rationale is that such occurrences turnout to "spread populist, nationalist, fundamentalist and anti-Semitic ideas". The article finds that these concerns materialized during the French Revolution once religion was substituted for politics as well as in the Soviet Union Era.

Habermas' approach towards discourse is very much in agreement with that of Lipowatz. The thinker states for instance, that it should be about disregarding individual status such that better arguments win just on that account.[38] To Lipowatz's picture, he adds the fact that engagements should be open and therefore earnest and transparent as well as accessible for all persons to participate in.

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37 Parvin, P., Saunders, B, 'The Ethics of Political Participation: Engagement and Democracy in the 21st Century.' Res Publica 24, 3–8 (2018). <https://doi.org/10.1007/s11158-017-9389-7>

38 Zhe Liu and Ingmar Weber, Is Twitter a Public Sphere for Online Conflicts? A Cross-Ideological and Cross-Hierarchical Look Social Informatics, 2014, Volume 8851, ISBN: 978-3-319-13733-9.

Habermas refers to his hypothesis as a 'public sphere'. Indeed, discourses prior to the emerging of Twitter seemed devoid of good faith making them to lack fairness. Felicity Armstrong has illustrated this in her research published upon closely following events at a one Marshlands Primary School in the early 2000s when "Learning Education Authorities" (LEAs) across the United Kingdom shutdown several schools that taught only students with disabilities as a way of encouraging inclusivity. The goal was to have all learners attend the same classes despite their nature.[39]

Armstrong concluded that the area LEA had organized different stakeholder meetings and that the strategy had allowed them to lie about how policy implementation would look like depending on who they were talking to. Enthusiasts about Twitter would argue in such a case that if a parent was to post something on their timeline and then it is read by a teacher, the reader would come to really know the LEA officials for who they are and that would land them in big trouble.

Beyond these features, Twitter should also be weighed against the changes that it set out to occasion in conversations. For the start, we can look at what Neil Sadler has termed as a contestation between 'readerly' and 'writerly' texts.[40] Writerly communication would be the discourse that dominated public conversations before the coming of Twitter. It composes of writings that are detailed in terms of figures and facts. They are also quite lengthy and explicit in style. They include books, Newspaper columns, Magazine reports etc. Reading them, there is absolutely no doubt about what the author meant on the part of the consumer. By extension, while not being texts, existing alternative avenues to this approach before 2006 had the same impact on their audience.

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39 Felicity Armstrong (2003) Difference, discourse, and democracy: the making and breaking of policy in the market place, International Journal of Inclusive Education, 7:3, 241-257, DOI: 10.1080/1360311032000108867.

40 Neil Sadler 'Narrative and interpretation on Twitter: Reading Tweets by telling stories' <https://journals.sagepub.com/doi/10.1177/1461444817745018#tab-contributors> [Accessed October 16th, 2023]

Twitter was launched and it only allowed 140 characters per tweet.[41] That later changed to 250 yet still there is so much that one can write in that space.[42] A tweep found that they had to create a thread, ignore rules of grammar yet even then they would come out with something 'readerly' i.e., leaving the followers to fill in the words left out.[43] This approach only existed in fiction and especially poetry up to that point.

Particularly in relation to media, short texts broke conventional journalism putting in its place collective reporting with the exception of sharing links.[44] Papacharissi has expressed this fact in terms more precise than I could ever do thus; "Stories are told collectively, although not necessarily collaboratively, by large numbers of users".[45] This contribution by Twitter is considered in the circles of individuals that treat Twitter as a beacon of free speech to be a realization of Lipowatz's test regarding inclusiveness. Twitter brought with it instantaneity too. While physical newspaper readers have to wait at least a day to know about what is going on in the world and Radio listeners only get to learn what is new when the News hour comes, the people being reported about have Twitter accounts where they post their thoughts as they come (sometimes before talking to the press).

While the breaking news aspect of Twitter happened by accident– this was on 15th January, 2019 when a photo of a US Airways flight which had crashed into River Hudson was tweeted before any traditional media outlet featured the story–, it has ever since become a norm.[46] Moreover, the newsroom at times delays updates even further as they go about fact-checking there prompting individual journalists to

41 See, https://youtu.be/mjLjvF6GtVg?si=1k-wM9U5LuTvsDng [Accessed October 16th, 2023]
42 X now allows verified users to post with no cap on the number of words.
43 Even in cases when an individual would have said all that they would have wanted, you could not be sure that your audience would read every other tweet. Indeed, it is common place to find that the tweets coming first in threads carry more likes.
44 Hermida A, Twittering the News: The emergence of ambient journalism. Journalism Practice, 2010, 4(3): 297–308.
45 Papacharissi Z, Affective Publics: Sentiment, technology and politics. Oxford: Oxford University Press, 2015.
46 Supra note 6.

tweet ahead of time.[47] Ideally, this should help with the fast spread of information and so enable all kinds of reactions whenever urgency is crucial.[48]

Immediacy is also linked to an increase in the availability of information since when an event is ongoing people are more likely to comment on it than otherwise. This diversity triggered a shift from cultures that often portrayed 'well-defined' narratives leaving little room for 'stand-alone' information.[49] We can now turn to what protests represent.

