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MAKERERE LAW JOURNAL 2015

THE LAW AS AN ANSWER TO THE HEALTH-RELATED CONUNDRUMS
Baguma Moses

"INNOCENT" CRIMINALS: A CASE FOR VICTIMS OF REVENGE PORNOGRAHY
Victor P. Makmot

ASSESSING THE IMPACT OF THE HIGH COURT DECISION IN THE CASE OF *SULAIMAN KAKAIRE & ANOTHER V. THE PARLIAMENTARY COMMISSION*
Joe Oloka-Onyango

MEDIA FREEDOM VERSUS NATIONAL SECURITY: WHAT IS THE LIMIT? A CASE STUDY OF THE CLOSURE OF DAILY MONITOR PREMISES IN 2013
Kisaakye Juliana Izizinga

KWOYELO'S LONG ROAD TO JUSTICE: A PRACTITIONER'S REFLECTION ON TH ERECENT SUPREME COURT RULING IN *UGANDA V. THOMAS KWOYELO, ALIAS LATONI*, CONSTITUTIONAL APPEAL NO. 1 OF 2012
Steven Oola

COPYRIGHT PROTECTION BEFORE AND AFTER THE TRIPS AGREEMENT; IMPACT OF THE NEW REGIME ON DEVELOPING COUNTRIES
Tuhairwe Herman

PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: A MEANS OF ACHIEVING ENVIRONMENTAL SUSTAINABILITY IN NIGERIA
Hakeem Ijaiya

A PREDICTIVE LEGAL HYPOTHESIS ON GROWTH OF NATION-STATES: JURISPRUDENCE REVISTED
Lubowa Jeremiah

POLICE FORCE AS AN INSTITUTION IN THE ADMINISTRATION OF JUSTICE IN NIGERIA: AN EMPIRICAL DISCOURSE
Abdulraheem-Mustapha Mariam A.

THE LAW AS A TOOL FOR SOCIETAL TRANSFORMATION
Ocen George

"THEY'VE SAID TOO MUCH!" THE SUBJUDICE RULE: DO WE STILL THIS LAW IN UGANDA TODAY?
Kagere Judith Babirye

THE NEXUS BETWEEN TAX POLICY AND SOCIO-ECONOMIC TRANSFORMATION: UGANDA'S DILEMA
Muhereza Allan Murangira

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EDITORIAL NOTE

I am delighted to present to you the 2015 edition of the Makerere Law Journal. I am honoured to have been part of the process that has brought this insightful piece of legal writing to fruition, for various reasons.

The very first reason is the increase in the number of student writers. It has indeed been heartwarming to receive this many well-researched and eloquently expressive articles from the students themselves.

For us as the Editorial Board of the 2015 edition of MLJ, the opportunity to edit articles from fellow students, distinguished scholars and practitioners has been a gem. I am glad that all these subjected their articles to our scrutiny.

The most important reason perhaps, is the fact that the articles are relevant to the prevailing situation in Uganda, particularly freedom of the press, misuse of social media in the form of revenge pornography, the relevance or lack thereof, of the *sub judice* rule and the issue of amnesty; insightful on what is happening on the International scene such as copyright protection and its impact on developing countries; and are able to push the reader out of his or her comfort zone, to actually think about issues that have been left unattended to for too long even in the legal arena where they should have long been addressed like Juvenile justice. Some of the articles do not stop at jolting one into thought but also give plausible solutions to some of the challenges the world is grappling with, for example, public participation for environmental sustainability. This journal also addresses several areas in which the law could be used as a tool of transformation, including the health sector and society itself.

The super most exciting reason, however, is that for the first time this Journal has also been published online with hope to upload the preceding two editions (2013 and 2014) as well. Need I say more on this?

I do hope that whoever gets hold of this journal will not be able to put it down till they have devoured all its content cover to cover, or till they have scrolled to the last page of it. May it be a means for the reader to learn, unlearn and relearn!

Brian Kibirango

Editor-in-Chief

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TABLE OF CONTENTS

THE LAW AS AN ANSWER TO HEALTH-RELATED CONUNDRUMS
Baguma Moses……………………………………………………………………………1
"INNOCENT" CRIMINALS: A CASE FOR VICTIMS OF REVENGE PORNOGRAPHY
Victor P. Makmot……………………………………………………………………………6
ASSESSING THE IMPACT of THE HIGH COURT DECISION IN THE CASE OF *SULAIMAN KAKAIRE & ANOTHER V. THE PARLIAMENTARY COMMISSION*
Joe Oloka-Onyango……………………………………………………………………………22
MEDIA FREEDOM VERSUS NATIONAL SECURITY: WHAT IS THE LIMIT? A CASE STUDY OF THE CLOSURE OF DAILY MONITOR PREMISES IN 2013
Kisaakye Juliana Izizinga……………………………………………………………………………38
KWOYELO'S LONG ROAD TO JUSTICE: A PRACTITIONERS REFLECTION ON THE RECENT SUPREME COURT RULING IN UGANDA VS THOMAS KWOYELO, ALIAS LATONI CONSTITUTIONAL APPEAL NO. 1 OF 2012
Steven Oola……………………………………………………………………………49
COPYRIGHT PROTECTION BEFORE AND AFTER THE TRIPS AGREEMENT; IMPACT OF THE NEW REGIME ON DEVELOPING COUNTRIES
Tuhairwe Herman……………………………………………………………………………65
PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: A MEANS OF ACHIEVING ENVIRONMENTAL SUSTAINABILITY IN NIGERIA
Hakeem Ijaiya……………………………………………………………………………80
A PREDICTIVE LEGAL HYPOTHESIS ON GROWTH OF NATION-STATES: JURISPRUDENCE REVISITED
Lubowa Jeremiah……………………………………………………………………………99
POLICE FORCE AS AN INSTITUTION IN THE ADMINISTRATION OF JUVENILE JUSTICE IN NIGERIA: AN EMPIRICAL DISCOURSE
Abdulraheem-Mustapha Mariam A……………………………………………………………………………116
THE LAW AS A TOOL FOR SOCIETAL TRANSFORMATION
Ocen George……………………………………………………………………………128
"THEY'VE SAID TOO MUCH!" THE SUB JUDICE RULE: DO WE STILL NEED THIS LAW IN UGANDA TODAY?
Kagere Judith Babirye……………………………………………………………………………136
THE NEXUS BETWEEN TAX POLICY AND SOCIO-ECONOMIC TRANSFORMATION: UGANDA'S DILEMMA,
Muhereza Allan Murangira……………………………………………………………………………143

THE LAW AS AN ANSWER TO HEALTH-RELATED CONUNDRUMS*

Baguma Moses**

ABSTRACT

This article highlights the various ways in which poor economic development breeds health-related challenges, and how the law can be used to unravel the challenges. It begins by shedding some light on the meaning of economic development for the purposes of the article, and later delves into a scrutiny of the nexus between a poorly developed economy and the health sector, with Uganda at the center.

I. INTRODUCTION

Economic development may be understood as to refer to an increase in the standards of living, improvement in self-esteem needs and freedom from oppression as well as a greater choice.[1] Generally, it encompasses changes in the standards of living for the country's citizens. Poor economic development would therefore refer to a decrease in standards of living in a given country. It has been argued that poverty and ill-health are one in the same.[2]More often than not, poor countries host worse health records than countries with developed economies; with the poor bearing appalling health outcomes, while the well-heeled enjoy better ones.[3]Poor economic development creates a breeding environment for health-related concerns in quite a number of ways, as illustrated below using Uganda as a case in point, whose healthcare performance is one of the worst in the world according to the World Health Organization, ranking 186th out of 191 nations.[4]

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* This article was first written for The Lex: lead Group essay competition (2015), answering the question; "How does poor economic development contribute to health-related concerns; how can law control these concerns and improve lives?" The essay was highly ranked by a panel of international judges and the author was a finalist, receiving an award.

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[1] Michael Todaro, *Economic Development* (Pearson Education and Addison-Wesley 11th Edition, 2011)

[2] Adam Wagstaff, Poverty and health sector inequalities

[3] Ibid.

[4]Mubatsi, January 3, 2013 https://futurechallenges.org/local/a-glance-at-challenges-in-Ugandas-health-sector/, accessed 20 December 2015.

II. CHALLENGES

Owing to its poor economy, Uganda lacks the requisite number of medical expertise. The state cannot afford to have medical personnel deployed to all parts of the country; rural and urban. In most cases, when there is an epidemic, doctors have to move from Kampala to various rural areas to handle such epidemics.[5] The shortage in the number of health workers could be owing to the increased rates of brain drain in the health sector.[6] Since they are not paid enough, health workers seek for greener pastures outside the country to avail to themselves better standards of living. What's more, the government encourages doctors and nurses from public hospitals to work abroad.[7]Consequently, most hospitals are below par, leaving the people with limited access to quality and effective health care services.

It would also suffice to note that Uganda's poor economy does not permit it to have the advanced medical technology to provide satisfactory health care services. Only the rich can afford access to hospitals abroad which are furnished with the advanced medical technology.[8]Moreover, public hospitals are considered to be inefficient in providing health care services. They, for instance, do not have enough medicines and it is believed that private hospitals provide better services.[9] This becomes a challenge in the health sector since, consequently, the poor cannot have the benefit of quality healthcare services. Statistics go to show that 51% of Ugandans do not have any contact with public healthcare facilities.[10]

Further, some people in Uganda are unaware of their rights in regard to health, especially in rural areas. Arguably, this is due to, inter alia, low literacy levels in the state, which is one of the

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[5]Ibid.

[6]Alon Mwesigwa, February10, 2015 www.theguardian.com/global-development/2015/feb/10/uganda-crippled-medical-brain-drain-doctors, accessed 20 December 2015.

[7] Ibid.

[8]Mubatsi, (n 2).

[9] *Id*. See also Kate Diamond, April 26, 2012, www.newsecuritybeat.org/2012/04/ugandas-demographic-and-health-challenges-put-into-perspective-with-newfound-oil-discoveries-part-one/, accessed 20 December 2015.

[10] Annie Kelly, April 1, 2009, www.theguardian.com/katine/2009/apr/01/healthcare-in-uganda, accessed 20 December 2015.

indicators of poor economic development. Only about 73% of Ugandans can read and write.[11] It follows that the 27% who cannot read and write do not know what remedies are available for them in the face of violations of their rights in relation to health. This encourages health workers to act wantonly and with impunity, hence poor delivery of health services in the country. An illustration of wanton conduct by medical workers would be drawn from the case of *CEHURD v. Nakaseke District Local Administration*[12] where a pregnant woman died in a hospital while awaiting obstetric care. A nurse who had confirmed signs of obstructed labour called the doctor on duty who did not arrive until the woman had been in labour for about 8 hours. She later died of haemorrhage and ruptured uterus.

III. REMEDIES

Litigation of the right to health is one of the ways in which challenges facing the health sector can be controlled. Litigation has been understood as a process through which legal actions are brought before courts to enforce particular rights.[13] Litigation has overtime become a recognized mechanism of holding governments accountable to international, regional, and national obligations. For instance, Center for Health, Human Rights & Development (CEHURD) filed a suit before the constitutional court[14] to hold the government accountable for the high number of preventable maternal deaths that occur in public health facilities due to the non-provision of basic essential maternal health commodities to expectant mothers. This case became a trigger of other cases challenging health rights violations.[15] This has since improved the delivery of maternal health services and it also controls impunities.

Health workers, in public hospitals especially can be sensitized about the state's obligations under national and international law to avail health services without discrimination against the

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[11] Taddeo Bwambale, August 28, 2013, <www.newvision.co.ug/news/646585-uganda-falls-short-on-2015-adult-literacy-target.html>, accessed 20 December 2015; https://en.m.wikipedia.org/wiki/List_of_countries_by_literacy_rate, accessed 20 December 2015.

[12] Civil suit No. 111 of 2012 (HC).

[13] <http://thelawdictionary.org/search2/?cx=partner-pub-4620319056007131%3A7293005414&cof=FORID%3A11&ie=UTF-8&q=litigation&x=8&y=8>, accessed 20 December 2015. See also<http://legal-dictionary.com/litigation>, accessed 20 December 2015.

[14] *CEHURD v. Attorney General* Constitutional petition No. 16 of 2011 (CC).

[15] *CEHURD v. Nakaseke District Local Administration* Civil Suit No.111 of 2012 (HC); *CEHURD v. Attorney General* Constitutional petition No.64 of 2011 (CC); *CEHURD v. Executive Director Mulago Hospital & Attorney General* Civil Suit No. 212 of 2013 (HC).

poor. Immediately noteworthy is the fact that Uganda is party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12 thereof guarantees the right to health. The committee on economic social and cultural rights in General Comment No. 14 explained that a state has core obligations, which include the obligation to ensure the right to access to health facilities, goods and services without discrimination, especially against vulnerable groups. This can be read with Article 21 of the 1995 Constitution of the Republic of Uganda which provides for equal protection for all notwithstanding one's social or economic standing. Further, the committee highlighted that the state has an obligation to protect the right to health in that even in case of privatization, laws must be enacted to ensure that there is equal access to health care.

With regard to the indigent people who neither know their rights nor can afford lawyers, they can be sensitized about their rights in regard to health by public interest lawyers and they can also be represented by the same in court, to enforce those rights. For instance, in Uganda, Public Interest Law Clinic (PILAC) has a number of programs such as the Community Law Programme and Mobile Clinic (CLAPMOC) that are purposed to extend legal services to the poor communities and members of vulnerable groups.[16] Such legal services include legal advice. PILAC also engages in public interest litigation, representing such people from indigent communities thus enforcing their rights.[17]

Courts also have a role to play in controlling the challenges faced in the health sector. In Uganda, there had been an impediment of judicial avoidance whereby courts, when presented with a question to do with health, would invoke the political question doctrine. The political question doctrine is a judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government.[18] It was first applied in Uganda in the case of *Attorney General v. Major General David Tinyefuza*[19]. However, in that very case, Justice Kanyeihamba noted that courts may intervene on grounds that the rights or freedoms of individuals are clearly infringed or threatened. In 2015, in the case

[16]http://pilac.mak.ac.ug/node/23, accessed 20 December 2015.
[17]http://pilac.mak.ac.ug/node/4, accessed 20 December 2015.
[18]Black's Law Dictionary, 8th Edition Pg. 3677.
[19] Constitutional Appeal No.1 of 1997 (SC).

of *CEHURD v. Attorney General*[20], the Supreme Court struck down the political question doctrine was thrown out and the case was referred back to the Constitutional court to be heard on its merits. The court highlighted that the constitutional court could challenge policy decisions made by the cabinet. If courts can cooperate by hearing cases challenging flaws in the provision of healthcare services, notwithstanding that policy making is a reserve for the executive under article 111(2) of the Constitution of the Republic of Uganda, there will be an improvement in health care delivery.

IV. CONCLUSION

In a nutshell, there are indeed various challenges facing the health sector cropping out of poor economic development as discussed above. However, most of these challenges can be averted if a holistic approach is employed; with joint efforts from the executive, legislature and judiciary. The executive to formulate policies aimed at bettering the health sector, the legislature to enact laws protecting, respecting and observing health-related rights, and the judiciary to review and challenge such policies by the executive and/or enactments by the legislature. Lawyers also, as the best placed individuals of the legal fraternity, have a role to play in ensuring that the right to health as enshrined in various national and international laws, is realized, thus improving the health sector in various developing countries.

[20] Constitutional Appeal No.1 of 2013 (SC).

"INNOCENT" CRIMINALS: A CASE FOR VICTIMS OF REVENGE PORNOGRAPHY

Victor P. Makmot*

Even though amorous rejection often leads to a lot of emotional anguish and torment, no one thinks the "pangs of despised love" should be considered a social harm or that refusing an unwanted relationship should be grounds for legal redress.[1]

I. INTRODUCTION

In the last three years the public and social media have been inundated with a deluge of nude pictures and compromising videos of Ugandans. The victims or perpetrators (depending on one's point of view) range from celebrities[2] to politicians[3] to average run-of-the-mill university students.[4] Cutting across age, social and economic classifications, it is clear that anyone can be a victim of this unusual new trend. For example in 2014 the nude pictures of Desire Luzinda, a popular pop artiste on the Ugandan music scene, were leaked by her ex-boyfriend after a lovers' quarrel.[5]

Some pictures/videos have apparently been taken by consent of the party or parties involved as intimate keepsakes for their partners or spouses and others have seemingly been taken without the consent of the victim. Regardless of how the pictures or videos came to be, the real mischief arises when the said pictures/videos are leaked to social media and/or public media usually by a former partner.[6] With today's technology whereby every mobile phone is also a video camera and social media allows pictures and videos to be sent around the country and across the globe in seconds, the spectre of a leaked compromising video or picture hangs over all of us.

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[1]. *WILLIAM SHAKESPEARE, HAMLET act 3, scene 1*

[2]Ugandan pop artiste and victim of revenge porn victim could face criminal charges. November 14, 2014 Daily mail.co.uk

[3]Police strip political rights activist, pictures spread like wild fire on social media. Oct.11.2015 African spotlight.com

[4]November 7, 2013 monitor Uganda, UCU apologizes for sex tape..