2.3 THE NATURE OF DEMONSTRATIONS

Given that we already defined what demonstrations are, we shall leave out the features that are not relevant for our criticism of Twitter. It is obvious for example that any protest entails a huge number of participants. Our first feature comes from *Small Change; The Revolution shall not be tweeted*;[50] protests are dangerous. This is because every significant demonstration has to concern real issues about the plight of people. And by seeking to address them, such efforts pose a threat to the prevailing regime. It is rather an exception then for the persons being called out to recognize their shortcomings at the onset.

In arguing that Twitter hides activists away from the fangs of authoritarian actors,[51] proponents of digital activism miss the whole essence of demonstrations–resistance. In the quoted article, Malcolm Gladwell narrates that within a couple of days of camping in Mississippi, volunteers started to disappear mysterious only for their colleagues to learn about their deaths later. Other obnoxious acts that characterised a greater part of the time that the mission carried on included the

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47 This is what journalists mean when they write in their Twitter profile something like 'Opinions mine'. See for example, <https://x.com/PabloBach?t=z8pQZ0g5qNfIzF3Ilu6CSA&s=09> (accessed October 16th, 2016).

48 Hermida A (2013) #Journalism. Digital Journalism 1(3): 295–313

49 Manovich L: The Language of New Media. Cambridge, MA & London: The MIT Press.

50 Supra note 7.

51 Yaqui Wang, 'Why Twitter Under Elon Musk is Good News for China's Rulers.' <https://www.hrw.org/news/2022/11/02/why-twitter-under-elon-musk-good-news-chinas-rulers> [Accessed October 16th, 2023]

burning of several black churches as well as bombings on houses where activists hid.

Doug McAdam has also pointed out that demonstrations will work only when the majority of the protesters engaged have their good friends along with them.[52] The data on this holds true even for events in history that seem spontaneous like the fall of the Berlin Wall. Friendship is critical because again, protest times are more likely to be hard than otherwise. It is important for one's psychology then to know that they are not alone or to have a person they have ties with comfort them when all hell breaks loose. The criticism here would be that followers on Twitter can substitute for friendship. It is an assertion that we shall assess and conclude that it is false.

For their strength, we can still illustrate another key feature of demonstrations by closely inquiring into the 60s civil rights movement and that is, organization. Aldon D. Morris writes in his study *The Origins of the Civil Rights Movement* about how there were standing committees, accountability mechanisms, and even disciplinary authorities within the movement structures. This setup was rigorous and equally spread out.[53] There was also no ambiguity regarding who the heads were.
Finally, Arce and Rice have found that it is essential that protests resonate with the demands of a society.[54] Seeming obvious, I will argue that in fact this issue is not and show that Twitter protests are unlikely to meet the requisite criterion.

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52 Supra note 7.
53 A.D. Morris, 'The Origins of the Civil Rights Movement. Free Press; Collier Macmillan,' New York, London, ©1984.
54 Acre and Rice, 'The Political Consequences of Protest,' DOI- 10.2307/j.ctvjf9x8c.6.

3.0 DISCOURSE AND DEMONSTATIONS ON TWITTER

3.1 WEIGHING TWITTER AGAINST THE NATURE OF DISCOURSE

3.1.1 GOOD FAITH

The odds of conversing candidly on Twitter are rather low. Jaron Lanier's ABCDEF metric as encapsulated in *Ten Arguments for Deleting your Social Media Accounts Right Now*[55] is salient here especially if one understands the letters "A", "B", and "F". B stands for companies "Butting" into people's lives having spied on them. In the case of Twitter, this translates into the algorithm feeding you content that it is aware you like. Because one really has no control over what is happening, they soon become "Assholes" who opt for "discharge" instead of "discourse".