[5] Ugandan pop artiste and victim of revenge porn victim could face criminal charges. November 14, 2014 Daily mail.co.uk

[6]Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, THE AWL (Nov. 10, 2011), http://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics

While relatively new to Uganda, the unusual fad of taking nude pictures and making sex tapes and the concomitant habit of their 'leaking' has been going on for a while in countries such as the USA and UK.[7] In these countries the leaking of the pictures/videos is referred to as 'revenge pornography' from the fact that it is usually a jilted lover who in an act of revenge will disseminate the pictures and videos. Defining revenge porn is a procrustean task as there are a number of parameters that are often attached to it for instance journalists and activists, lawyers and pundits have used the term revenge porn to refer to all manner of non-consensual pornography, including images captured without victim's knowledge[8], images of a victim's face transposed on a sexually explicit body[9], hacked images and images uploaded by jaded ex-lovers.[10]

We see that in most instances the definition tends to be by way of the content and not distribution however Revenge porn refers to sexually explicit images that are publicly shared online without the consent of the pictured individual.[11]

II. HOW BAD IS REVENGE PORN?

In Uganda, the dangers posed by revenge porn may be even tenfold given the fact that these sexual and explicit pictures or videos are made illegal by the Anti-Pornography Act of 2014. Hence, a person may be facing criminal charges on top of the fact that the exposure of one's intimate life in a such a manner may affect them emotionally causing a lot of distress, resulting in loss of employment and complications when seeking employment in the future for sensitive jobs such as being a teacher, or even being an employee in a government parastatal where one of the prerequisites includes being of a high moral standing, in a more conservative society like ours in Uganda victims may be severely hampered especially when in the process of finding a

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[7]November 14, 2014 Daily mail.co.uk (supra)

[8]Victims who were videotaped without their knowledge represent an estimated ten percent of victims, though these victims were not expressly discussed in the non-consensual pornography statistics. *Why One Mom's Investigation Might Actually Stop Revenge Porn*, ON THE MEDIA (Dec. 6, 2013), http://www.onthemedia.org/story/why-one-moms-investigation-might-actually-stop-revenge-porn/transcript [hereinafter *One Mom's Investigation*].. 11.02.16

[9]An estimated twelve per cent of non-consensual pornography was Photo shopped, or otherwise edited and manipulated. *One Mom's Investigation*, *supra*

[10] This accounts for the remaining 36% of non-consensual pornography in America. *One Mom's Investigation (supra).*

[11]This definition was adopted by the Criminal Court of the City of New York. People v. Barber, 2014 NY Slip. Op. 50193(U) (Feb. 18, 2014), *available at* http://www.courts.state.ny.us/reporter/3dseries/2014/2014_50193.htm.

potential marriage partner as most may be unwilling to associate themselves with a person whose pictures or videos are in circulation. In some extreme cases, it may be possible that the backlash from such exposure may cause a person to commit suicide.

Further the shame that may result especially when faced with the harsh judgement of the public. With the onset of social media such as Facebook and WhatsApp the impact on the victims can be multiplied a hundred fold because of the numerous users and the speed with which these images may be shared.

According to a survey carried out by the Uganda Communications Commission[12] in June 2014 it was found that the number of mobile subscribers in Uganda was 19,506,550 people. The same study goes on to reveal that out of the above number those who are registered as fixed and mobile internet users and subscribers were 4,196,113 people with 106,900 people being able to access only fixed internet. The figures are an indicator that although the pictures and videos may be restricted to the internet and not publishable in print, the damage would still be cataclysmic and it has been the trend that more often than not the pictures slowly but surely find their way from the internet and onto the front page of local tabloids such as Red Pepper, Kamunye and the like. It may also be necessary to note that although all these sites have fairly strict policies that control the content shared and that they take steps to delete the offensive material, one is unable to delete the downloads, caches and links that may be shared between individuals.

It is agreed that this poses a serious threat to all of us as Ugandans however the victims especially should be able to find means of seeking legal redress when faced with such an unfortunate predicament.

III. WHAT DOES THE LAW SAY?

The Anti-Pornography Act clearly states that it creates the offence of pornography[13] and that this crime would extend to those who take part in the production and dissemination of illicit material including those that are shared through electronic media such as Facebook and the internet[14].However it should be noted that though it purports to ''create'' the offence of

[12] www.ucc.co.ug./facts andfigures.

[13] The long heading of the anti-pornography act of 2014of the laws of Uganda

[14] Section 2 of the Anti-Pornography Act

pornography,[15] before it was passed there were other laws that were dealing with the distribution of offensive and illicit materials and publications. One of such laws which were repealed includes one in the Penal Code Act that criminalized the trafficking of obscene publications.[16]

Other laws include the Computer Misuse Act 2011 which provides for the offence of child pornography making it illegal and punishable by a fine and or at least 15 years in prison.[17] The above laws are but an example of the framework that was in existence to combat pornography however it is clear that in the making of such laws it was never envisaged that those captured in these pictures and videos would actually be considered victims and as such would need protection.

The threat of such pictures could even constitute abuse for example in a scenario where a person is trapped in abusive relationship and is forced to stay in it due to the threat of one's explicit pictures being posted and shared for all and sundry to see. Furthermore, people engaged in trafficking or prostitution may be forced to remain after their tormentors take pictures of them involved in sexual acts. In this situation the laws that are intended to protect the people are the very same one which seek to keep them tortured and imprisoned in various types of suffering. As a result we take the time to explore if there is any alternative hope for anyone depending on the law to save them from such a predicament.

IV. REVENGE PORN *vis a vis* THE RIGHT TO PRIVACY

Article 27 of the 1995 Constitution of the republic of Uganda provides for the Right to privacy of a person, home and other property. This article enunciates the sanctity of the privacy of citizens with regard to the citizen's places of residence, correspondence and communication.

In a world where most of our communication is electronic, it is imperative that such communication or such media should be protected to the utter most since it is from the same technological advancement that it faces the largest threat. It has become increasingly common for a number of young couples, in a bid to show the extent of love they have for one another, to

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[15] Long Title of the Anti-Pornography Act 2014

[16] Section 166 of the penal code act cap 120 of the laws of Uganda repealed by Section 28 of the Anti-Pornography Act 2014

[17] Section 23 of the Computer Misuse Act 2011

engage in the practice of taking and sending each other pictures of themselves in various states of undress or of particular body parts which is normally referred to informally as sexting and also to take videos of themselves involved in sexual activities.[18]

The Anti-Pornography Act criminalizes the production of pornography.[19] The question that then arises is whether it would still be pornography within the meaning of the Act if two consenting adults in a relationship or a married couple took these pictures and sent them to each other or went a step further to film themselves performing a sexual act but had kept this to themselves and had not disseminated it to the public in anyway. What would be the effect if a third party, an interloper, by whatever means accesses the material and exposes it for the entire world to see. The object in such a situation would require a look into the motive of the individual which is something that the statue appears to be intent on avoiding and does this by making the offence to appear as one of strict liability.

By the construction of the Act it would appear that both the third party and the person featuring in the illicit publications would both have committed the crime of producing pornography. However, would it not be considered a breach of one's right to privacy if the only way the victim appears on the radar of the anti-pornography committee is when one of the partners spitefully after the breakdown of the relationship takes it upon him or herself to get even by posting those intimate photos as was the case for popular pop artiste Desire Luzinda whose nude pictures were leaked by her now estranged Nigerian lover after the relationship deteriorated to a point of no return in 2014.[20] The police seem to think that this in itself would be a crime as Kampala Metropolitan Police spokesperson, Patrick Onyango, said exposing photographs of a person injures his or her right to privacy is an offence.[21] However, he said they would only investigate if Ms Luzinda or those offended lodge a complaint with police. [22]

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[18] **Couples Who Sext Have Better Sex: Study - New Vision**
www.newvision.co.ug/new vision/.../couples-sext-sex-study
[19] Section 13 anti-pornography act
[20] November 14, 2014 Daily mail.co.uk
[21] In a comment to the Daily monitor on November 14 2014, in reference to the case involving the leaking of nude photos belonging to Desire Luzinda.
[22] *Id.*

Would it not also be relevant for a judge in interpreting the statute to also pay attention to the *mens rea* and motive of the offending parties? Would it be fair to subject a person whose motive was to take these pictures for his or her partner with the intention of them being kept private as was the case for Desire Luzinda as opposed to one who makes them and circulates the illicit material with the aim of character assassination and malice as was done by her former boyfriend. It would appear that the victim would have already suffered severe shame and ridicule in addition to the possibility of facing prosecution and possible jail time. In the decision of *Uganda v. Dr. Richard Ndyomugyenyi, Dr. Myers Lugemwa, Martin Shibeki*[23], the Court, found of persuasion the guidelines given by Lord Reid in *Sweet v. Parsley*[24] that:

1) Wherever a section is silent as to *mens rea*, there is a presumption that in order to give effect to the will of Parliament, words importing *mens rea* must be read into the provision.
2) It is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.
3) The fact that other sections of the Act expressly require mens rea is not itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. It is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament.

Likewise, for Court to take time and assess the mental aspect in interpreting section 13 of the Anti-pornography Act would go a long way in assisting the victims of revenge pornography and those whose right to privacy has been breached and also would manage to effectively separate between those who had the motive to cause embarrassment and stress and people who took those illicit pictures and believed they were acting "innocently."

In the case of *Victor Juliet Mukasa v. AG*[25], the applicant sued for among other things a violation of her right to privacy under article 27 of the constitution, in a bid to justify the actions of

[23] HCT, CR.SC 003 of 2010.
[24] [1970] Appeal Cases, at 132.
[25]Mukasa and Another v Attorney-General (2008) AHRLR 248 (UgHC 2008)

ransacking her residence and confiscating her property it was stated that the appellant Victor Juliet Mukasa and her friend and co-appellant Yvonne Oyoo were lesbians and as such the documentary evidence provided proof in that regard, however it was held that the freedoms provided by the constitution must be interpreted in light of our international obligations and the internationally accepted standards and that such rights apply to even minorities. To say that victims of revenge pornography are a minority would be a stretch however the fact that their illicit pictures and videos may be acquired in ways that constitute a breach to their right to privacy would require that the courts take valid steps to protect their right just like was done in the case of *Victor Juliet Mukasa v. AG*. Also basing on the same case it would be true that such illicit pictures if taken with in the privacy of one's home would find protection under the article 27 of the constitution.

In the case of *Sciacca v. Italy*[26], the applicant submitted that the dissemination of her photograph at the press conference had infringed her right to respect for her private life, contrary to Article 8 (right to respect for private life) of the European Convention on Human Rights. The Court noted that the photograph, taken for the purposes of drawing up an official file, had been released to the press by the tax inspectors. According to the information in its possession, there was no law governing the taking of photographs of people under suspicion or arrested and assigned to residence and the release of photos to the press. It was rather an area in which a practice had developed. As the interference with the applicant's right to respect for her private life had not been "in accordance with the law" within the meaning of Article 8, the Court concluded that there had been a breach of that provision. It considered that the finding of a violation constituted in itself sufficient justification for the non-pecuniary damage alleged by the applicant and awarded her EUR 3,500 for costs and expenses. After all to say that the violation of their right to privacy should be overlooked due to the fact that they created what would be termed as pornography and these have fallen into the wrong hands and as such have been exposed either maliciously or otherwise would be akin to saying that the human rights violations against Victor Mukasa and Yvonne Oyoo were to be overlooked due to the fact that they were suspected to be lesbians and as such would amount to discrimination.

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[26]Sciacca v Italy(no. 50774/99)

However, this would have to be greatly qualified as it would have to fall clearly within the ambit provided by article 27 of the constitution but however if all the requisite factors are in place then by way of article 50 one may apply to court to seek redress from the perpetrator.

A. *BY WAY OF EQUITY*

One of the principles of equity being that equity will not suffer a wrong without a remedy, as such we find it fitting that we explore the possibility of equitable relief for the victims and sufferers of revenge porn. This is possible since the laws applicable in Uganda include the principles and doctrines of equity.[27]

A particular aspect explored by other common wealth countries in an effort to combat the danger presented to the people as a result of revenge porn sought out the use of an action for breach of confidence. In the case of *Prince Albert v. Strange*[28], it was stated by the court that the jurisdiction in confidence is based not so much on property or on contract as on a duty of good faith. In granting an injunction restraining the publication of the catalogue containing descriptions of etchings, the court said it was 'an intrusion -an unbecoming and unseemly intrusion ,offensive to that inbred sense of propriety natural to every man, if, intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life, into the home (a word hitherto sacred among us).' The action of breach of confidence as asserted by Mitchell J identified three essential elements required namely[29]:

1. The information was of a confidential nature.
2. The information was communicated or obtained in circumstances importing an obligation of confidence.
3. There was an unauthorized use of the information.

In the case of *Wilson v. Ferguson*[30], Ms Wilson and Mr Ferguson were fly-in/fly-out workers at a mining site in Western Australia called Cloud break. They had been in a romantic relationship since 2012, living together in the defendant's house when they were off-site and living in

[27] Section 16 Judicature Act 1996
[28] 8 Feb 1849 CHD.
[29] *Wilson v Ferguson* [2015] WASC 15 at [46
[30] [2015] WASC 15.

separate apartments when they were on-site. Over the course of their relationship they used their mobile phones to send each other photographs of themselves naked or partly naked. Mr Ferguson also took explicit photographs of Ms Wilson with her knowledge and consent.

Ms Wilson also used her mobile phone to take videos of her while naked and, at least on one occasion, engaging in sexual activity. The video became a point of contention between the parties after Ms Wilson had left her phone in Mr Ferguson's presence for a short time and, on her return, he told her he had used her phone to email the videos to himself. Ms Wilson became upset and an argument ensued, during which Mr Ferguson agreed that no one else would see the videos. He also later sent her text messages to the effect that "he wouldn't be showing them to his friends or anything like that."

Ms Wilson came to suspect that Mr Ferguson was being unfaithful. At approximately 11:50 am on 5 August 2013 she sent Mr Ferguson a text message saying she was ending the relationship. Soon after that message was sent Mr Ferguson posted 16 explicit photographs and two explicit videos of Ms Wilson on his Facebook page, and made them available to his approximately 300 "Facebook friends." He also posted various abusive comments on Facebook.

At about 6:10pm on 5 August 2013 Ms Wilson sent Mr Ferguson text messages asking him to take the photographs and videos off his Facebook page, which he did about an hour later.

In the Supreme Court of Western Australia Mitchell J found that Mr Ferguson deliberately intended to cause Ms Wilson "extreme embarrassment and distress", with the harm being compounded by the fact that Cloud break was a male-dominated workplace. His Honour also found that when Ms Wilson became aware of the disclosure of the images she became "horrified, disgusted, embarrassed and upset," and anxious about the prospect of returning to work. She developed problems with sleeping, required counselling sessions and could not return to work until 30 October 2013, during which time she was required to take leave without pay and suffered a loss of wages of $13,404.

The above case would illustrate that the principle applied by the courts in proceedings asserting a breach of confidence is that the court will restrain the publication of confidential information

improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.[31]

In light of the above requirements it can applied to our present scenario that for the case of a couple that willingly exchange such explicit pictures for their own reasons but do so under an understanding that such pictures or videos are to be seen only by them and as such actions and word are said to that effect and then later one of the two parties decides to go against this promise and goes ahead to expose or publish this material then on top of being liable under the Anti-Pornography Act they would also be liable in equity and as such equity would be seen not to allow a wrong without a remedy and as such would protect the rights and dignity of the victim and ensure they get tangible relief in terms of compensation.

Equity may not be completely exhausted in providing us with a remedy and this may come in to answer the question of those who have pictures and these pictures have been transferred into the hands of an unscrupulous party who is threatening to release the pictures.

In the case of *Giller v. Procopets*[32], the plaintiff was in an abusive relationship with the defendant. The accused used a hidden camera to record the plaintiff in various sexual acts and later threatened and attempted to show the video to the plaintiff's family and friends. During trial in the Supreme Court of Victoria, Ms Giller claimed damages for breach of confidence based on the showing of the sexually explicit videos. The trial judge found that the sexual relationship between the parties was confidential and Mr Procopets had breached that confidence. However, his Honour held that Ms Giller could not recover damages for breach of confidence because: firstly, Ms Giller had not sought an injunction; and, secondly, Australian law did not permit an award of damages for breach of confidence for mental distress falling short of psychiatric injury.

Upon appeal it was held that the fact that Ms Giller had not sought an injunction to restrain Mr Procopets from showing or distributing the video did not deprive the court of its power to award

[31] Revenge pornography, Privacy and the law by Tom Gotsis.

[32] *Giller v Procopets* [2008] VSCA 236; (2008) 24 VR 1 at 395

damages because "[t]hat power exists so long as a court has jurisdiction to grant an injunction."[33] In other words, "it is both necessary and sufficient that an injunction could have been brought."[34]

The above judgment implies that if one has a proverbial gun to one's head in form of such videos and chooses to take steps to share and distribute such material one can restrain him or her from doing so by means of an injunction.