A multiplicity of manipulated users then formulates a "fake" society whose truth is distorted and their communication toxic. The algorithm further makes users to care about the illusion of the community hence they become less willing to work with facts even in cases when they should. At that point, all good faith is lost.
As I conceded earlier, while genuine discourse cannot thrive in such a setting, there are ventures which will do depending on how far your ethics get. The New York Times reported in 2018 for example, that with $225, it was possible for a person to acquire 25,000 fake followers (if you use Twitter you know that followers is a status symbol that people care about).[56] That could give you a whole different standing in industry but it is unlikely you will want to engage with ghosts.

The caveat to playing to the whims of the majority are the people who already occupy a high stature in real life since their audiences will follow them without the demand on their side to care about what everyone else is doing. Yet even then, we can still find that A, B, and F still haunt this category of people in another way.
Theirs is mostly a receiving end phenomenon. As they go about posting on controversial topics, users with big accounts gather as much hatred as they do

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55 Lanier, 'Ten Arguments for Deleting Your Social Media Accounts Right Now.' New York: Henry Holt and Company, 2018.

56 The Follower Factory; Everyone wants to be popular online some even pay for it available at <https://www.nytimes.com/interactive/> [Accessed October 16th, 2023]

with likes.[57] Once the collective of those that disagree with them are settled on how to attack, the struggle becomes how they out compete each other in inflammation. Kenya's former president Uhuru Kenyatta thus, shutdown his Twitter and Facebook accounts in March 2019 citing victimhood to unending insults; this even when the Statesman had previously earned himself the title of "digital president".[58]

The effect that this feedback has on its target is a decline in their perception of the people on the other side of argument and from first principles this is the beginning of making bad arguments.[59] It is no wonder the political atmosphere is full of all sorts of names; from 'climate deniers' to 'wokenness', and from 'Trump derangement syndrome' to 'misogynists'. Nothing in what I am saying here is meant to disregard the fact that political conversations always carry a degree of heat for which those getting themselves involved should prepare. Instead, I am concerned about the perverse incentives that Twitter avails in conversations.

Going back to Lipowatz, such is a recipe that replaces struggle with war. This fact has been proven by a collaborative publication between experts from the College of Information Sciences and Technology, The Pennsylvania University, and University Park, Pennsylvania.[60] Having interrogated 20,000 tweets between three pairs of accounts known to share animosity in real life, the study found that some of the words used most by their followers while targeting the counter group were "kill", "hate", and "murder".

The Twitter model also works in such a way that our reaction to posts is driven by our first instincts. We approve of what we presume to be right and ignore or dismiss

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57 I am focusing here on users who post views as opposed to say cultural leaders because it is these accounts that attempt to engage in discourse on Twitter.

58 S. Lawal, 'Kenya's President confirms he shut down social media accounts because of bullying.' Available at <https://www.telegraph.co.uk/news/2020/11/26/kenyas-president-confirms-shut-social-media-accounts-bullying/> [Accessed October 17 2023]

59 In order to engage in constructive discourse, one has to assume the best intentions of their opponents [Stanley Fish: Winning Arguments, ISBN: 9780062226679.

60 Supra note 37

the posts that we believe are not thus leaving little room for any meaningful interaction. This more so when the most used buttons on the app, are that of like and then retweet. Pressing them will have the information subject spread faster than otherwise though doing so does not require the person concerned to critically think about what they are doing.

Consider the fact that Twitter's only direct confrontation feature for retweets is 'Quoting' a provision that in effect hurls criticism back to the initial person tweeting instead i.e., it doesn't impose any direct responsibility on the immediate person. We can better understand this concept by juxtaposing Twitter with Strohl's criticism of *Rotten Tomatoes*' movie ranking algorithm.[61] His bolder claim is that a good movie is one that heavily divides opinion. It is neither obvious nor does it leave the viewer comfortable. By only considering the audience that 'liked' a film therefore, we ignore those who 'did not' but have been left with questions which they may eventually resolve in the movie's favour.

Another straight forward barrier to good faith interactions is the fact that Twitter remains a public platform where the owners get to decide the rules of the game. Worse, as Michael Shellenberger found in the wake of Elon Musk's decision to release the company's earlier internal communications in what the billionaire dubbed the Twitter files, the rules are set in retrospect in some circumstances.[62] Now, in recognition of libertarian principles, I do not disagree that entrepreneurs should reserve the right to determine how it is that things go at their companies with limited exceptions. As far as discourse is concerned however, entrepreneurship is failing to create the ideal arena.

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61 Matt Strohl, 'Against Rotten Tomatoes,' available at <https://aestheticsforbirds.com/2017/09/21/against-rotten-tomatoes/> [Accessed October 16th, 2023]

62 Chris Cuomo and Tyler Wornell, 'Shellenberger on 'Twitter Files': Investigation is necessary.' < https://www.newsnationnow.com/cuomo-show/shellenberger-on-twitter-files-investigation-necessary/amp/> [Accessed October 16th, 2023]

Even if we were to take Twitter's claims seriously though and grant that it is a site that supports conversations, it is still not clear that that is good enough. Whilst LinkedIn's objective i.e., selling one's self in the job market keeps users focused every time they visit the application for instance, major political discourse is not like that.[63] It comes and goes. To understand this, we only need to read the atmosphere during elections. It is completely different from the times otherwise.[64] Of course this is an extreme example but it drives the point home.

For the time that there are no topics to share opinions about then, users are left dormant so they create their own discourses which are often diabolical. And when this pattern repeats itself over and over, what should have been an activity of passing time now becomes the main business[65] including extending the discovered style to political exchange whenever it comes up again. It is a public secret thus, that Twitter users act out most arrogant than any other batch elsewhere on the internet.

There are counter suggestions to be made in this regard especially because Twitter is also a News place and therefore more likely to spark off conversations than not. To the extent that they are valid, they will be addressed under Twitter's instantaneity feature.

63 Supra note 54.

64 Knowing this Russia has always tried to interfere in US elections. [Kevin Breuninger: Russia tried to influence U.S. elections in 2022 and will do it again, nation's top Intel agency says. <https://www.cnbc.com/amp/2023/03/08/russia-tried-to-influence-us-elections-in-2022-and-will-do-it-again-intel-agency-says.html> [Accessed October 16th, 2024]

65 Consider the account @Aisha11ug. Within a little over a year of joining Twitter, the holder as up to 173,000 followers which is a big in Uganda. What content is shared there? Mostly sexual. Whether men prefer women's bosoms or their behind. See, <https://x.com/Aisha11ug?t=EVhbPr45j7s9RdCB9WHV2A&s=09>(accessed, October, 16th 2023).

3.1.2 REASON

Good faith is about intentions, but Twitter has not just changed why we engage in discourse. It has rewritten conversation itself. Thi Nguyen[66] has rightly pointed out that the application has reduced engagements into a form of a game. This he has called gamification.

For this restructuring, reason has paid the price. Rather than have subscribers aim to make watertight arguments, the platform has devised its own way of awarding what a good proposition is i.e., the number of likes, retweets, and followings that it gets the person who has posted it. This gives the user a sense of approval which is something that we are evolutionary inclined to feel good about. We can learn more about gamification by looking closely at the model tried out by Disney in a bid to increase productivity of its employees.[67] The company introduced leaderboards and a ranking system and as a result the face value objective was attained. Employees testified to finding motivation all of a sudden yet they hated the way in which this discovery happened. Many of them started injuring themselves for example as they rushed through duties. It will be no surprise then that it has now been settled that tweets do not go viral because of their truthfulness or rigor in construction.[68]

Games get gamers hooked because their goals are concise, clear, and easy to aim for; come first in a race, and you get yourself 300 coins, come second and you win 100 coins… The reason the approach cannot work in discourse however, is that when being engaged in a game, one consciously knows that they are only playing. They can derive some fun but they will not seek to impose any game truths onto

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66 C. Thi Nguyen, "How Twitter Gamifies Communication," in J. Lackey, ed., Applied Epistemology (Oxford: Oxford University Press, 2021), 410-436. Learning.

67 Gabrielle, 'How Employers Have Gamified Work for Maximum Profit.' October 10, 2018 available at <https://aeon.co/essays/how-employers-have-gamified-work-for-maximum-profit.> [Accessed 23 October 2023]

68 J.W Brady, J.C. Jackson, B. Lindstr¨om, and MJ Crockett: Algorithm-mediated social learning in online social networks. Preprint at OSF preprints. https://doi. Org/10.31219/osf. Io/yw5ah,2023.

reality. That is not the case with Twitter of course. As a particular set of posts trend, those whom they reach will take them for being critical thoughts.
Also important to note is that Twitter is not only like games, it really is a game. Its algorithm is literally informed by the practices of the gaming industry in Las Vegas.[69]

Perhaps the exception to the gamifying going on Twitter is the *Spaces* provision. The way it works is that you will receive a notification when a person you follow is scheduled to host one of these audio conversations.[70] Once the engagement starts, you will see a purple rectangular strip on top of your screen where you can choose to log in or not. The strip will also appear if at all a person you follow is speaking in a Space. The algorithm will also make available in your feed Spaces that are popular elsewhere and those that might interest you though you have to do a bit of digging to find these. Relatedly, Elon Musk has now allowed for the posting of long videos on the platform with an option of being downloadable if the person sharing allows.