An injunction is a court order directing the party named to discontinue an act stipulated in the order or to undo a transaction specified by the court.[35] In the case *Legal Brains Trust Limited v. AG & Anor*[36], it was stated that an Injunction is a Court order requiring an individual to do or omit doing a specific action. It is an extraordinary remedy that Courts utilize in special cases where preservation of the *Status Quo* or taking some specific action is required in order to prevent possible injustice. They are issued early in a law suit to maintain the *Status Quo* by preventing a Defendant from becoming insolvent or to stop the Defendant from continuing his or her allegedly harmful actions. Choosing whether to grant Temporary Injunctive relief is a discretionary power of the Court. In the case of *State v. Odell*[37], Court stated that an Injunction is a prohibitive, equitable remedy issued or granted by a Court at suit of a Petitioner directed at a Respondent forbidding the Respondent from doing some act which the respondent is threatening or attempting to commit or restraining a Respondent in continuance thereof, such act being unjust, inequitable or injurious to the Petitioner and not such as can be addressed by an action at law.[38]

The wrong or injustice in this case being a person taking advantage of the secrets and personal pictures and videos shared and made by the two of them to hold one at ransom or to exact revenge or misery and emotional distress to the party in question. It would go a long way in mediating the disastrous effects of such revelations and as such would ensure that the victim of such exposure received appropriate damages in case the injunction is not followed.

B. IN RELATION TO TORT LAW

[33] *Giller v. Procopets* [2008] VSCA 236; (2008) 24 VR 1 at [404] per Neave J
[34] *Giller v. Procopets* [2008] VSCA 236; (2008) 24 VR 1 at [404] per Neave J
[35] Mohammed Ramjohn; Beginning Equity and Trusts
[36] Legal brains trust limited v AG and Anor no.54 of 2014
[37] *193 Wis.2d 333 (1995).*
[38] Legal brains trust limited v. AG and Anor no.54 of 2014

In light of the right to privacy we see that victims of revenge porn may also see light at the end of the tunnel by way of tort law. Seeing as the role of tort law is to govern the relationships between individuals then it would only be fitting that it interferes in favour of the victim of revenge porn. By definition it was seen that revenge porn mainly dealt with those explicit pictures or videos that were posted are published by jaded lovers however a wider definition in from of non-consensual explicit content. Such is necessary because one must be able to favourably cater for the numerous types of victims who may require redress. Not all revenge porn may be posted out of spite from a relationship gone sour, some may be from hackers, from stolen gadgets such as phones or laptops, and others may be taken and posted as pranks and also by individuals who just want to gain notoriety. Regardless of the motive, the impact on the victim remains the same and as such to limit redress to only those who are being victimized by former romantic interests may be a rather narrow and unfulfilling application of the law.

Defamation consists of the torts of libel and slander. There are distinctions between libel and slander which are attributable to their origins and development, and have little real justification in modern law. Libel is a defamatory statement in some permanent form, for example, writing, recorded film or speech[39] in the case of *Youssoupoff v. MGM Pictures Ltd*[40], the claimant was portrayed in a film as having been seduced by Rasputin. This was a permanent form of defamation and therefore amounted to libel. The fact that the pictures or videos taken are explicit is very dangerous in itself but with access to modern technology and innovations like photo shop it is now possible for a person to be misrepresented in form a picture featuring their face but the body of another person. If one has been unable to procure the illicit pictures from the usual sources such as the person who took them, they may choose to make pictures of their own and share these on the internet with the effects being just as bad as or even potentially worse than if the pictures had actually been taken by them.

Given the definition of libel and the elements it constitutes it would be right to say that such an act can represent libel. The fact that the picture is not true would not make it any less libellous because the impact would still be that it would reduce the standing of the individual in light of other right thinking members of society.

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[39]Principles of Tort Law by Harpwood, Nigel Gravels, Vivienne Harpwood and Phil.
[40]COURT OF APPEAL 1934

The impact of having the tort of defamation in line with combating revenge porn especially of the fabricated type which may be otherwise referred to as pseudo pictures would be the victim's ability to claim damages for the embarrassment and emotional distress and also the ability for one to receive an apology publicly from the offender. Though moderately acceptable it would be necessary to evaluate whether or not that would be sufficient compensation for the suffering one may have to endure. Furthermore would the apology if any change the perception of right thinking individuals with regards to the victim. The pictures, false and fabricated as they may be, can be blocked and removed but the mental picture of that person remains and as such it would still leave room for the offender to walk away albeit providing some relief. Some may feel this may not be enough but redemption is not far off in sight.

Section 179 of the penal code act cap 120[41] provides:

> Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gesture, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed libel.

In the case of *Uganda v. Nyakahuma Kalyegira*[42], the appellant was charged with making defamatory remarks about the president online and was charged with criminal libel. The question reserved by court was "Whether publishing on line constitute a commission of any offence under section 179 of the Penal Code Act."

Section 181 of the Penal Code Act defines publication thus;

> (1) A person publishes a libel if he or she causes the print, writing, painting, effigy or other means by which the matter is conveyed to be so dealt with, either by exhibits, reading, recitation, description, delivery or otherwise, that the defamatory meaning thereby becomes known or is likely to become known to either the person defamed or any other person

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[41] Cap 120 of the laws of Uganda

[42] HCT-OO-CR-MC-0001 – 2013(Arising from KCC Court Crim. Case No. 531/2011).

Basing on the construction of the section 2 of the Computer Misuse Act which defines ''computer'', ''access'' and ''data'' the court found that the publication online would constitute an offence under section 179[43]. It may be that the redemption that would ably justify and redress those victims of revenge porn may be ably founded upon the construction of the words of the learned judge in this case. The construction would ably provide for the criminal prosecution of those perpetuators of revenge pornography however the stumbling block may ultimately be found in the very place in which the solution is.

Article 28(12) of the Constitution[44] provides that: "Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law." The fact that there is no clearly stated offence and prescribed punishment will always be a hindrance for the victims of revenge pornography and this is compounded by the fact that the law created as a codification of the laws regarding explicit publications is rather inept when it comes to dealing with revenge pornography and merely focuses on criminalizing the offense of making and distributing while ignoring the truth that there may be those who are subjected to abuse as a result of the rigidity of the statute. That in itself could be considered as a form of marginalization but however that is a topic for another day.

C. WITH REGARDS TO COPYRIGHT LAW

Copyright and related rights form a major branch of intellectual property. Copyright protects the rights of an author to prevent the unauthorized publishing and copying or modification of works of authorship. Works of authorship include literary works such as books or computer programs , dramatic works of art such as plays ,musical works, audio visual works such as movies or videos and works of visual art such as sculptures, painting, architectural works technical drawings maps and photographs.[45]

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[43] Holding of Lameck N. Mukasa in HCT-OO-CR-MC-0001 - 2013
(Arising from KCC Court Crim. Case No. 531/2011)

[44] The 1995 Constitution of the Republic of Uganda.

[45] A study report on Copy rights and Neighbouring rights law by Uganda Law reform Commission law (com pub no. 9 of 2004).

Reproduction and display of an individual's copyrighted images constitutes copyright infringement, so copyright law gives revenge porn victims the tools to taking down offending material of them that may be available on the internet or in other retrievable media.

According to section 4 of The Copyright and Neighbourhood Act 2006, the author of any work specified in section 5 shall have a right of protection of the work, where work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which it is created. The protection of the author's work under subsection (1) shall not be subject to any formality. For the purpose of this section, a work is original if it is the product of the independent efforts of the author.

Section 5 of the same act further goes on to state those works which are covered under copyright which include inter alia audio-visual works and sound recording, including, photography. The two provisions are of the import that pictures and videos taken of an individual by them and of them belong to them and as such they have a copyright to those pictures and any publication of those photographs or videos in one way or another would amount to a breach of that copyright and the victimized party can sue for that breach. The overwhelming majority of revenge porn is self-photography, and these victims are already able to use copyright law as a remedy because they have authorship rights in their explicit works. Victims, however, have yet to test courts' willingness to construe authorship in this way for revenge porn cases. According to Professor Mary Anne Franks, "it is not clear how much traction this theory will have in actual cases."[46] Also this manages to leave out the small but not inconsequential group of people whose picture may not be self-photography. Given the heat against pornography one is unlikely to predict how the judges may rule in light of a case of copyright infringement regarding explicit images of the revenge genre but all one can do is be hopeful.

V. WAY FORWARD

Be it as it may, the need for a law to deal with and offer competent redress to the victims of revenge porn grows day by day as it is becoming a regular occurrence to see an individual's explicit photographs trending on popular social media sites and in newspapers. Other branches of

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[46]Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge porn. Porn*, CONCURRING OPINIONS (Feb. 15, 2013),

law may seem to offer a patchwork of solutions however for full and comprehensive protection the onus falls back upon those who make the laws to have the necessary vision and foresight to nip the vice in the bud and also provide laws giving equal measure of punishment and protection to it citizens.

FREE AT LAST? ASSESSING THE IMPACT OF THE HIGH COURT DECISION IN THE CASE OF *SULAIMAN KAKAIRE & ANOTHER V. THE PARLIAMENTARY COMMISSION*[*]

J. Oloka-Onyango[**]

I. INTRODUCTION

The original title I was given for my presentation was "Free at Last: A Critique of the High Court Decision in the case of *Sulaiman Kakaire v. The Parliamentary Commission.*" I usually don't like to use titles which are chosen for me by others. But who can resist such an iconic title as 'Free at Last!' which is taken from Martin Luther King, Jr.'s 1963 "I Have a Dream" speech?[1] So I have retained the old title, especially since the new one that is given on the program for the day is rather bland.

In using the phrase 'Free at Last,' Rev. King was sure that he was on the threshold of a new liberation for black people in America. However, the organizers of this meeting appear to be unsure as to whether the judgment of Justice Yasin Nyanzi in the *Kakaire* case represents genuine liberation for journalists or it is yet another twist in the long struggle for freedom of information and expression in Uganda. Such trepidation is not out of place, given that in Uganda on so many occasions we have made one step forward only to be forced several steps back.

Given this history, my mission today is to praise the Judiciary, and to give heart and empower those who seek to expand our freedoms rather than to the reduce them. To paraphrase Mark Anthony, I'm not here to bury Nyanzi I am here to praise him, because in my humble opinion, the decision in *Kakaire's* case is a landmark one in the development of Media Freedoms in the country. Indeed, judges like Justice Nyanzi, together with others like Egonda Ntende, Solome Bbosa and Lydia Mugambe need to be given extra praise for the resilience they have demonstrated in ensuring that the rights and freedoms enshrined in Chapter Four of the 1995 Constitution are actually worth the paper on which they are written. These are truly the people's judges.

[**] Professor of Law, Makerere University.

[1] Delivered on August 28, 1963 at the Lincoln Memorial, Washington D.C.

In praising those judges who are brave enough to uphold our freedoms it is important for us to go back in history. At Makerere University I teach the subjects of Constitutional History and Constitutional Law. The major case on which these courses turn is of course the 1966 decision by the High Court in *Uganda v. Commissioner of Prisons, ex parte Matovu*. I have a varied relationship with that case. I used to hate it, but in my later days I have come to appreciate it more and more, especially insofar as it provided the initial tentative steps for the rise and growth of public interest litigation (PIL) which is a tool that has been used to challenge the archaic and medieval laws and practices that continue to characterize our governance even as we march on into the 21st century.[2]

However, the case from this period in our history which I love above all others is that of *Uganda v. Abubaker Kakyama Mayanja & Rajat Neogy*.[3] The case involved charges of Sedition brought against Mayanja (as author) and Neogy (as editor of the magazine *Transition*) for an article which had criticized the government of the day for failing to appoint an indigenous Chief Justice to head the judiciary in Uganda at the time. Decided in a context in which the Obote-1 government was descending into increasing autocracy, everybody knew that the two were dead meat. However, when they appeared before Chief Magistrate Mohamed Saied, the court stated,

> In all conscience and in view of what has already been said about the law of sedition the farthest I can go, putting myself in the position of an ordinary intelligent reader of the magazine, is to say that the accused Mayanja undoubtedly used a very inept expression in advancing what he thought was one of the main reasons for the delay; that this was manifestly ill-advised and certainly intemperate, reckless and defamatory language which he used in emphasizing his point of view, but I can go no further than this. I cannot bring myself to interpret this passage in a strict and narrow sense forgetting about the general tendency and

[2] These issues are further explored in my inaugural lecture. See J. Oloka-Onyango, *Ghosts and the Law: An Inaugural Lecture*, Makerere University, October 5th, 2015.

[3] For a comprehensive examination of the state of press freedom in early post-independence period, see Bernard Tabaire, "The Press and Political Repression in Uganda: Back to the Future?," Reuters Fellowship Paper, Oxford University (2007), accessed at: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/The%20Press%20and%20Political%20Repression%20in%20Uganda%20-%20Back%20to%20the%20Future.pdf.

> drift of the article as the prosecution would have this court to hold. Any other construction would, in my humble opinion, tend to stifle this freedom of expression and tend to create a servile press which is not contemplated by the exception to section 41.[4]

The case was important not only because of the bold and direct manner in which the court expressed its dissatisfaction with the prosecution attempt to secure a conviction for the mere expression of an opinion, but also because of the rank of the judge and the broader context of dictatorship within which he was operating. Saied demonstrated that however low-ranking you may be in the judicial hierarchy, your decisions can still resonate with force and light for generations to come. How many of our contemporary judges have such courage?

II. FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION UNDER THE 1995 CONSTITUTION

Uganda's earlier constitutions gave scant attention to the right to information. Indeed, the right was generally subsumed within the protection of the right to freedom of expression.[5] In contrast, the 1995 Constitution has several provisions which captured the right and even extended it well beyond the simple question of expression. Among those provisions are the following:

First are paragraphs II and XXVI and XXIX of the National Objectives and Directive Principles of State Policy.

Paragraph II (i) (on Democratic Principles) declares: "The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance."

Paragraph XXVI (on Accountability) declares:

> (i) All public offices shall be held in trust for the people;

[4] See 'The Judgment (in the Transition Sedition Trial in Uganda), *Transition* No.38 (Jun-Jul, 1971), at 47, accessed at: http://www.jstor.org/stable/2934311?seq=7#page_scan_tab_contents.

[5] See for example Article 26 of the 1962 Constitution, which was reproduced verbatim in Article 17 of the 1967 Constitution.

(ii) All persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people;

(iii) All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.

Paragraph XXIX (on Duties of a Citizen) states:

> The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations; and accordingly, it shall be the duty of every citizen—
>
> (f) to promote democracy and the rule of law; and
>
> (g) to acquaint himself or herself with the provisions of the Constitution and to uphold and defend the Constitution and the law.

Article 29 covers the freedoms of conscience, expression, movement, religion, assembly and association, and explicitly states:

(1) Every person shall have the right to—

(a) Freedom of speech and expression which shall include freedom of the press and other media.

Finally, Article 41 provides for the Right of Access to Information (A2I):

(1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.

(2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

In line with Article 41(1), Parliament promulgated the Access to Information Act of 2005. The stated goals of the Act are to promote an efficient, effective, transparent and accountable government; protect persons disclosing evidence of contravention of the law, maladministration or corruption in Government bodies; promote transparency and accountability in all organs of the state by providing the public with timely, accessible and accurate information, and empower the public to effectively scrutinize and participate in Government decisions that affect them.

III. THE CASE LAW ON FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION (1995 TO 2015)

Initial cases relating to freedom of expression under the 1995 Constitution did not find much sympathy in the courts of law. Thus, in the case of *Uganda v. Haruna Kanaabi*,[6] the editor of the *Shariat* newsletter was prosecuted for having referred to Rwanda as Uganda's 40th district. Although Chief Magistrate Flavia Munaaba was of the view that the constitutionality of the law on Sedition was doubtful, she refused to make a reference of the case for interpretation and instead convicted the Accused. On appeal in *Haruna Kanaabi v. Uganda*,[7] the High Court similarly skirted the issue. In *Uganda Journalists Safety Committee and Anor (Haruna Kanaabi) v. Attorney General*[8] the Constitutional Court cited defective affidavits and the failure to follow a number of rules of procedure as sufficient grounds to dismiss a petition challenging certain provisions of the Press and Journalists Statute of 1995.

Some light began to shine through as journalists began to continuously challenge the adverse provisions of the law which affected freedom of expression and the right to information. Thus, in *Charles Onyango Obbo & Anor v. Attorney General*,[9] Justice Solome Bbosa declared that a bail of UGX.2,000,000/= imposed on two journalists charged with the offence of publishing false news was excessive. A further break-through was registered with the case of *Major General David Tinyefuza Munungu v. Attorney General.*[10] Here, the Constitutional Court held that Section 121 of the Evidence Act which rendered unpublished official records relating to

[6] Crim Case No.997/1995.
[7] Crim. App. No.72/1995.
[8] Const. Pet No.6/1997.
[9] High Court of Uganda at Kampala; (S.B Bossa J.H.C), December 22, 1997 Criminal Miscellaneous Application No.145/97.
[10] Constitutional Appeal No. 1/1996.

affairs of state inadmissible in court except with the permission of the head of the department offended Article 41 of the 1995 Constitution. Finally, in *Paul Ssemogerere and Zachary Olum v. Attorney General*, the Supreme Court declared Section 15 of the National Assembly (Powers & Privileges) Act which was formulated in similar terms as section 121 as unconstitutional. In the words of Justice Kanyeihamba,

> … since under article 41(1), information in possession of the state is freely available to a citizen except where its release would be "prejudicial to the security or sovereignty of the state or interference with the right of privacy of any person" I can find no constitutional or legal grounds to prevent the release and use of Hansard or stop members of parliament from giving evidence in courts of law....