Twitter's long videos and audios however, still lack some key features. Audios cannot be downloaded for example except with the aid of third-party software. It seems that the company's prioritization of texts has come at the expense of more stable means of engagement. Alternatively, this might be a deliberate omission. Playing an audio recording online for example, still keeps the listener logged on Twitter there making them susceptible to traversing recent tweets as they listen in. Assuming that Twitter succeeds in eventually producing the best of voice and video though, it would seem that the company would be offering that which is already being done elsewhere with podcasting and platforms like Patreon, YouTube, and

69 Natasha Dow: Addiction by design: machine gambling in Las Vegas, Princeton University Press, Princeton, NJ, 2012.
70 Anna Sonnenberg, 'Twitter Spaces: Your Complete Guide to Getting Started' <https://www.socialmediaexaminer.com/twitter-spaces-a-live-audio-guide-for-marketers/> [Accessed October 16th, 2023]

Rumble. That would not be the magic bullet Twitter that has been preached to be all this while.

Rationality has further been undermined by the feed that appears on a user's screen in what Bandy and Diakopoulos have referred to as the 'algorithmic timeline' as opposed to the 'chronological timeline'.[71] The terms are used to define the two different streams where recent tweets appear with one carrying posts by people you follow and another carrying those which are curated by Twitter depending on what the algorithm has concluded you will like. The latter is dependent on factors such as your previous likes as well as posts liked by the users you follow.

Bandy and Diakopoulos concluded that users are more inclined to like the Tweets that the algorithm presents them with than what is available in the chronological timeline because the said tweets fitted well within their unrevealed preferences. These posts however, were often more sensationalizing. This is supportive of a different study by Jonathan Haidt and Chris Bail which has shown that rather than isolate tweeps into the so-called filter bubbles[72] such that their opinions are affirmed over and over thereby making them contemptuous of any other world views, Twitter has been a catalyst for division by instead feeding people on the most extreme ideas when exposing them to alternative schools of thought.

As if this is not enough, the algorithmic timeline has in real time had a compounding effect on the chronological timeline. Through 'observation learning' (users study the algorithm and infer what it is that it rewards) and 'reinforcement learning' (users who have previously benefited from the way the algorithm selects posts) for example, Twitter users tend to change their messaging with the objective of having their tweets taken on by the algorithm.

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71 Supra note 34.

72 Filter bubbles refer to algorithmic curating that shelter users from opposing perspectives. [Eli Pariser. The filter bubble: How the new personalized web is changing what we read and how we think. Penguin, 2011.]
Penguin, 2011

Twitter subscribers who spend a considerable portion of time scrolling through the algorithmic timeline, are also likely to follow the accounts appearing there, as well as retweet and like their content etc. This in effect sees data that started off in the algorithmic timeline crossover to the chronological one.

We now turn to the supposed improvements for the better.

3.1.3. INFORMATION AVAILABILITY

Somewhere on the bar of availing information, a balance must be stricken between quality and quantity.[73] Unfortunately, Twitter seems to have focused much on one aspect. I shall not labour to explain how the platform's users care less about facts, truth etc. as that point has already been made. The important take for us here is not to confuse the availability of information with the weight it carries. Whilst Twitter has been heralded for giving everyone a voice for example, research has shown that users of a lower status (having fewer followers) by far contribute low quality information e.g., inaccurate figures.[74]

Moreover, the access of information should not be infinite if such data is to transform those who consume it. I am aware that there are limits on what one can see and not see on Twitter however the bar of closing on people is so low.[75] In effect, even if two users were to follow the same people, they would find themselves reading different tweets depending on the time that they check with their Twitter.[76] There has thus been so much distortion with people feeding on different information that it has become so difficult to agree on the ground rules for which disagreements should happen.

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73 Supra note 54
74 Supra note 37.
75 https://castbox.fm/x/id65 [Accessed October 16th, 2023]
76 Supra note 37.

To the credit of Mr. Musk, he has put a limit on the number of posts one can see in a day. This however, has come with a lot of pushback given the model on which the platform has thrived all this while.[77]

3.1.4. INSTANTANEITY

If you want to find something bad to say you will always do, and there are those from my side of the argument that have found issues against the fact that Twitter has enabled a fast transfer of news. I won't fall for the temptation in my case though.