The most important case on freedom of expression since the enactment of the 1995 Constitution is that of *Charles Onyango Obbo and Andrew Mujuni Mwenda v. The Attorney General*,[11] in which the Supreme Court struck down the offence of publishing false news, with Justice Mulenga pointing out that such a charge was not only inconsistent with the freedom of expression of the press, but it did not meet the requirements of a law seeking to limit or restrict human rights in terms of Article 43(2) of the Constitution.

Since the enactment of the A2I Act of 2005, two cases have sought to invoke the provisions of the law in order to secure increased access to documentation in the hands of State officials. The first was that of *Charles Mwanguhya Mpagi & Angelo Izama v. The Attorney General*.[12] The two journalists sought copies of agreements made between the government of Uganda and various companies involved in the prospecting and exploitation of oil in Uganda.[13] Although the Permanent Secretary of the Ministry of Energy did not directly reject the request he responded by stating that more time was needed to consult other government bodies before he could properly respond. The Solicitor General also stepped in to argue that the agreements could not be accessed due to a confidentiality clause prohibiting their disclosure. Using section 18 of the

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[11] Constitutional Appeal No. 2 of 2002.

[12] Miscellaneous Case No. 751 of 2009.

[13] The analysis in the following paragraphs is taken from Africa Freedom of Information Centre, *Analysis of the Court Ruling in Charles Mwanguhya Mpagi and Angelo Izama vs. Attorney General (Miscellaneous Cause No. 751 of 2009) against the Framework of the Uganda Access to Information Act, 2005 and International Access to Information Standards*, accessed at: http://www.right2info.org/cases/r2i-charles-mwanguhya-mpagi-and-izama-angelo-v.-attorney-general.

A2I Act, the petitioners took the PS's non-committal response and the SG's opinion as a refusal, and filed a complaint in the Chief Magistrates Court at Nakawa under section 37 of the Act.[14] The court dismissed the government's argument that the information could not be released for fear of breaching a confidentiality clause contained in the agreements because to do so would mean that the State would be able to restrict all information arising out of agreements by simply inserting language which covers this angle.

The court assessed both the public interest and the harm contemplated and it was not satisfied that the public interest in the disclosure was greater than the harm contemplated, and held that the two journalists did not show how they would use the information for the benefit of the public. According to the Court, "Government business is not in its entirety, supposed to be in the public domain." The court determined that demonstrating such a benefit was necessary to prove a public interest in disclosure.[15]

The *Mwanguhya & Izama* case can be critiqued for two main reasons. First of all, it is the public authority to prove that any disclosure of the information in its possession would be more harmful to the public interest that its disclosure. It is not for the persons requesting that information to do so. Secondly, there is no provision in the law which requires that the person requesting the information justifies how they are going to use it.[16]

The second case on A2I is *In Re: The Access to Information Act 2005, Edward Ronald Sekyewa v. National Forestry Authority*,[17] which concerned an attempt to secure documents relating to the management of forests in Uganda. The NFA argued that the reason and purpose for which the information was required should have been disclosed since there was a possibility of jeopardizing public interest in case the information was misused. In response, Chief Magistrate Boniface Wamala stated,

> The above provision is quite clear and unequivocal. The reason for which the information is required and the belief of the officer supposed to provide the information as to purpose for which the information is required are irrelevant considerations. This therefore means that whether the Applicant has given any specific reasons or not, the application has to be considered on its merit. This, in

[14] *Id.*, at 3.
[15] *Id.*, at 6
[16] *Id.*, at 6.
[17] Misc. Cause No.73 of 2014.

> my view, is the reason the "Request Form" under Schedule 2 of the Act does not require a statement of such reasons. It was clearly the purpose of the legal drafters of the Act that such is not a relevant requirement.[18]

Dismissing the second objection raised by Respondent's counsel, the court ordered that the Applicant be given access "… to any and all records or information that the Applicant requested for in accordance with the Act," and furthermore, that "…the Executive Director of the Respondent be prevented from concealing information pertaining to the subject matter of the Applicant's request."[19] Although the *Sekyewa* case was a much more solid decision than *Mwanguhya & Izama* perhaps the distinction in outcomes lay in the different kinds (and sensitivity) of information being sought. All-in-all, the area of jurisprudence remains highly underdeveloped and the journalist community needs to become more proactive in giving life to provisions in the law which can greatly improve the right of access to information in Uganda.

IV. DISSECTING KAKAIRE

The case of *Sulaiman Kakaire & David T. Lumu v. Parliamentary Commission & Clerk to Parliament*,[20] primarily dealt with the right to a fair hearing within the context of the powers of Parliament, but more importantly with respect to the right to information insofar as it concerned the access of journalists to a major institution of Government. The case ended up in court because of two stories authored by Sulaiman Kakaire (A1) and David Tasha Lumu (A2), both of whom belonged to the Uganda Parliamentary Press Association (UPPA), an umbrella association for journalists covering parliament and working for the local bi-weekly newspaper *The Observer*.[21]

The stories in question highlighted the way in which the Speaker had handled the petition signed by 127 lawmakers who wanted a recall of Parliament, which at the material time was in recess, "…to debate President Yoweri Museveni's handling of the death of Butaleja Woman Member of

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[18] *Id.*, at 4.
[19] *Id.*, at 7.
[20] High Court of Uganda at Kampala, Misc Cause No. 232 of 2013 before Justice Yasin Nyanzi, July 3, 2015.
[21] See, 'How Kadaga, Oulanyah fought over petition,' *The Observer*, January 21, 2103, at: http://www.observer.ug/index.php?option=com_content&view=article&id=23261&catid=78&Itemid=116, and Sulaiman Kakaire, *'House recall petitioners strike deal with Kadaga,' The Observer,* http://www.observer.ug/news/headlines/23307-house-recall-petitioners-strike-deal-with-kadaga, January 23, 2013.

Parliament, Cerinah Nebanda..."[22] In the opinion of the reporters, the manner in which the Speaker conducted business in that regard amounted to an attack on the independence of Parliament.[23] In response, the Speaker claimed that the stories were false and damaging to the offices and persons of the Speaker and Deputy Speaker of Parliament.[24] She advised that the journalists retract their stories and make an apology or face suspension from future proceedings of Parliament and a ban from its premises.

Convinced that they had no case to answer the duo refused to retract the stories and/or apologize. Hence, in a letter signed by the Public Relations Officer of Parliament on January 28, 2015, their accreditation was suspended. The two applied for judicial review[25] citing Articles 40(2); 29(i) (a) and 50 of the Constitution of the Republic of Uganda as well as Section 2(3) of the Administration of Parliament Act Cap 257 and Sections 37(i) and 38(i) of the Judicature Act Cap 13.

The applicants sought a number of orders from the court, *viz*:

i. *A declaration that the decision made by Parliament through the office of the Clerk to Parliament dated 28th January 2013 to suspend the Applicants from Parliament was ultra vires;*
ii. *An order of Mandamus requiring the Respondents to lift the suspension against the Applicants;*
iii. *An order of Certiorari quashing the decision suspending the Applicants by a letter dated 28th January, 2013 signed on behalf of the clerk of parliament by the Public Relations Officer of Parliament;*
iv. *An injunction permanently restraining the Respondents from ever interfering with the Applicants' news reporting at Parliament and their freedom of press;*

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[22] HRNJ Uganda, 'Court nullifies speaker's dismissal of journalists,' July 4, 2015. Available at: https://hrnjuganda.wordpress.com/2015/07/04/hrnj-uganda-alert-court-nullifies-speakers-dismissal-of-journalists-from-parliament/. (Accessed September 21, 2015)

[23] *Id.*

See Article 19, *Freedom of Expression in East Africa: Parliament bans Journalists over stories about the Speaker,* February 13, 2015. Available at: https://www.article19.org/resources.php/resource/3608/en/newsletter:-freedom-of-expression-in-eastern-africa.

[25] Via Notice of Motion under Rule R.3 (i) (a) (b) (2), R.6 of the Judicature (Judicial Review) Rules 2009.

v. *An order prohibiting the Respondents and Parliament from interfering with the Applicants and other journalists reporting at Parliament under the Uganda Parliament Press Association in regard to independent media/news and press reports not geared favourably on the Speaker of Parliament;*

vi. *A declaration that the GUIDELINES FOR MEDIA COVERAGE OF PARLIAMENT did not have the force of law and could not be enforced under Cap 13;*

vii. *An order for damages to the Applicants,* and

viii. *Costs of the Application.*

A1 Sulaiman Kakaire deponed that the duo had been suspended from Parliament without being given the opportunity to be heard, nor had there been any input over the matter by the relevant Disciplinary Committee.

The applicants thus challenged the Speaker's decision on the following grounds:

(i) they were not heard;

(ii) they were charged with a non-existing offence, and

(iii)the action was marred by procedural impropriety and irrationality.

The petitioners argued that as a result of the above developments their work had been greatly affected in that they could no longer access Parliament or conduct investigative journalism or carry out independent reporting, and yet these constituted their assignments by their employer.

In opposing the application, Clerk to Parliament Jane Kibirige denied relying on the said "Guidelines" in arriving at the decision to suspend the applicants even though these did exist. She averred that parliament was empowered by law to allow or refuse any stranger onto its precincts, a power vested in the Speaker. She also asserted that the decision to suspend the applicants did not in any way curtail or impair their constitutional rights since special access to public places is not one of the constitutional guarantees accruing to the press. The respondents also averred that whereas the applicants had been suspended, other accredited reporters from the *Observer* newspaper had not been stopped from reporting on Parliament. She also argued that the source of the letter of suspension was irrelevant since the Clerk to Parliament was empowered to delegate such of their functions at any time in consultation with the Speaker.

Finally on the right to a fair hearing, Kibirige averred that the applicants had been given a fair hearing prior to their suspension having been duly notified of their eminent suspension if they did not retract their "false statements."

The issues before the court included:

1. *Whether the applicants were strangers at the precincts of Parliament;*
2. *Whether the Parliamentary Public Relations Officer's letter served to and suspending the applicants from conducting their usual business at parliament complied with the relevant procedure, and*
3. *Whether the applicants had been accorded a fair hearing.*

On the issue of the status of the applicants (No.1), the judge observed that having been persons accredited to cover proceedings at parliament the applicants were not strangers and that this only became so when they were suspended from parliament by the said letter.[26] As such, they could not be construed as belonging to a category of persons who could be denied or permitted entry to the parliamentary premises as and when the Speaker deemed it necessary. On whether the PRO's letter complied with the relevant procedure, the Judge observed that while it was true that section 11 of the Administration of Parliament Act permitted the Clerk to Parliament to delegate such of that office's powers to any officer in the service of that office, in consultation with the Speaker, such delegation must, strictly speaking, comply with the requirement of authorization by the Speaker. That authorization cannot be waived. To the extent that in the course of the proceedings the respondents failed to produce an affidavit from the Speaker as confirmation that she had indeed given the necessary authorization and the fact that no minutes for the alleged meeting were attached as further proof, the Judge concluded that the PRO was not vested with the authority to make the decision and thus to communicate such a decision to the Applicants.[27]

On whether the Applicants had been accorded a fair hearing, the judge disagreed with the contention by Respondent's Counsel to the effect that such hearing could be inferred from the fact that the Applicants' employer had been notified of the transgressions of the applicants vide

[26] Nyanzi judgment, Para 14.
[27] *Id.*, Para 21.

an email dated January 22, 2013 and a subsequent discussion between *The Observer Newspaper* and the Public Relations Officer, as well as the Speaker and Deputy Speaker of Parliament.[28] Respondents' counsel had also averred that "…hearing does not mean hearing of a case such as would be in a court of law," and that instead, "(i)t means an opportunity to put one's case before a decision is made."[29] In the instant case, the Respondents had written to the Managing Editor of the Applicants' employer.

However, the Judge observed that the right to a fair hearing applied in all circumstances and that it was immaterial whether one was appearing before an administrative or judicial body. This is why all such persons are given the right to apply to a court of law for judicial review in respect of any administrative decision taken against him or her.[30] Additionally, according to Article 44(c) the right to a fair hearing is a non-derogable right. Therefore, as was decided in *Kampala University v. National Council for Higher Education*[31] "… all administrative Bodies should accord the persons appearing before them a fair hearing."[32]

Having laid down the above legal provisions, the Honorable Justice concluded that "… in order for the right to be heard to be fulfilled as per the provisions of the Constitution, the applicants ought to have been called before an independent body and informed of the allegations against them, [and] given an opportunity to respond to the said allegations and a decision thereof made."[33] In this respect, the ruling of Lord Denning in *Selvarajan v. Race Relations Board*[34] is apposite:

> The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.[35]

[28] *Id*., Para 23.
[29] *Id*., Para 24.
[30] Article 42 of the 1995 Constitution of Uganda.
[31] Misc Cause No. 053 of 2014.
[32] Nyanzi judgment, para 26.
[33] *Id*., para 27.
[34] [1976] 1 ALL ER 12.
[35] *Id*., at 19.

To the extent that such an opportunity was not provided to Kakaire and Lumu the decision of the PRO fell short of the test. The Court also made an order stopping the Parliamentary Commission and the Clerk from denying the two journalists access to Parliament.[36]

V. THE SIGNIFICANCE OF KAKAIRE FOR THE FREEDOM OF JOURNALISTIC EXPRESSION

Unsurprisingly, Justice Nyanzi's ruling in the *Kakaire* case was welcomed by both the journalists and their lawyers who expressed the hope that it would go a long way in enhancing the protection of their rights from being violated by State officials. David Tasha Lumu for example is reported as saying this was "…a landmark judgment for journalists in Uganda especially those reporting in Parliament, media house and the entire media industry" adding that "(i)t…made the standard very clear about the powers of politicians to intimidate critical reporters."[37] In the view of the applicants' lawyer Allan Mulindwa, "The Fourth Estate has prevailed. This means politicians can no longer use blackmail to lock out journalists from holding them accountable while in public offices."[38] The National Coordinator of the Human Rights Network for Journalists in Uganda (HRNJ) Robert Ssempala welcomed the court's decision to protect journalists from political interference, advising that any person who had a complaint against a given journalist should petition the disciplinary committee of the Media Council rather than misusing their offices selfishly to gang up on the media.[39]

Although warmly welcomed by the Press, it is necessary to point out that the *Kakaire* case essentially laid down the clear extent of the powers of the Speaker of Parliament *vis á vis* the position of journalists in the House. In other words, the case was mainly about the Right to a Fair Hearing (Article 28), which could be regarded as a due process right rather than as a substantive one. The right to a fair hearing is a constitutional guarantee that is central to the enforcement of individual rights and freedoms. Any action that results in the abuse of the right

[36] Para.33(c).
[37] Interview with HRNJ-Uganda, *op.cit.*
[38] *Id.*
[39] *Id.*

needs to be challenged in the bid to strengthen the overall protection of democratic freedoms of all categories.

Despite the limitation of the case to the right to a fair hearing, the position of the court nevertheless needs to be applauded because not all judges have adopted such an assertive position when confronted by the excessive use of executive or administrative power. For example, in the case of *Jacqueline Kasha Nabagesera & 3 Ors. v. Attorney General & Anor* ('Kasha-2'),[40] a court found nothing wrong with the high-handed action of the Minister of Ethics and Integrity in arbitrarily closing down a meeting of LGBTI activists. In other words, Justice Nyanzi could have taken the easy way out of the matter by finding that the Speaker or her designated representative had the power to arbitrarily decide who should be allowed to report on parliamentary proceedings and who should be prevented from doing so.

The *Kakaire* decision is also important because although the judge does not mention this the ruling underscores the point that the Constitution is supreme (Article 2) and that it binds all authorities and persons throughout Uganda—including State agencies such as Parliament. It also underlined the stipulation in Article 20 of the 1995 Constitution which obliges all organs and agencies of Government to respect the rights enshrined in the Bill of Rights. In other words, not all acts done by officials at whatever level are legitimate especially those that impinge on freedoms and liberties. *Kakaire's* case demonstrates that Government officials endowed with political and other powers cannot simply be allowed to engage in arbitrary acts without due regard to the law and get away with it.

The case only obliquely touches on articles 29 (freedom of expression) and 41 (the right of access to information). Indeed, the petitioners and the judge made no reference to Article 41.[41] Nevertheless Article 41 is implicated in the case *via* the right to access angle. That article is crucial in the struggle for enhanced governmental openness and increased accountability. If a journalist is denied access to the premises of a State agency or organ from which they derive their information, in effect they have been denied the right of access to information.

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[40] Judgment of Justice Stephen Musota in *Jacqueline Kasha Nabagesera & 3 Ors. v. Attorney General & Anor*, Misc. Cause No. 33 of 2012, [2014] UGHC 49, accessed on September 2, 2014 at: http://www.ulii.org/ug/judgment/high-court/2014/85.

[41] Aside from Article 28, the case also relied on Article 40(2) on the right of every person to practise his or her profession.

Access to information relates to another important right, the Right to Truth (R2T). Recent developments in International Law have seen the evolution of such a right but mainly within the context of the commission of Gross Human Rights Violations and against acts of impunity by State authorities. The issues raised in the *Kakaire* case make a compelling argument for the application of the R2T to the domestic context and for linking the R2T to the right to information and freedom of expression. In essence, the R2T is crucial for open government and State accountability. And just as is the case with other rights there are State duties which correspond to the Right to Truth. These include the following:

(a) The duty to archive, prevent the destruction of, and permit access to official records;

(b) The duty to limit restrictions on the disclosure of official documentation and prove the need for secrecy before an independent court or tribunal;

(c) The duty to search for records, and in some circumstances, to gather, generate and reconstruct unavailable information;

(d) The duty to ensure effective and untainted oversight of records; and

(e) The duty to fulfil obligations relating to request for information within a reasonable time.[42]

These measures would go some way in ensuring that the Right of Access to Information is better protected and improved. In this way the operation of journalism in Uganda would be made more secure.

The *Kakaire* case raises one final issue, the question of impunity on the part of State officials, including the Speaker and the Clerk to Parliament. Since the *Kakaire* case, Parliament has done the following:

1. Issued bans against over 50 journalists,
2. Filed a notice of appeal against the decision of the High Court, but not taken the matter further, and

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[42] See Open Society Justice Initiative (Right to Information), Harm and Public Interest Test, accessed at: http://www.right2info.org/exceptions-to-access/harm-and-public-interest-test.

3. Still refused to issue Kakaire with a press card for 2015.

Quite clearly, Parliament is playing a delaying game but one which is in serious contempt of the Judiciary. This calls for a concerted effort on the part of journalists and their professional bodies to take the appropriate steps to put an end to this impunity by returning to the courts of law and requesting for decisive action to address what is basically contempt of court on the part of officials of Parliament.

MEDIA FREEDOM VERSUS NATIONAL SECURITY: WHAT IS THE LIMIT? A CASE STUDY OF THE CLOSURE OF DAILY MONITOR PREMISES IN 2013

Kisaakye Julianna Izizinga[1]

I. INTRODUCTION

"Freedom of expression is the matrix, the indispensable condition of nearly every other freedom."[2] This is one of the defining principles of the First Amendment to the Constitution of the United States of America[3], arguably one of the most democratic countries. It is therefore safe to say that the right to freedom of expression is the core of every democracy. It is noteworthy that democracy was put at the centre of the 1995 Constitution of the Republic of Uganda, when the people of Uganda committed in the preamble to:

> *...building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress*[4]

This is a pledge to the enforcement of democracy as a guiding principle in the new socio-economic and political order of the Constitution. Ordinarily, this would mean the realization of a democracy where the right to freedom of expression is respected. This however is not the case in Uganda as can be seen in the following discussion on the right to media freedom.

II. THE PRESS IN UGANDA: *FREE AND NOT FREE?*

The Press Status in Uganda as of 2013 is 'partly free' with Press freedom at 54%[5], as is reported by Freedom House. It is reported by Human Rights Watch, that "between January and June

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[2] Per Benjamin Cardozo in *PALKO v. STATE OF CONNECTICUT*, 302 U.S. 319

[3] U.S Const. amend. I.

[4] Preamble of the 1995 Constitution of the Republic of Uganda

[5]https://freedomhouse.org/report/freedom-press/2013/uganda#.VTTYofAwDQs.

2013, there have been 50 attacks on media journalists. This only gets to show the dismal state of media freedom in Uganda.[6]

Press censorship has been the tool applied by all Ugandan post-colonial leaders, in a desperate attempt to hold onto power undemocratically. This is something that the subsequent Independence regimes inherited, as the State employed press censorship as a means of holding on to power. An example is in Milton Obote's regime where "Ssekanyolya," a pro-Buganda newsletter[7] was closed down, for simply being a pain to Obote who was facing Buganda resistance at the time. This went on in the regimes that followed, and even with the supposed 'fundamental' change in leadership that happened in 1986, there still remains no fundamental change as relates to the freedom of expression in Uganda.

A clear illustration of this is the closure of Daily Monitor, K-FM, Dembe FM and Red Pepper in May 2013. On May 7th, 2013 the Daily Monitor published a story titled *"Probe Assassinations Claims, says Tinyefuza",* and this was followed with the closure of the media houses which were now characterized as scenes of crime. What was the crime? Publishing of a letter written by Gen David Sejusa (the Coordinator of the Intelligence Services) to General Ronald Balya (Director, Internal Security Organization) asking him to investigate claims that there was a plot to assassinate senior army and government officials deemed opposed to the so-called "Muhoozi project."

This was a project allegedly aimed at ensuring that Muhoozi, the first son of Uganda, succeeds his father Yoweri Museveni as president of the Republic of Uganda. This was deemed to be a matter of national security warranting a limitation on the media houses' right to freedom of expression. As such, the authors of the story Richard Wanabwa and Risdel Kasasira together with the newspaper's managing editor were summoned to Criminal Intelligence and Investigative Directorate (CIID) headquarters in Kibuli, Kampala for interrogation. This

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[6] HUMAN RIGHTS WATCH (2013) World Report 2013 (Uganda).

[7] http://www.monitor.co.ug/Magazines/PeoplePower/The-dark-history-of-Uganda-s-media-and-past-governments/-/689844/1869456/-/11sp5nj/-/index.html.

interrogation demanded for the handover of the letter in question and release of the journalists' source, which the journalists refused to do.[8]

This was followed by a siege that was unprecedented in that it was a direct attack on the media, causing these houses to shut down operations for about 11 days. This act that was heavily criticized by civil and International society, and Human Rights Network for Journalists in Uganda gave an ultimatum to the Uganda Communication Commission and the Police to open the closed down media houses immediately, or else they would be dragged to court. This however fell on deaf ears.

This is the same story of *Media Freedoms v. National Security*; where is the line drawn? How far does national security go? Should this limitation be to the benefit of the people, a few individuals, or to the State itself?

III. WHY FREEDOM OF EXPRESSION IS NOT RESPECTED

To understand why there are continuous violations of the right to freedom of expression, one has to appreciate Uganda's history. Uganda is a country scarred with tyranny, conflict and exploitation. Of all the 9 leaders that the country has seen since Independence, 8 have been ushered into power by way of conflict/wars. In such a country, every regime has to work at consolidating political power, thereby employing the harshest forms of dictatorship, which includes press censorship, and this is not only peculiar to Uganda.

The situation in Uganda is however not an isolated one when put in context with the practice elsewhere. In Eritrea, a country that was characterized as the most censored State by the Committee to Protect Journalists in April 2015, there have been several media houses shutdowns, for purely political reasons. In Burundi, when the attempted military coup broke out in early 2015, the government responded by threatening press freedom and attacking independent media houses. On May 14th, the government forces broke down the gates of Radio Isanganiro in the name of national security which was said to publish coup related statements. Luckily, the radio was found to only be playing music, and the journalists safely hiding away in

[8]Chronology Of Events Leading To Closure Of Monitor Premises, MONITOR ONLINE NEWS posted Friday May 31, 2013 at 01:00 at http://www.monitor.co.ug/News/National/Timeline-to-the-closure--of-Monitor/-/688334/1867856/-/oj3iv2/-/index.html.

a nearby hotel. The situation in Burundi was sparked off after the President Pierre Nkurunziza announced his run for president again, which the majority thought was against the Constitution of Burundi, that placed a two term limit. In Nkurunziza's defence, he argued that his first term did not count as he was elected by Parliament, and not directly by the people[9]. While away at peace talks in Tanzania, a coup was masterminded, and an attempt for the highest position in the country made by Major General Godefroid Niyombare, the former intelligence chief. This however did not last long.

The political climate in Uganda, Burundi and Eritrea is similar in that all three countries have suffered political strife, and in an attempt to hold onto power, the leaders have often employed press censorship. It is no wonder that in countries scarred by war and political conflict that have ushered in dictatorship, there is limited press freedom which is justified by an untrue assertion that national security needs to be protected, as has been illustrated above. This explains the continued violations of the right.

IV. UNDERSTANDING THE RIGHT TO FREEDOM OF EXPRESSION AND NATIONAL SECURITY

A. NORMATIVE CONTENT OF THE RIGHT

As already mentioned, the right to freedom of expression defines the existence of a democracy in any State. Article 29 of the Ugandan Constitution provides for the right to freedom of expression saying;

> *(1) Every person shall have the right to—*
>
> *(a) Freedom of speech and expression which shall include freedom of the press and other media;*

This freedom is also enunciated in Article 19(2) the International Covenant on Civil and Political Rights, which Uganda ratified in 1987. The African Charter on Human and People's Rights recognizes the same freedom under Article 9(2). Internationally the right to freedom of expression has been expounded upon by the Human Rights Committee in General Comment

[9] http://www.theguardian.com/world/2015/may/15/burundi-army-dead-radio-station-battle-coup-leaders-arrested retrieved on 2015-11-11.

Number 34[10] to include all forms of expression, which includes expression through writing, orally, art, music among others. It should however be noted that the right to freedom of expression in the International Covenant on Civil and Political Rights is however limited under paragraph 3 of Article 19.

Article 19(3) of the International Covenant on Civil and Political Rights 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 provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
> *(b) For the protection of national security or of public order (odre public), or of the public health or morals."*

The Ugandan Constitution, which is the Supreme law of the land[11], states in Article 44 that the enjoyment of rights is limited in so far as it prejudices the rights of others and is against public interest. Sub-Article 2 goes on to emphasize that public interest under the Article "shall not permit political persecution, detention without trial, or limitation of the enjoyment of the rights and freedoms demonstrably justifiable in a free and democratic society, or as provided for in the Constitution." It is important at this point to note that under the African Charter, there is no limit to the right to freedom of expression.

The question to ask oneself therefore is; "What amounts to a justifiable limitation to the right to freedom of expression in the name of national security in a demonstrably justifiable free and democratic society/ as envisaged by the law?"

There is little authority in the Ugandan jurisdiction as to what is "demonstrably justifiable in a free and democratic society." This is a vague phrase used in legal documents like the Canadian Charter of Rights.[12] Borrowing from the Canadian jurisdiction, the test set out in *R v. Oakes*[13],

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[10] General Comment Number 34, adopted at the 102nd Session of the United Nations Human Rights Committee, CCPR/C/GC/34 at paragraph 12.
[11] Article 2(1) of the 1995 Constitution of the Republic of Uganda.
[12] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, http://canlii.ca/t/ldsx retrieved on 2015-11-11.

has been applied to illustrate what is demonstrably justifiable in a free and democratic society. This was expounded upon by Chief Justice Dickson to mean that before the restriction of a right, there ought to be the existence of a pressing and substantial objective that has to be met, and the means of attaining the objective must be proportional so as to ensure minimal impairment to the right.

B. *RESTRICTIONS AS INTERPRETED BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE*

The Human Rights Committee in General Comment Number 34 has stated that for any restriction to be imposed to the right to freedom of expression, it must pass the tripartite test[14]; that is,

i.) The restriction must be "provided by law",

ii.) The restriction may only be imposed for one of the grounds set out in paragraphs (a) and (b) of Article 19(3), and

iii.) They must conform to the strict tests of necessity and proportionality.

a. *The Proportionality Test*

In the South Korean Case of *Shin v. Republic of Korea*[15], which involved the seizure of the applicant's painting by the authorities on grounds that it amounted to an "enemy benefiting expression" under the National Security Law, the Human Rights Committee held that there is need for the test of proportionality to be met before a restriction can be made on the right to freedom of expression. In measuring proportionality, it was said that the need to protect national security ought to be of equal weight to the right to freedom of expression. This calls for the use of the least intrusive measure to achieve the intended legitimate objective, and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated.[16]

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[13] *R v. Oakes* [1986] 1 S.C.R. 103

[14] Para. 22 of General Comment Number 34 to the International Covenant on Civil and Political Rights.

[15] *Hak-CHul Shin v Republic of Korea,* Communication No 926/2000, UN Doc. CCPR/C/80/D/926/2000

[16] HUMAN RIGHTS COMMITTEE, General Comment No. 22, Freedom of Thought, Conscience and Religion (Article 18),
CCPR/C/21/Rev.1/Add.4, para. 8.

b. The Necessity test

This is to the effect that it has to be established that the restriction is necessary. In other words, it should be established that there is no other way of upholding national security, or public morals, or the rights and reputations of others, save for by way of limiting the right to freedom of expression of an individual. Only then can the restrictions on the right to freedom of expression be deemed necessary as was further proponed in *Ross v. Canada*[17] by the Human Rights Committee.

Furthermore, the need to protect national security may warrant restriction upon an individual's freedom of expression, but only if such a limitation is, inter alia, *"necessary" for a legitimate purpose in the sense that there must be a "pressing social need" for the restriction.*[18]

V. RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION IN DEFENSE OF NATIONAL SECURITY

Dr. Prabhakaran Paleri, a former Indian Navy and celebrated scholar and academic in national security, describes National Security to be;

> *The measurable state of the capability of a nation to overcome the multi-dimensional threats to the apparent well-being of its people and its survival as a nation-State at any given time by balancing all instruments of state policy through governance, that can be indexed by computation, empirically or otherwise, and is extendable to global security by variables external to it.*[19]

Borrowing from the legal definition in corresponding jurisprudence, Malawi defines public security

> *to include the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the preservation and suppression of violence, intimidation, disorder and crime, the maintenance of the*

[17] *Ross v. Canada*18 October 2000, Communication No. 736/1997 (UN Human Rights Committee)
[18] *Handyside v. United Kingdom*, Eur Ct HR, Application No 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, para. 48.
[19] Parleri, Prabhakaran (2008). NATIONAL SECURITY: IMPERATIVES AND CHALLENGES. New Delhi: Tata McGraw-Hill, at 521.

> *administration of justice and the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to lawfully constituted authority and the laws in force in Malawi.*[20]

Therefore, national security also encompasses a military, economic, political, and environmental aspect. It also pertains to the functionality of the three arms of government (Executive, Legislature and Judiciary). Hence national security seeks to protect the sovereignty of the State, and the interests of the people, and it is in such situations that a limitation on the right to freedom of expression can be upheld as was envisioned by Article 19 (3) of the International Covenant on Civil and Political Rights.

Furthermore, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[21] state that for the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation. This was the report of the UN Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression, who also set out his expert view on limitation in his report to the Commission on Human Rights in 1994.

From the foregoing, it is clear that defence of national security should not be the State's immediate resort whenever national security is at risk. It has in fact been observed that legitimate national security interests are, in practice, better protected when the press and public are able to scrutinize government decisions than when governments operate in secret.[22]

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which were referred to by the Special Rapporteur on Freedom of Expression[23], and

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[20]The Malawian Preservation of Public Security Act defines public security. Laws of Malawi, Chapter 14:02, § 2.

[21]UN COMMISSION ON HUMAN RIGHTS, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: http://www.refworld.org/docid/4672bc122.html [accessed 11 November 2015]

[22] Sandra Coliver, COMMENTARY ON THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION. IN SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (The Hague: Martinus Nijhoff Pubs, 1999).

[23]Report of the Special Rapporteur, Mr Abid Hussain, pursuant to Commission on Human rights resolution 1993/45

are considered to be best practices for establishing when there is a legitimate claim of protection of national security so as to restrict any freedom. Principle 2 sets out the following standard;

> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.[24]

VI. ANALYZING THE 2013 MEDIA HOUSES CLOSURE *vis a vis* INTERNATIONAL HUMAN RIGHTS STANDARDS

In light of this, the question then to be asked is whether the 2013 media houses shut down meets the criteria that is set out in the above laws? In light of the above International human rights standards, the 2013 Media houses closure cannot be said to have been in the interest of national security, let alone be said to be a limitation that is demonstrably justifiable in a free and democratic society. This is because it did not amount to a direct militant attack on the political integrity of Uganda. Instead it was more engineered at the government saving face, so as to hide the true evil of its undemocratic and sectarian actions, as was evidenced in the impugned letter.

Furthermore, the acts of the State in the 2013 events went beyond the limit for it was disproportional to the right that was sought to be protected. The State could have employed other means that are not so drastic as to render the right to freedom of expression.

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[24] As reported by Article 19, http://www.article19.org/resources.php/resource/37377/en/annex:-international-freedom-of-expression-standards-relating-to-the-guardian-newspaper%E2%80%99s-reporting-of-the-snowden-disclosures.

The closure of the media houses in 2013 was said to be in protection of national security. However looking at the effects of the media shut down, there was no National security threat. In fact, if anything, the acts of the Daily Monitor and the other media houses was that of publicizing an act of the government that has been said to threaten national security. This was the publicizing of the fact that some senior government and military officials' lives were at stake for opposing the alleged 'Muhoozi project.' This is in no way proportional to the right that was disadvantaged, that is the right to freedom of expression.

Firstly the closure of Daily Monitor was a violation of Section 38 of the Press and Journalist Act which protects against compelling a journalist to disclose the source of his information unless the source gives consent. In May 2013 when the writers of the article in the Daily Monitor and the managing editor of the newspaper were taken for interrogation by police, this was the direct purpose of the interrogation. As such the interrogation was a direct attack on the law.

As per the International standards set out in the International Covenant on Civil and Political Rights and the Special Rapporteur's report, the State's closure of the Daily Monitor offices was illegal. Firstly, as per the tripartite test the restriction on the right to freedom of expression must be necessary. Paragraph 35 of General is clear that "when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat." This was not the case for the 2013 media closure. The suppression of media freedoms so as to save the government from embarrassment or exposure of its wrong doing, or conceal information as to the functioning of a public authority has expressly been stated by the Johannesburg Principles to be unnecessary.[25] This was the nature of the closure of Daily Monitor premises in 2013.