Whilst it is true that live broadcasting has been found to be less accurate than reporting done after the fact for example,[78] I am convinced that there is a place for quick travel of information. My only query is whether this alone weighs enough in a comparison of gains and costs. Additionally, even if Twitter was to go away, its legacy in this regard would not be lost as News outlets now put up stories on their websites in real time.

3.1.5. SINGLE V COLLECTIVE NARRATION

In comparison with other existing media, Twitter has done a better job at democratizing communication. That said however, it is a long way from resolving the status problem mentioned earlier. Ranking users in terms of their followers for example, has shown that those with small audiences are least likely to be mentioned by users with whom they disagree during a general exchange.[79]
In this, one reads over enthusiasm on the side of Twitter optimists for contending that it is possible to forget about all status symbols and 'just debate'.

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77 Twitter Puts Daily Limits on Number of Tweets Users Can Read <https://learningenglish.voanews.com/amp/twitter-puts-daily-limits-on-number-of-tweets-users-can-read/7168407.html> [Accessed October 16th, 2023]

78 C.A. Tuggle and S.Huffman, 'Live Reporting in Television News: Breaking News or Black Holes?' <https://go.gale.com/ps/> [Accessed October 16th, 2023]

79 Supra note 37.

3.2. WEIGHING TWITTER AGAINST THE NATURE OF DEMONSTRATIONS

3.2.1. ORGANIZATION

An account operator on Twitter has no real control over their following. And because of this, they cannot tell anyone what to do later on check with them on whether they fulfilled it. No doubt even online demonstrations have faces but still, this is far from a leadership that will deliver a revolution.

To understand this, we need to closely engage the different ways in which the application can be employed in protests i.e., creating awareness, mobilization, and then real action.[80] My contention is that while Twitter can help with the first two, it fails when it comes to actual protesting. This is the whole argument made in *Tweets and the Streets*.[81] Seeking to be neither radically optimistic nor pessimistic, Paolo Gerbaudo asserts that tools like Twitter should be viewed as complementary to "face-to-face gatherings".

I go further than Paolo though to say that awareness and mobilization are somewhat irrelevant in protests. Instead, the important thing is to base your theme on a matter that resonates with the rest of society. Being impacted by the grievances at hand already, people will join you on their own accord. This is why in 2011 activists in Egypt hardly faced any problems when Hosni Mubarak cut off communication country wide.[82]

In giving a counter argument, Manuel Castells has conceded to a difference in structure yet insisted that online demonstrations work.[83] His distinctions— which I find important and therefore agree with— are what he calls 'Swarms' and then 'Networks'. Networks represent the well streamlined leadership that I have argued for already whereas swarms are basically a diverse composition with no center.

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80 Sandor Vegh, 'Classifying Forms of Online Activism: The Case of Cyber Protests Against the World Bank, in Martha McCaughey and Michael D. Ayers (eds).'

81 Supra note 4.

82 Egypt cut off. < https://amp.dw.com/en/protests-in-egypt-continue-despite-government-shut-down-of-internet/a-1480175> (accessed, October 17th, 2023).

83 Manuel Castells, 'Communication Power' Oxford University Press, 2009.

To illustrate that swarms work, Castells sites a 2003 scenario in which *Wired* journalist Bill Wasik sent out an email inviting readers to gather at a jewelry shop. The plan was that upon reaching there, they would organize themselves and then disperse in a way that forms an artistic pattern. And sure, scores of people turned up. This example is a false comparison though, since as shared already protests actually involve confronting forces that are willing to go as far as killing people if that is what it takes to stop them. That atmosphere is in stark difference with that which I have just described. The latter requires a place that provides encouragement on days of mourning, a sense of direction when patience is running out, and even wisdom when the first hint of success starts to be felt.

Indeed, the Occupy Wall Street protests started earlier than the public got to know them.[84] It is just that the catch fire moment only came after the organizers went back to the drawing board and devised mechanisms of intense groundwork coordination. How ironical for a country where Twitter is headquartered.

3.2.2. PROTESTS SHOULD RESONATE WITH THE BROADER SOCIETY

Another problem with online demonstrations is that it is difficult to think that the concerns they represent reflect society at large. This is because almost in whichever part of the world you go to, the platform is heavily populated by the elite. The so-called Twitter Pashas.[85] Twitter subscribers are also usually more politically involved than an average citizen.[86] Even within the social media world itself, Twitter has far fewer users than platforms like Facebook or Instagram.[87]

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84 G. Lotan, '#OccupyWallStreet: Origin and Spread Visualized' *Social Flow* (blog), 18th October 2011 available at <http://blog.socialflow.com/post/7120244404/occupywallstreet-origin-and-spread-visualized> [Accessed on 23rd October 2023]

85 G.A. Amin, 'Egypt in the Era of Hosni Mubarak: 1981-2011' Cairo: American University in Cairo Press.

86 S. Wojcik and A. Hughes, 'Sizing up Twitter users' Pew Research Center, available at <https://www.pewinternet.org/wpcontent/uploads/sites/9/2019/04/twitter_opinions_4_18_final_clean.pdf> [Accessed on 23rd October 2023

87 Twitter has about 330 million users. See, <https://financesoniline.com/number-of-twitter-users/> Instagram on the other hand has over a billion subscribers. See, <https://backlinko.com/instagram-users> [Accessed on 23rd October 2023]

A classic example of the Twitter-physical world dichotomy came during the Egyptian referendum on Constitutional reforms instituted after the fall of the 2011 government. The general sentiment on the site was that everyone should vote 'No' (The reforms among other things included the restriction of a President to an utmost two terms in office) yet results eventually turned out otherwise with the 'Yes' side carrying the day with a whopping 77%.[88] Tweeps were not only wrong, they were dead wrong.

3.2.3 CRITICAL FRIENDSHIP

We know that this feature held true during the Arab Spring. If at all, the people who mostly tweeted during the revolution that is errantly attributed to Twitter were all in the West. And Golnaz Esfandiari has attested to this.[89]

It is also the case that the seemingly friendly people may be doing so owing to ulterior motives. We have already seen under discourse that the Twitter algorithm has a way of encouraging this behavior. When an issue is trending for instance (and Twitter demonstrations will always do), it is easier for someone to reach an audience that they would otherwise not and therefore gain from more likes and followers by putting up a Tweet with the key words.[90] Evgeny Morozov's work testifies too to the fact that some Twitter users are posting in such instances in order to impress their friends rather than make a statement about an issue they care about.[91]

It is because of some of these mistakes that the Arab Spring wave reached Ethiopia but fell short of bringing about impact as it had done elsewhere. The *Beka* movement garnered thousands of sympathizers on social media only for a handful

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88 S. Rukundo, 'New Tide in African Affairs? An Analysis of Internet Activism In Africa' Makerere Law Journal 2018, (V. P. Makmot and G.H. Dawood (eds)).

89 G. Esfaniari, 'The Twitter Devolution: Far from being a tool of revolution in Iran over the last year, the Internet, in many ways just complicated the picture.' <https://foreignpolicy.com2010/06/08/the-twitter-devolution> (accessed, October 17th, 2023).

90 Supra note 75.

91 E. Morozov, 'The Net Delusion: The Dark Side of Internet Freedom.' Public Affairs, Philadelphia, 2011.

of them to turn up for the final show i.e., the mass gathering called in Meskel Square.[92]

3.2.4 REAL DANGER

We have demonstrated already why danger is part and parcel of demonstrating. This is so much so that opposing responses sometimes extend beyond a country's borders. Following Tunisia's political success during the Arab Spring thus, China banned the Jasmine as it had emerged a symbol of resistance in Tunis.[93] This meant that the flower could not be sold, worn, or talked about.

Granted there might be a couple of intimidations during online protests especially to the forerunners,[94] but it is nothing comparable to physical activism. Protests on ground easily drive the resisting regimes into desperate mode that way forcing them to overreact, panic, and other related conduct that leaves little options a part from force for an actor that is adamant. In fact, bad governments must prefer that their citizenry express discontent online than otherwise. There is evidence to show for example, that putting up a tweet reduces ones anger making them less likely to act on their concerns. Morozov has thus described online protests as "feel good activism".[95]

The most appropriate way to judge a state's concern about a demonstration is from its response. The fact that there has been limited to no response to the Twitter crowd is evidence to their lack of veracity. Indeed, governments have actually

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92 T. Skjerdal, 'Why the Arab Spring Never Came to Ethiopia in B.Mutsvairo (ed) Participatory Politics and Citizen Journalism in a Networked Africa: A connected Continent' Plagrave Macmillan, Lodon, 2016.

93 K. Brant, 'Jasmine Banned in China' <https://www.pdxmonthly.com/home-and-real-estate/2011/05/china-jasmine-ban-may-2011> (accessed, October 17th, 2023).