VII. CONCLUSION

It is important to note that this article does not propone for the scrapping of national security as a ground for limiting the right to freedom of expression in any way as this would prove catastrophic. This is because it is not the writer's intention to underplay the risk that may come

[25]Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

with the exposure of certain information that is indeed sensitive and may have serious implications on the sovereignty and integrity of a State. However, this should be balanced out by ensuring that not the most drastic of measures are taken in the guise of protecting a potential breach of national security. The tests of proportionality and necessity proponed by the Human Rights Committee should be strictly adhered to, so as to achieve true freedom of expression in a demonstrably free and democratic society.

It should be recognized that in fact there is some information that may legitimately be secret on the ground of national security, and as such is by law not accessible to all persons. It is then required of the secrecy laws to define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared.[26] This however was not the case for the closure of Daily Monitor in 2013 as has been illustrated above.

It is therefore the writer's recommendation that the government should set clear guidelines as to what amounts to information which would amount to a threat to National security, justifying the restriction of the right to freedom of expression and other civil liberties. These guidelines should be in conformity to the principles of democracy. It is only this measure that will see an end to the undemocratic and forceful infringement of the media's right to freedom of expression as was the case in the 2013 Daily Monitor closure.

Even in the absence of a proper legal framework in Uganda, the journalistic community continues to fight for their freedom, showing solidarity to all affected journalists. This is proof of a revolution brewing to uphold the most fundamental right of all civil liberties- the right to freedom of expression.

The resilience of the journalists during the May 2013 incident only gets to show that not all hope is lost as regards freedom of expression. Uganda has a very resilient and unstoppable media in Uganda, as was seen in the protests that followed the closure of the media houses in May 2013, and the solidarity of Civil Society Organizations and journalists elsewhere. The media stands by the "Tell the prince the truth, even if it offends him" as proponed by Confucius.

[26]International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004.

KWOYELO'S LONG ROAD TO JUSTICE: A PRACTITIONERS REFLECTION ON THE RECENT SUPREME COURT RULING IN UGANDA VS THOMAS KWOYELO, ALIAS LATONI CONSTITUTIONAL APPEAL NO. 1 OF 2012

Stephen Oola*

I. INTRODUCTION

On April 8th 2015, the Supreme Court of Uganda after almost 3 years of waiting issued its ruling on the controversial trial of former Lords Resistance Army (LRA) rebel commander Colonel Thomas Kwoyelo, also known as Latoni.[1] A panel of seven Justices led by the newly appointed Chief Justice, Hon. Justice Bart Katureebe unanimously agreed in part with the Attorney General (AG), that Kwoyelo should face trial before Uganda's nascent International Crimes Division (ICD), even though the appeal succeeded in part.[2] Other Justices on the bench were: Hon. Justice Benjamin Odoki, Hon. Justice John Wilson Tsekooko, Hon. Justice Jotham Tumwesigye, Hon. Justice Lady Esther Kisaakye-Kitimbo, Hon. Justice Galdino Okello and Hon. Justice Lady Christine Kitumba.

II. BACKGROUND

A. *BRIEF FACTS*

Kwoyelo, a former LRA commander was the first person to be indicted before the nascent International Crimes Division, a special Division of the High Court of Uganda created in 2008 to prosecute persons who bare the greatest responsibility for serious crimes committed in the course of armed conflicts within the jurisdiction of Uganda.[3] He was allegedly injured in gun battle and was captured by the Uganda Peoples Defence Forces (UPDF) in March 2009, in the Garamba

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[1] See Supreme Court Judgment. Available online at http://www.ulii.org/ug/judgment/supreme-court/2015/5 (accessed 26 September 2015).

[2] *Id.*

[3] For a background and legal issues surrounding the Kwoyelo case, see Kristy MacNamara, Seeking Justice In Ugandan Courts: Amnesty And The Case Of Thomas, WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW ,Vol 12, Issue 3, 2013 http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1457&context=law_globalstudies (accessed 26 September 2015).

National Game Park in the Democratic Republic of Congo, during Operations Lightening Thunder. Kwoyelo was initially charged before the Buganda Road Magistrate Court, and later committed to the High Court where he was remanded to Luzira Prison. He later applied for amnesty on January 12, 2010, but the Director of Public Prosecution (DPP) held on to his files and did not respond to his amnesty application request.

The Uganda Amnesty Act 2000, under section 3(3), provides that when a reporter (in detention) applies for amnesty, the DPP has to certify that he/she is not charged or detained to be prosecuted for any other offence unrelated to war or armed rebellion, before the reporter can be released. Accordingly, following his application for amnesty and the Amnesty Commission convinced that Kwoyelo was entitled to amnesty wrote to the DDP requesting for certification but got no reply.

On6th September 2010, Kwoyelo was instead charged with grave breaches/war crimes under the Geneva Conventions Act 1964, which domesticates the four Geneva Conventions that set out the norms of permitted conduct in the context of (international) armed conflict and the rights and protection of non-combatants. He appeared before the International Crimes Division (ICD) of the High Court of Uganda sitting in Gulu on 11 July 2011 facing an amended indictment with 53 counts of crimes against humanity, war crimes and other crimes under Uganda Penal Code Act allegedly committed during his involvement with the Lord's Resistance Army.[4]

At the begining of the trial, Kwoyelo's Defence counsel, led by Caleb Alaka and John Francis Onyango objected to the trial on grounds that Kwoyelo was being discriminated against. They argued that Kwoyelo, like other senior LRA commanders captured before him was entitled to amnesty. They raised several constitutional questions, which required interpretation by the Constitutional Court and by law; the ICD was obliged to refer such matters for interpretation.

B. LEGAL ISSUES

On 22 September 2011, the matter was referred to Uganda's Constitutional Court to determine;-

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[4] See Human Rights Watch brief on the case. Available at https://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo (accessed 26 September2015).

1. *Whether the failure by the Director of Public Prosecutions (DPP) and the Amnesty commission to act on the application by the Accused person for grant of a Certificate of Amnesty, whereas such Certificates were granted to other persons in circumstances similar to that of the Accused Persons, is discriminatory, in contravention of, and inconsistent with Articles 1, 2, 20(2), 21(1) and (3), of the 1995 Constitution of the Republic of Uganda.*

2. *Whether indicting the Accused Person under Article 147 of the Fourth Geneva Conventions Act, Cap. 363 (Laws of Uganda), of the offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with, and in contravention of Articles 1, 2, 8 (a) and 287 of the 1995 Constitution of the Republic of Uganda, and objectives 1 and XXVIII (b) of the National Objectives and Directive Principles of State Policy, contained in the 1995 Constitution of the Republic of Uganda.*

3. *Whether the alleged detention of the Accused in private residence of an unnamed official of the Chieftaincy of Military Intelligence (CMI) is in contravention of, and inconsistent with Articles 1, 2, 23 (3), 4(b), 24 and 44 (a) of the Constitution of the Republic of Uganda.*

C. HOLDING OF THE CONSTITUTIONAL COURT

On Sept 22nd September 2011, the Constitutional Court having heard the matter and reached a verdict halted Kwoyelo's trial before the ICD. In its ruling, the court held that the Amnesty Act did not offend Uganda's International Treaty obligations, nor did it take away the prosecutorial powers of the DPP given under the Constitution as submitted by the Attorney General.

The Court further held that the respondent had been discriminated against contrary to the provisions of Article 21(1) (2) of the Constitution. In a unanimous judgement signed by all five Justices of Appeal: Twinomujuni, Byamugisha, Nshimye, Arach-Amoko and Remmy Kasule, the court said that the Amnesty Act of Uganda is constitutional and that it "was satisfied that the applicant (Kwoyelo) has made a case showing that the Amnesty Commission and the Director of Public Prosecution (DPP) have not accorded him equal treatment under the Amnesty Act." The court ordered that Kwoyelo's file be returned to the ICD "with a direction that it must cease the

trial of the applicant forthwith".

According to the Constitutional Court, the application of amnesty in Uganda is not inconsistent with Uganda's obligation under international law.[5] Parliament of Uganda has powers to make laws on any matter for the peace, order, development and good governance of Uganda and Uganda's amnesty act was meant to be used as one of the many possible ways of bringing the rebellion to an end by granting amnesty to those who renounced their activities.[6] It was distinguishable from other context, including the South African Amnesty under the TRC Act. It observed that Uganda's amnesty law does not whittle down the prosecutorial powers of the DPP or interfere with its independence and finally ruled that there is no uniform international standard or practice, which prohibit states from granting amnesty.

But the Government and Prison authorities refused to let Kwoyelo free. What followed was a series of legal gymnastics and utter disregard of the principle of separation of powers and abuse of judicial processes as JLOS publicly criticized the judges' decisions and together with the then Chief Justice, Benjamin Odoki coerced the Minister of Internal Affairs to lapse Part II of the Amnesty law. The Attorney General later filed an appeal to the Supreme Court to challenge the Constitutional Court ruling.

On 11 November 2011, the ICD ceased Kwoyelo's trial but deferred the question of his release to the DPP and the Amnesty Commission.[7] On 17 November 2011, the DPP wrote a letter to the Amnesty Commission, stating that Kwoyelo could not be released from remand at Luzira Prison because he had pending charges against him that rendered him ineligible for amnesty. Kwoyelo's lawyer, Caleb Alaka, filed an application in the High Court seeking orders to compel the DPP and Amnesty Commission to grant him amnesty, issue him with an amnesty certificate and release him from custody. The orders were granted but ignored with impunity. The AG again lodged another appeal before the Supreme Court to stay the execution of the orders, which was granted by the Chief Justice Benjamin Odoki sitting alone. Kwoyelo's other lawyer John

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[5] For more on the Constitutional Court ruling, see Oola Steven, Uganda LRA Trial Halted' On Insight Of Conflict. Available at http://www.insightonconflict.org/2011/09/uganda-lra-kwoyelo-trial-halted/ (accessed 26 September 2015).
[6] *Id*.
[7] See Confusion As ICD Halts Kwoyelo Trial, UGANDA RADIO NETWORK at http://ugandaradionetwork.com/a/story.php?s=38301 accessed 26 September 2015.

Francis Onyango then filed a Petition before the African Commission on Human and Peoples Rights in Banjul Gambia challenging continuing Kwoyelo's illegal detention and mistreatment as violations of his rights.[8] The ACHPR found the case admissible and the AG was asked to respond to the allegations, which it denied.[9]

D. THE SUPREME COURT CASE

a. *Grounds of Appeal*

Although only three issues had been framed and decided upon for decision by the Constitutional Court, in his appeal to the Supreme Court the Attorney General filed 13 grounds of appeal as follows:-

1. *The Constitutional Court erred in law in holding that Sections 2 and 3 of the Amnesty Act are not inconsistent with Articles 120 (3) (b), (c) and (d), 120 (5) (6), 126 (2) (a), 128 (1) and 287 of the Constitution.*
2. *The Constitutional Court erred in law and fact in finding that the impugned sections of the Amnesty Act do not infringe on the prosecutorial powers of the DPP or interfere with his independence.*
3. *The Constitutional Court misdirected itself and erred in law and fact in interpreting the plea of pardon as recognized under Article 28 (10) in relation to the independence of the DPP in conducting prosecutions.*
4. *The Constitutional Court erred in law and in fact in failing to consider the status, and effect of the Geneva Conventions Act in relation to the Amnesty Act, and wrongly decided that the DPP can only prosecute persons declared by the Minister to be ineligible for amnesty.*
5. *The Constitutional Court erred in law and in fact in holding that the Respondent acquired a legal right to be granted amnesty or pardon under the Act.*
6. *The Constitutional Court erred in law in holding that the Amnesty Act*

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[8] See Lamony Stephen, African Human Rights Commission Silent On Kwoyelo Detention. Available at http://africanarguments.org/2013/03/14/african-commission-silent-on-detention-of-lord's-resistance-army-commander-thomas-kwoyelo-by-stephen-a-lamony/ (accessed 26 September 2015).

[9] See, Uganda Sets The Record Straight In The Thomas Kwoyelo Case. Available at http://www.jfjustice.net/uganda-sets-the-record-straight-in-the-thomas-kwoyelo-case/ (accessed September 2015).

addresses Uganda's obligations under international treaties and conventions.

7. *The Constitutional Court misdirected itself and erred in law and fact when it concluded that it had not come across any uniform international standards or practices which prohibit states from granting amnesty and that the learned State Attorney did not cite any either.*
8. *The Constitutional Court misdirected itself and erred in law and fact when it failed to consider both the purpose and effect of the Amnesty Act in determining the Constitutionality of the Act.*
9. *The Constitutional Court erred in law and fact in finding that the Director of Public Prosecutions did not give any objective and reasonable explanation why he did not sanction the Respondent's application for amnesty.*
10. *The Constitutional Court erred in law in holding that the Amnesty Commission and the Director of Public Prosecutions did not accord the Respondent equal treatment under the Amnesty Act, and that their actions were inconsistent with Article 21 (1) and (2) of the Constitution.*
11. *The Constitutional Court misdirected itself and erred in law and fact when in the absence of evidence it found that the DPP had sanctioned the grant of amnesty to 24,066 people and that 274 people were granted amnesty in 2010 which was "apparently sanctioned by the DPP", and it wrongly relied on this finding to decide that there was unequal treatment of the Respondent.*
12. *The Constitutional Court erred in law in failing to find that the Amnesty Act was inconsistent with Article 21 (1) (2) after it had found that the Act permits prosecution of government officials or UPDF personnel for grave breaches of the Geneva Conventions, but prohibits prosecution of rebels for the same offences.*
13. *The Constitutional Court erred in fact in finding that there was no affidavit in reply by the Respondent.*

b. Issues

According the Supreme Court justices concurring with the defence counsel, despite the numerous grounds of appeal filed by the Attorney General, the appeal raised only three substantive issues namely;

1. *Whether the Amnesty Act is inconsistent with the Constitution on the grounds that it impinges on the prosecutorial powers of the DPP;*
2. *Whether the Amnesty Act is inconsistent with the Constitution of Uganda and Uganda's international law obligations on account that it purports to grant blanket amnesty for all crimes including those stipulated in the Geneva Conventions Act; and*
3. *Whether the respondent was discriminated against contrary to the provisions of the Constitution.*[10]

c. *Ruling*

According to their lordships, on the issue of whether the Amnesty Act impinges on the prosecutorial power of the DPP, they found that it did not. The Act therefore is not inconsistent with the Constitution in that regard. As to whether the Amnesty Act is inconsistent with Uganda's international law obligations, they equally found that it is not, as it does not grant blanket amnesty for all crimes.[11]

With regard to whether the respondent has suffered any discrimination or unequal treatment under the law, however the court concluded that, the respondent had not suffered discrimination or unequal treatment under the law. The DPP acted within his powers not to certify the respondent for grant of amnesty, and to commence prosecution against him on specific crimes under the Geneva Conventions Act. In the end, the appeal succeeded in part. The Supreme Court declared Kwoyelo's trial by the International Crimes Division of the High Court as proper and should proceed.[12]

d. *Ratio decidendi*

In his lead judgment, Hon. Justice Bart Katureebe said:

> It appears to me that the amnesty as defined both in the Act and by the learned authors cited above is targeted at political crimes and those incidental to such acts or crimes. I do not think the definitions, and indeed the purpose of the Act, or in

[10] See Supreme Court Judgment ibid.
[11] *Id.*
[12] *Id.*

> its implementation, would include granting amnesty to grave crimes committed by an individual or group for purposes other than in furtherance or in the cause of the war or rebellion.[13]

He added;

> The Amnesty Act of Uganda is not a blind Act granting blanket amnesty to cover any crime committed during the rebellion, however grave such crimes might be. Therefore, neither in its purpose or effect is the Act inconsistent with the Constitution. This is because not only has the DPP the liberty to prosecute, as discussed, but the Minister may also declare certain individuals as ineligible for amnesty. That is how Uganda has addressed the issue of persons who have waged war or rebellion against the country, and how such people may be granted amnesty. [14]

On the issue of DPP's powers to investigate and prosecute war crimes, he observed as follows:

> (T)he Act does not infringe on powers of the DPP in any way which is inconsistent with the Constitution. In exercise of his powers, the DPP does not have to wait for the Minister to do his own part. His powers are in the Constitution and independent of the Minister. The respondent was in lawful custody. The DPP was required to satisfy himself that the person has committed crimes that are not within the ambit of section 2 of the Amnesty Act. Once so satisfied, I see no reason why the DPP cannot proceed to prosecute.[15]

On discrimination and unequal treatment before the law, his lordship noted that;

> Criminal responsibility is individual- It is not absolutely necessary for the DPP to give reasons as to why he did not certify for any one individual. The charges preferred are evidence as to why the DPP did not certify for grant of amnesty. The

[13] *Id.*
[14] *Id.*
[15] *Id.*

> Amnesty (Amendment) Act does not state the factors that the Minister may consider in declaring a person ineligible for amnesty. In any event, if the person is declared ineligible for amnesty, the DPP could prosecute that person if there are prosecutable offences.[16]

And finally on Uganda's International obligations, Katureebe argued that the Act covers only acts in furtherance of war. In his

> …view, the Amnesty Act did not foreclose on certain individuals who may have committed these types of offences from being made to account for their actions. Any crimes committed that were not necessitated by the furtherance of the war or rebellion were not a subject of amnesty under the Amnesty Act.[17]

III. IMPLICATIONS TO UGANDA'S TRANSITIONAL JUSTICE PROCESS

The Kwoyelo Supreme Court Ruling will potentially have far reaching implication on Uganda's transitional justice trajectory.[18] The extent however will largely depend on the commitment of the state to implement a robust transitional justice mechanisms, interest and proactivity of the DPP to investigate and prosecute serious conflict related crimes, activism by human rights advocates to ensure perpetrators are held accountable, civil society transitional justice actors advocating comprehensive transitional justice implementation and victims groups and survivors willingness to engage and participate in the transitional justice process.[19] The Supreme Court adopted a purely legalistic approach to the amnesty question, ignoring decades of political and scholarly debate on the relevance and application of amnesty in conflict and post-conflict transitional era.[20] It equally avoided the issue or merits and demerits of Uganda's amnesty

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[16] *Id*.
[17] *Id*.
[18] See Kasande Sarah and Regue Meritxell, Pursuing Accountability for Serious Crimes in Ugandan Courts: Reflections on the Thomas Kwoyelo Case, ICTJ BRIEFING, January 2015. Available at https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-Kwoyelo-2015.pdf (accessed 26 September 2015).