94 Dr. Spire in Uganda has on different occasions reported about being threatened. See for instance, https://twitter.com/SpireJim/status/1661094657986887687t=Lm2zmbaZg2fjJm5rLvwZ8A&s=19 [Accessed October 17th, 2024]

95 E. Morozov: The Brave New World of Slacktivism', Foreign Policy (blog), 2009.

shutdown the platform whenever they felt that momentum was beginning to gather around them. This is especially true with elections.[96]

At their best then, demonstrations on Twitter would still not be a good strategy if at all the people that one is opposed to can wake up to completely halt all progress made. Moreover, with the benefit of resources, governments are generally placed to progress by several folds in comparison to the citizenry in relation to the usage of technological including possible capacities to mitigate their ill will. The only potential that the people can always count on is their resolve.

4.0 CONCLUSION AND WAY FORWARD

For this chapter, I share practical steps to be taken given my stand in the analysis coming before. As you will realize, I say nothing about demonstrations as I am convinced that even with modifications, it is not possible to successfully carry out one on the platform.

In regards to discourse, the recommendations are divided into two; those that can be done on a personal level and then what Twitter as X can do if it is to actually deliver on this promise. Admittedly, several suggestions might shock the reader as they are made with a mindset of optimizing discourse rather than profits for instance.

These recommendations are also not a one size fit all. I am aware that people reading the article will be persuaded up to different degrees so you can work with what you can afford. As a result, each of the points should be read on its own since any two might appear to contradict each other. Independent reasons have been given to help you with this.

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96 T. Karombo, 'Tanzania has blocked social media, bulk SMS as its election polls open.' <https://qz.com/africa/1923616/tanzanias-magufuli-block-twitter-facebook-sms-on-election-eve> (accessed, October 17th, 2023).

4.1 PERSONAL RECOMMENDATIONS

- As much as possible, stop liking, reposting, or commenting on posts.[97] As we have seen, the algorithmic timeline is influenced by these actions and while its feed might be more interesting, it is more likely to sensationalize you. I have left you with at least the option of following people that share content you are interested in.
- As much as possible, do not look at the posts in your algorithmic timeline. Recall that this cannot substitute for the first recommendation since as we found already, having input in what happens with the algorithmic timeline can affect the chronological timeline too.
- Stop having discourse on X. Instead, post information in a way that leaves a drawing of conclusions to the reader. This should work well for areas of expertise or important facts and figures that you have come across.
- If at all you cannot do without sharing opinions, then start a podcast or a website and then share links from there on your account. Long format helps discourse as it gives context. X has started on this too though the progress remains a needle to be dug from a stuck of hay.

  There is no denying the fact that a website and podcasting would take us back to the old place where conversation is dominated by some leaving everybody else with only commenting or sending private emails.
- Occasionally, post a video, record a Space, or write something that has taken you weeks or even months to put together.[98] Hopefully this can contribute to the emerging of a culture where we recognize how difficult it is to do original thinking.
- Quit X. I really don't know that you can actively stay on the platform and not find yourself either running after likes and follows or caught up in conversations that turn sour.

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97 Cal Newport, 'Digital Minimalism; Choosing a Focused Life in a Noisy World.' Portfolio/Penguin, 2019

98 Supra note 1.

This is different with institutional accounts however, since the handlers are not directly concerned like it is with personal accounts apart from looking at their role from a business growth perspective. The challenge lies with the ethics i.e., how one wishes that other people stay on the platform that they have themselves quit.

4.2 RECOMMENDATIONS FOR X

Almost certainly (and understandably so), the company cannot agree to any of these suggestions mostly because it is too difficult to make substantial profits in a discourse-first project.[99] It might have to take an inventor motivated by frustration rather than money like it was with Satoshi Nakamoto[100] to resolve this dilemma.

- X should remove the like icon from the app. People should be able to follow users they like and repost their content though the number of reposts that a post has received or that of people following an account should not be publicly visible.

  Of course, this will reduce the number of X users significantly. That shows us how much the platform is about discourse, if at all.
- The algorithmic timeline should be dropped.
- Making X a strictly subscriber app. This would help with shelving the algorithmic input as the company would have a direct income source which would mean therefore, that it does not have to optimize information circulation.

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99 Meta's Threads for example, is more manipulative in comparison to Twitter as discussed. Meta's ranking algorithm resembles Tiktok's. <http://castbox.fm/app/castbox/> [Accessed October 17th, 2024]

100 Satoshi invented Bitcoin with a view of overturning the world's banking system over his/her concerns over the way it operated. We do not know the person as the project is not one that aims at bringing them direct incentives. V. Ntamugabumwe and J. Kingdom, 'The Legal Risks of Cryptocurrency on State Sovereignty; A Case study of Uganda' Makerere Law Journal, Vol 18 Issue 3

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