[19] See Commentary by Paul Bradfield, Beyond the Hague at http://beyondthehague.com/2013/08/09/the-lapse-of-amnesty-in-uganda-stimulating-accountability-or-prolonging-conflict/ (accessed 2016 September 2015).
[20] See Supreme Court ruling fuels debate over double standards in war prosecution, International Justice Tribute accessible at http://www.refugeelawproject.org/files/others/International_Justice_Tribune_article_on_Col._Thomas_Kwoyelo.pdf (accessed 26 September 2015).

process on reintegration and ongoing conflict resolutions but instead resorted to strict interpretation of international humanitarian laws and Black Laws Dictionary definition on the subject. In my mind, their lordships appears to have been steadfast in preserving the integrity of the ICD, appeasing the JLOS fraternity and not offending the Amnesty Commission but in essence removing any teeth of the Amnesty Act, thus a ruling with several implications as follows;

A. *KWOYELO IS BACK IN THE DOCK AND IN FOR ANOTHER LONG WAIT:*

The ruling implies that the Colonel Thomas Kwoyelo's trial, which was halted by the Constitutional Court in September 2011 and ceased by the International Crimes Division of the High Court, will have resume. The DPP will have to revisit the file and assess its evidence and reconnect with witnesses. A new prosecutorial team will have to be constituted. With the passing of learned counsel Joan Kagezi who was lead prosecutor of the case, this is expected to take quite some time. Kwoyelo will need a defence counsel and it is hoped that the legal team that defended him initially will be willing to continue defending him. At the end, it's a long road ahead for Kwoyelo in his search for justice and if the old adage, which goes justice delayed is justice, denied is anything to go by, then one wonders whether for Kwoyelo there is light at the end of the tunnel.

B. *INTERNATIONAL CRIMES DIVISION IS NOW IN THE SPOT LIGHT:*

The resumption of the Kwoyelo trials comes with unprecedented pressure and spot light on the ICD given the on-going International Criminal Court (ICC) proceedings against another LRA commander Dominic Ongwen.[21] Now the court will not only have to demonstrate its capacity to competently and fairly try Kwoyelo according to Ugandan standard, rather it will be judged and compared with standard and processes within the Hague based court. Secondly, the court will have to appoint and train new judges as some of the former judges who had commenced the case have since moved on to the Court of Appeal. Thirdly, the Courts Rules of Procedures are yet to be finalized and logistically the major funders who initially backed the court have since withdrawn critical funding to the government.

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[21] See Sarah Kasande and Meritxell Regue, supra note 19.

C. NON-IMPUNITY AS A BASIS FOR TRANSITIONAL JUSTICE IN UGANDA:

The Supreme Court took judicial notice of Juba Peace Agreements and its call for accountability and reconciliation: According to Hon Justice Bart Katureebe, even though the main agreement between the Government and the LRA was never signed, and consequently even the signed agreements did not become operational. Its provision is illustrative of what the parties had in mind with respect to gross violations committed during the conflict. He observed, "the Amnesty Act was in place, but it is clear to me that none of the parties envisaged that it granted amnesty for grave crimes. There appears to have been a conscientious effort to separate acts of rebellion from acts of grave criminal conduct that amounted to commission of international crime. The International Crimes Division of the High Court seems to have been created as a consequence of this."[22] This means that JLOS and the government of Uganda and indeed all Transitional Justice actors must take a fresh look at the Juba Peace Agreement and rethink how its implementation should be effected comprehensively. As a founding document for current and future transitional justice initiatives, the Juba Agreements cannot be selectively implemented. To do so, will undermine its spirit of the Juba Peace talks and jeopardize effective complementarity and realization of the twin goal of accountability and reconciliation.[23]

D. UGANDA'S AMNESTY IS NOT BLANKET AND LEAST USEFUL:

For a very long time Uganda was at the centre of the peace versus justice debate. Whereas this debate was kick started with the ICC indictment of five top LRA leaders in 2005, in reality it was about Uganda's amnesty law of 2000. Whereas, many international human rights organizations condemns amnesty in all its form, the battle within the Transitional Justice practitioners was whether the amnesty offered was blanket or not. I was amongst the very few voices, sometimes a lonely voice, convinced from the beginning that this amnesty had sufficient limitation and conditions that disqualify it from being blanket. At least the court has finally settled the debate and vindicated my position. According to the Supreme Court, Uganda's amnesty is not a blanket amnesty. It is only applicable to political crimes (very narrowly defined) and those incidentals to

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[22] See Supreme Court ruling supra.

[23] For different components of the Juba peace Agreements, see http://www.beyondjuba.org/BJP1/peace_agreements.php accessed 26 September 2015.

such acts or crimes and does not extend to grave crimes committed by an individual or group for purposes other than in furtherance or in the cause of the war or rebellion.

According to his lordship, the because the Act provides for the DPP to certify reporters for grant of amnesty and also gives the Minister powers to declare certain persons as being ineligible for grant of amnesty, would imply that the Act does not extend a blanket amnesty to all persons and to all crimes as argued by the Attorney General.

E. INVESTIGATIVE & PROSECUTORIAL POWER OF THE DPP UNFETTERED:

The DPP is certainly the clear winner in this decision. He emerged with enormous powers with regard to future amnesty and even truth and reconciliation processes in Uganda. The Court said, the Act does not infringe on powers of the DPP in any way, which is inconsistent with the Constitution. In exercise of his powers, the DPP does not have to wait for the Minister to do his own part. His powers are in the Constitution and independent of the Minister. The respondent was in lawful custody. The DPP was required to satisfy himself that the person has committed crimes that are not within the ambit of section 2 of the Amnesty Act. Once so satisfied, I see no reason why the DPP cannot proceed to prosecute.

According to the Supreme Court, there are two aspects to the role given to the DPP. If the DPP was not satisfied that a particular crime was not committed in furtherance or in the cause of the war or rebellion, then he would, in my view, exercise his normal prosecutorial powers to charge such a person with a specific offence under a specified law in Uganda.

The second aspect is where, under Section 3(3) and (4) a reporter is charged with or held under lawful custody for an offence, which is covered by the amnesty under Section 2, i.e. an offence eligible for amnesty. In that case the DPP is required to investigate the case and satisfy himself that the offence is eligible for amnesty under Section 2. It is then that the DPP may issue a certificate for grant of amnesty. It follows that if the DPP is not so satisfied, he will not so certify, and may commence prosecution proceedings against that person.

F. SEQUENCING PEACE AND JUSTICE MEASURES:

The Supreme Court rightly declared peace and justice as interdependent imperatives to be implemented concurrently without foregoing victim's right to justice or peace in the pursuit of

the other. The question their lordship didn't address is what constitutes other measures of justice beyond criminal prosecutions. In his observation, his lordship observed as follows:

> … in my view, it is difficult to see how impunity can help bring peace. When people have committed gross crimes that outrage the conscious of the world, these should first be made to account for their conduct. After trial, where necessary and applicable then reconciliation and pardon mechanisms may be put in place for such people.

He added that;

> The Agreement signed between the Government and LRA would illustrate the desire to have peace based on granting amnesty for war or rebellion, while at the same time demanding accountability by individuals for grave crimes committed against the population.

Whereas this is true, the Juba Agreements enumerated several measures of accountability beyond formal criminal prosecutions like acknowledgment, truth commissions, reparations, illegal and institutional reforms, traditional justice mechanisms, all of which their lordship didn't address their minds to.

In his conclusion, their Lordships observed that:

> There are no uniform standards or practices in respect of amnesty. Each country may put in place appropriate mechanisms with regard to amnesty to solve or address a particular conflict situation it is facing. But there appears to be a minimum below which amnesty provisions may not be permitted in respect of grave crimes as recognized in international law.

It appears therefore, that in cases of grave breaches and serious international crimes, justice is understood solely as criminal prosecution and no amount of truth-telling, reparations or alternative mechanisms is sufficient.

G. PEACE AGREEMENTS AND FUTURE AMNESTIES TO BE IN COMPLIANCE WITH EXISTING LAWS

The Supreme Courts equally proscribed parameters for future peace negotiations to uphold human rights and comply with existing laws. The court took judicial notice of the fact that since 1986 the Government of Uganda has signed a number of peace Agreements with some rebel groups. But the Courts are enjoined by Article 126 to administer justice while taking into account the aspirations and values of the people. According to his lordship, the values and aspirations of the people of Uganda must be to have peace and tranquillity based on the rule of law. "Peace based on impunity by people who may wish to hold the rest of society hostage and blackmail cannot be the peace envisaged in the Constitution." Accordingly,

> if a person wages war on Uganda, it is conceivable that the people of Uganda will want that person to come to an amicable settlement of their differences with the Government. The person who commits such crimes may be eligible for grant of amnesty for the act of rebellion or waging war on Uganda, under the Act, but he is not, in my view, entitled to amnesty for the grave crimes he may have committed.

H. THE LRA WAR IS AN INTERNATIONAL ARMED CONFLICT, WHICH MEANS THE OPTIONAL PROTOCOL TO THE GENEVA CONVENTION, IS APPLICABLE:

According to their lordship, the conflict in Northern Uganda may be said to largely be not of an international character and is therefore subject to the above provision of the Geneva Conventions. But there were occasions when it spread out to other neighbouring countries, e.g., Sudan and Democratic Republic of Congo thereby taking on an international character. So in any event, the Geneva Convention Act would apply. This is practically important because it widens the accountability gap beyond the LRA and implies that anyone-local or international may initiate criminal proceedings against the UPDF too before other regional, international court or national courts with universal jurisdiction.

He added that the prohibition of amnesty for serious crimes at international level is part of Uganda's domestic laws. The Court ruled that the Act covers only acts in furtherance of war: "These prohibitions are part of the law of Uganda which the Director of Public Prosecutions and the Minister must bear in mind when deciding whether a person is eligible for amnesty or not."[24]

I. AMNESTY REMAINS RELEVANT FOR UGANDA'S TJ PROCESSES ALBEIT LIMITED:

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[24] *Id*.

Amnesty as transitional justice (TJ) mechanisms could still be necessary for conflict resolution and TJ processes but it must be very limited in scope. Citing the Geneva Convention of 1956, his Lordship concluded that the important words here are "to grant the broadest possible amnesty to persons who participated in the armed conflict."[25] In his view this phraseology does not mean that amnesty has to be granted for all crimes irrespective of their gravity both in municipal or international law. This would mean that people who committed genocide or crimes against humanity would be granted amnesty. "In the context of the history of the Geneva Conventions and the background of the crimes that had surfaced during World War II, I do not believe that the framers of the above protocol intended that such crimes would be exempted from accountability."[26]

J. DPP TO DEVELOP CLEAR INVESTIGATION AND PROSECUTORIAL STRATEGY:

Going forward it appears amnesty will now be granted on a case by case basis but the judges also put a stop to the current DPP approach to the LRA situation. They said it must be assumed that the Director of Public Prosecutions studied the cases of the people he certified and satisfied himself that whatever offences they may have committed, were covered by Section 2 of the Act. This means going forward that the DDP is required to develop a clear investigation and prosecution plan and determine in principle, which of the combatants are committing serious crimes to warrant prosecution.

According to his lordship "one cannot simply assume, in the absence of evidence, that Brigadier Banya and Kolo committed the same crimes as the respondent is charged with."[27]This means there must be reasons for the DPP to determine whether an individual appearing before the Amnesty Commission should be given amnesty or not. I think this calls for setting up of a special investigation unit within the office of the DPP to conduct specialize and ongoing investigation into situations of armed conflict involving Ugandans to determine commission of non political crimes. It appears that if someone has sufficient evidence that an amnesty beneficiary had committed serious crimes, he or she could challenge that amnesty and demands prosecution on grounds that the DPP did not study that particular case.

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[25]*Id.*
[26]*Id.*
[27]*Id.*

K. PAST AMNESTIES NOT AFFECTED

Of course this judgment cannot apply retrospectively. This means all the over 27,000 amnesties given to date are valid and not affected by this ruling. Future amnesties however will be under more serious scrutiny. The judges were alive to the fact that amnesty is an important tool for reintegration of ex-combatants and reconciliation within the communities. They lordship observed, "When a country is emerging from an internal conflict, there is need for reconciliation so as to bring about peace. The amnesty granted to those people is therefore proper under the law."[28]

IV. CONCLUSION

In conclusion therefore, the Supreme Court ruling in *Uganda v. Thomas Kwoyelo* casts a long shadow on Uganda's transitional justice pathways. It enshrines punitive accountability as a basis for the pursuit of peace, justice and reconciliation in Uganda but equally takes judicial notice of the Juba Peace Agreement as a framework for comprehensive accountability and reconciliation process in the country. This means Ugandan must rekindle the spirit of the Juba agreements which set out a framework for truth seeking, traditional justice mechanisms, legal and institutional reforms, through a range of formal and informal mechanisms. Their Justices also indulged in an important global peace versus justice debate and with regard to Uganda settled the issue controversially to many. There can be no peace with impunity but they totally ignored what forms accountability might take beyond criminal prosecutions. They have opened a parade box by classifying the LRA as an international armed conflict –or as they said, an internal armed conflict with international characteristic making the optional Protocol of the Geneva Convention Act applicable. They equally added that as a country we are bound by all our international obligations. Finally, by subjecting the viability of any amnesty to the DPP's discretion, the ruling removed a critical roadblock to domestic prosecution of war crimes, crimes against humanity and serious international crimes a scene for practical complementarity with the international criminal court and a ground to request transfer of current and future ICC indictments to be prosecuted by the ICD domestically.

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[28] *Id.*

COPYRIGHT PROTECTION BEFORE AND AFTER THE TRIPS AGREEMENT; IMPACT OF THE NEW REGIME ON DEVELOPING COUNTRIES

Tuhairwe Herman*

ABSTRACT

At the end of the Uruguay Round of the General Agreement on Tariffs and Trade in 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was enacted to govern aspects of intellectual property in the international arena. The inclusion of the TRIPS Agreement was due to lobbying of developed countries to secure international protection of intellectual property rights given their importance to trade and development. The TRIPS Agreement is considered by some scholars to be the foundation of the international Intellectual Property Regime. Part II Section 1 of the TRIPS Agreement provides for copyright protection. This article is thus a critical analysis of whether the TRIPS Agreement introduced a new legal regime on copyright protection that subsequent agreements have built upon when compared with the preexisting international legal regimes. The discussion will then focus on some of the impacts of the new international regime on developing countries like Uganda.

I. INTRODUCTION

Copyright is "the right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audio-visual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work."[1]

The "copyright" in a work restricts the use of the work, and not the knowledge behind the work.[2] As a general rule, first expressed in *Baker v. Selden*[3], copyright law seeks to protect the

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[1] Garner Bryan A., BLACKS LAW DICTIONARY, (9th edn. A Thomson Reuters Business, 2009), at 386.

[2] August Ray, INTERNATIONAL BUSINESS LAW; TEXT, CASES, AND READINGS, (5th edn. Pearson Education International, 2009), at 435.

[3] 101 U.S. 99 (1879).

expression of the idea, not the idea itself. The work should be original with the author having expended some creativity into it.[4]

The person with a copyright work is entitled to economic/pecuniary rights. These rights, granted by statute or judicial pronunciation entitle the owner to exploit the work for economic gain.[5]

The owner is also entitled to moral rights to prohibit others from tampering with their works.[6] These cannot be assigned and they guarantee the integrity of a creation despite any change in economic rights of the work.[7]

II. HISTORY AND DEVELOPMENT OF INTERNATIONAL COPYRIGHT PROTECTION

The challenge faced in copyright protection was that works were copied across borders with differing copyright regimes since protection granted was territorial.[8] It was necessary that an international system be set up to govern international intellectual property law.[9]

The first step was for countries to enter into bi-lateral agreements mutually agreeing to protect foreign copyright.[10] These treaties in effect granted national treatment regarding copyright protection to nationals of partner states. With time this led to an intricate international system with various agreements.

It was this disjointed system that spurred the negotiation and subsequent signing of the Berne Convention for the Protection of Literary and Artistic Works in1886[11] which basically provided

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[4] *MacMillan & Co Ltd v. Cooper,* TLR Vol 40, at 188.
[5] August, supra note 3, at 454.
[6] *Id.,* at 453.
[7] Garner, supra note 2, at 1100.
[8] If protection was only granted to works produced in a country, foreign works were bound to be available in "pirated" forms and at cheaper prices. See Gervais Daniel J., The Internationalization Of Intellectual Property: New challenges From The Very Old And The Very New, FORDHAM INTELLECTUAL PROPERTY, MEDIA AND ENTERTAINMENT LAW JOURNAL, (2002) at 935. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=733723 (accessed 1st May 2015).
[9] Bainbridge David, INTELLECTUAL PROPERTY, (8th Edn. Pearson Education Limited, 2010), at 26.
[10] Gervais, supra note 9.
[11] Bogsch Arpad, The First Twenty-Five Years of the World Intellectual Property Organization from 1967 to 1992 INTERNATIONAL BUREAU OF INTELLECTUAL PROPERTY: WIPO PUBLICATION NO.881, (1992), 31-40.

for national treatment amongst signatory countries.[12] There were however various amendments until 1979.[13]

In its present form, *The Berne convention* establishes a "union" of states that is responsible for protecting artistic works. The principle of national treatment which grants non conditional protection underlies the spirit of the Convention.[14]

With the rise of new technologies such as tape recorders that made the reproduction of works easier, there was need to also set up laws to curb massive copyright infringement. Thus, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was enacted on 26 October 1961. The Rome Convention is basically in place to protect performers, producers of phonograms and broadcasting organisations from publishing of work to which they have not consented to.[15]

With these developments, it was clear that Intellectual Property rights were of the utmost importance in spurring economic growth.[16] Copyright industries alone contributed almost five per cent of the United States of America's Gross Domestic Product (GPD) and between four to five per cent of the Industrialised Nations' GDP.[17] It was therefore necessary to incorporate international property in international trade. There were various negotiations, including the Uruguay Round Negotiations from 1990 to 1993, from which the TRIPS Agreement was agreed upon.[18]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is administered by the World Trade Organisation. It sets down minimum standards for the regulation of the various forms of intellectual property amongst member states of the World

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[12]Gervais, supra note 9, at 936.
[13]*Id.*
[14]August, supra note 3, at 487.
[15]WORLD INTELLECTUAL PROPERTY ORGANISATION, Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)'http://www.wipo.int/treaties/en/ip/rome/summary_rome.html.
[16] UNESCO, 'International Flows of Selected Cultural Goods, 1980-98,'(2000) Executive Summary Institute for Statistics and the Division of Cultural Policies, 2http://www.ius.unesco.org/en/public/doc/dult_sum_web.pdf accessed on 1st May 2015
[17]Gervais, supra note 9, at 940.
[18]*Id.*, at 947.

Trade Organisation.[19] The policy behind the minimum standards was twofold. First, the growing capacity of manufacturers in various countries to penetrate distant markets forced developed countries to rely more on comparative advantages in production of intellectual goods, than before.[20] Secondly, the upsurge of knowledge based industries altered the nature of output in international markets disrupting the advantage previously held by certain industries. Market access in developing countries was a strong bargaining chip for increased protection of intellectual goods in a globalised market.[21] There was need, therefore for developed countries to maintain a monopoly on the established markets.

III. COPYRIGHT PROTECTION UNDER THE TRIPS AGREEMENT AND BERNE CONVENTION

Article 2(2) TRIPS Agreement stipulates that member states are not to derogate from existing obligations that Members may have to each other under the Berne Convention, and the Rome Convention.

A wholesome reading of the TRIPS Agreement shows that the drafters intended to use the existing legal regimes as a foundation and build upon them in the following ways;

A. *BERNE CONVENTION*

a) *Minimum standards of protection and flexibilities*

Article 21 and the Appendix of the Berne Convention allow developing countries to grant protection lesser protection than is stated in respect to the right of translation and the right of reproduction. The confines of such protection are specified in the Appendix. To make use of the possibilities offered by the Appendix, the developing country must make a corresponding declaration to the Director General of WIPO.

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[19] Article 1(3) of the TRIPS Agreement provides in part, "Members shall accord the treatment provided for in this Agreement to the nationals of other Members.

[20] Reichman J. H., Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement, Vol 29, THE INTERNATIONAL LAWYER, (1995), at 346.

[21] *Id.*

There is no such flexibility in the TRIPS Agreement. One of its fundamental principles is laying down basic minimum standards.[22] The 'flexibilities' in TRIPS are only to the extent that nations were given transitional periods of time within which to harmonise their copyright laws with the TRIPS Agreement.

This however is a general principle more concerned with implementation of the Agreement than with Copyright protection.

b) National Treatment

The principle of National Treatment basically requires that parties to a Convention provide protection of works to non-nationals on the same terms as they do to their own nationals.

Both the Berne Convention and the TRIPS Agreement provide for the principle of National Treatment. Article 5(1) of the Berne Convention provides that:

> Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

Article 3 of the TRIPS Agreement provides that member states are to "accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property."

In this regard, the TRIPS Agreement is merely complementary to the existing obligations.

c) Computer programs and data compilations

The Berne Convention did not lay down any form of protection for computer programs and data compilations. At the time the Convention was enacted, computers in their current forms were unknown. However, under Article 10(1) of TRIPS, computer programs whether in source or object code, are protected as literary works under the Berne Convention.

[22]See, WORLD TRADE ORGANISATION, Overview; the TRIPS Agreement. https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm. The only exception is with the provisions of the Berne Convention on moral rights. See Article 9(1) TRIPS Agreement.

Data compilations are protected as such, under the TRIPS Agreement. They however, must by reason of the selection or arrangement of their contents constitute intellectual creations, though such protection does not extend to the data or material itself.[23] In so doing, Article 2(5) of the Berne Convention is maintained.

In ensuring copyright protection to computer programs and data compilations, the TRIPS Agreement is complementary to the Berne Convention's standards

d) Rental rights

Under Article 11 of the TRIPS Agreement, authors and their successors in title have the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works. Previously, there was no protection accorded to rental rights by the Berne Convention and in so legislating, the TRIPS Agreement set in place a new international law of copyright protection. It should however be noted that the TRIPS Agreement does not provide for the exclusive right to lend especially when the purpose is not commercial, such as in education institutions.

e) Moral rights

Article 6*bis* of the Berne Convention provides for the author's moral rights. The author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work which would be prejudicial to his honour or reputation.

On the other hand, the TRIPS Agreement is silent on moral rights, that is, neither are they provided for, nor denied. This may be due to the fact that TRIPS is more concerned about "Trade Related Aspects". But for whatever reason, this is a clear departure from the existing laws.

[23]Article 10(2) TRIPS Agreement

f) Author

The general principle of the Berne Convention is that the author has to be a natural person[24], but under the TRIPS Agreement, even legal entities can be authors. This interpretation is based on a wholesome reading of Article 12 which provides for the term of protection and note 1 to Article 1 states that 'nationals' in the agreement mean 'persons natural or legal.' On the other hand, Article 13, whose text is based on Article 9(2) of the Berne Convention posits the same idea, though the term 'right holder' is used.[25]

In enlarging the scope of protection as regards authors, TRIPS is complementary to the Berne Convention.

g) Term of protection

Regarding cinematographic works, under Article 7(2) of the Berne Convention, the term of protection is fifty years after the work has been made <u>available</u> to the public with the consent of the author. On the other hand, under Article 12 of the TRIPS Agreement, states the term of protection as fifty years from the year of authorised <u>publication.</u> By requiring publication the TRIPS scope is thus narrower. 'Availability' to the public would include publication since even the skills used in the work should be disclosed. Nonetheless, the TRIPS builds on the already existing obligations since the other terms are similar.

h) Scope of protection

Article 9(2) TRIPS states that "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." The Berne Convention is silent on this scope. But based on records of the various diplomatic conferences adopting and revising the Convention, it may be imputed that this was the scope. Moreover, the Convention only protects works.[26] In this aspect, the TRIPS was only complementary to the already existing obligations.

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[24]Correa Carlos, Yusuf Abdulqawi, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT,(2[nd]Edn, Wolters Kluwer, 2008), at 139.

[25]*Id.*

[26]WORLD INTELLECTUAL PROPERTY ORGANISATION, Implications of the TRIPS Agreement on treaties administered by WIPO, (Wipo Publication No 464, 2012), at 12.

i) *Limitations to copyright and related rights*

Under Article 13 of the TRIPS Agreement, member states may put in place limitations or exceptions to exclusive rights in cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. This is the spirit of Article 9(2) of the Berne Convention though there is a slight departure since TRIPS provides for general limitations while the Berne Convention refers to the possibility of permitting the reproduction of protected works without specifying other exclusive rights granted to the right holder.[27] Nonetheless, TRIPS is merely complementary to the Berne Convention in this aspect.

B. *ROME CONVENTION*

By contrast whereas the TRIPS Agreement incorporates various provisions of the Berne Convention, the provisions of the Rome Convention have not been encompassed in. Only Article 14 TRIPS Agreement calls for the Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations. It should be noted that European copyright legislations always tended to separate copyright from neighbouring rights.[28] It is this wedge that led to two separate conventions, the Berne Convention for copyright and the Rome Convention for neighbouring rights.

The TRIPS Agreement sought to harmonise this divide by including both in the same treaty. Secondly the term of protection for both is set at fifty years under Article 14(5). Note that under Article 14 of the Rome convention, the term of protection is twenty years. But the fifty years do not commence upon the death of the author, as is the position in Article 7(2) of the Berne Convention but from the end of the calendar year in which the fixation was made or performance took place.

But in all this, the TRIPS Agreement was harmonising the existing legal regimes laws and did not necessarily setting up a new international law on copyright. It was this that set the stage for other treaties to be enacted.

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[27]Carlos, supra note 25, at 141.
[28]Carlos *Id.*, at 139.

C. POST TRIPS ERA

In 1996, at the World Intellectual Property Organisation (WIPO) offices in Geneva, Switzerland, various countries enacted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WCT protects literary and artistic works like musical works, audiovisual works, computer programs, writings, original databases, photographs and works of fine art while the WPPT protects the rights of performers and producers of phonograms, which are rights that arise from copyright protection ("related rights").

The two treaties were enacted as a response to calls from stakeholders to update the existing legal regimes on copyright. The TRIPS Agreement enacted in 1994 was not comprehensive in laying down rights and obligations. The Agreement laid down minimum standards for copyright protection and it was necessary to supplement the Berne and Rome Conventions since new works had since been authored and new markets opened up. The Internet, considered by some to be man's greatest invention, had transformed the use of copyrighted material presenting new opportunities and challenges. A new international legal regime was therefore essential to cope with the changes in the industry.[29]

The treaties were adopted after protracted negotiations between various countries. Developed countries were majorly pushing for strict protection of rights across all member states while developing countries were concerned about the application of such regimes while their communication and entertainment sectors were still budding.

It should be noted however that both the WPPT and the WCT lay down obligations that are more or less similar to those in the TRIPS Agreements. Most of the changes in the new treaties relate to copyright in the digital age. It is therefore advised that a state that has already signed to the TRIPS Agreement should accept the WPPT and WCT treaties too, as technology continues to proliferate to new markets. The latter treaties are thus intended to fill in the gaps that arose due to technological advancements.

[29]The treaties are at times referred to as "Internet treaties."

The major difference however relates to the dispute resolution mechanism. The WPPT and the WCT are not directly subject to the World Trade Organisation (WTO) dispute mechanism like the TRIPS Agreement is.[30]

IV. MAIN ASPECTS OF THE TREATIES

Member states are obliged by both treaties to provide a framework for copyright and other related rights. The framework should have mechanisms which ensure that the rights of authors are not only on paper but are protected even when disseminated on new technological forums such as the Internet.[31] The framework should also grant sufficient protection to authors allowing them to derive benefit from their work and to be adequately remunerated if their creations are used by others.[32] The treaties also create new rights that are in exclusive to the Internet.[33]

Despite the seeming stringent conditions, member states are allowed certain flexibilities. Countries may set up various exceptions and limitations to enjoyment of the rights.[34] This is intended to strike a balance between the private rights of the authors and the rights of the general public to access and benefit from the work.

In addition to providing the rights, member states are obligated to set in place a framework for technological adjuncts to the rights. These are to ensure that right holders can enforce their rights and licenses online through various modes of technology. The first provision on "anti-circumvention" requires member states to provide sufficient legal protection and operative remedies against circumventing of technological barriers[35] used by right holders to protect their rights.[36] Among other purposes, this provision is intended to protect authors from hackers.

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[30]WORLD INTELLECTUAL PROPERTY ORGANISATION, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, at 12.
[31]Preambles to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
[32]Article 7(3) of the WIPO Copyright Treaty and Article 15 of the WIPO Performances and Phonograms Treaty.
[33]Article 10 of the WIPO Performances and Phonograms Treaty and Article 8 of the WIPO Copyright Treaty provide for the author's right of communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.
[34]The exceptions should be in public interest, for example, research and educational purposes.
[35]Examples include encryptions, firewalls, e.t.c.
[36]Article 18 of the WIPO Performances and Phonograms TreatyArticle 11 of the WIPO Copyright Treaty oblige contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of

The second type of safeguards is concerned with online markets that arose with the advent of the internet. Previously, markets were the traditional ones located in physical places which states would control with less hassle. The internet however produced markets such as www.ebay.com which may be accessed everywhere and from anywhere.[37] It was therefore necessary to deter and punish the deletion or alteration of information that accompanies protected material and is available online. This may be information that identifies the work, the authors, persons with neighboring rights or the terms and conditions for this. An example is where a person alters the name of an artist or producer credited with a song and replaces them with another.

V. IMPLICATIONS OF THE POST TRIPS TREATIES ON MEMBER STATES

A. INTERNATIONAL PROTECTION FOR RIGHTS HOLDERS

One of the fundamental tenets of international IP regimes is the principle that member states are to provide equal treatment to both nationals and non-nationals in granting protection. This is to ensure that persons who are seeking protection of IP in foreign countries are not unfairly deprived of their rights, or any benefit arising from them. The importance of such measures cannot be over emphasised in the global digital era where persons are able to infringe on copyright from different countries and distribute the infringing materials across the world, simultaneously.

These principles also embedded in the TRIPS Agreement, the WPPT and the WCT.

B. FOREIGN INVESTMENT IN DEVELOPING COUNTRIES

Countries that have applied international Intellectual Property (IP) regimes in their strict terms are bound to attract investment, more than countries which have lax foreign investment. Amongst other factors, foreign companies usually determine if they will sell enough of their legitimate products in the markets of a certain country before they invest heavily in the sector. If they discover that there is a weak IP regime or it has poor enforcement mechanisms, they are mostly deterred since there is a high probability that other people will duplicate their efforts and

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effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

[37]Recently the online markets have proliferated Ugandan markets. Common ones include www.kaymu.com, www.jumia.com, *inter alia.*

they will not be able to reap sufficient profit. A study of 14 countries by the World Bank noted that in relatively high-technology industries─a country's system of intellectual property protection often has a significant effect on the amount and kinds of technology transfer and direct investment to that country by Japanese and German, as well as U.S. firms.[38] Another study by the Organisation for Economic Co-Operation and Development (OECD) showed that the lack of intellectual property protection will be considered as a negative factor in investment decisions by nationals or foreigners.[39]

It is therefore essential that even if a country sets up strong copyright regimes to attract investment, the same should be regulated so that the nation benefits generally.

C. NATIONAL ECONOMIC CONTRIBUTION

Information, cultural and entertainment industries are built on the foundations of copyright regimes. Returns from industries such as printing, media, music and film industry may be resourceful in building the economy of a nation. The WIPO "Guide on Surveying the Economic Contribution of the Copyright-Based Industries"[40] shows that the economic contribution of the copyright-based industries has exceeded expectations. Experience from other jurisdictions has shown that strong copyright regimes have fostered employment and contributed to the nations' GDP[41].

D. PROMOTION OF ELECTRONIC COMMERCE

As noted previously, the WCT and WPPT were enacted to specifically cater for copyright protection in the emerging global trends. The Internet has become a useful forum for the transmission and use of material protected by copyright and other related rights. The rise in electronic markets such as www.amazon.com, www.jumia.com, www.kaymu.com are proof that

[38]Mansfield Edwin, Intellectual Property Protection, Direct Investment, and Technology Transfer, Germany, Japan, and the United States, INTERNATIONAL FINANCE CORPORATION OF THE WORLD BANK DISCUSSION PAPER 27 (1995).

[39]ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Economic Arguments for Protecting Intellectual Property Rights Effectively, Paris (1989).

[40]WORLD INTELLECTUAL PROPERTY ORGANIZATION, Guide on Surveying the Economic Contribution of the Copyright-Based Industries, (2003).

[41]Siwek S.E., The Measurement of "Copyright" Industries: The US Experience, Vol 1 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES, (2004), 17-25.

willing buyers and sellers are only willing to engage in forums where they are assured of procuring genuine products. Materials that are protected by copyright and related rights are some of the most sought after on the internet. It is therefore prudent that a well regulated market be in place for all stakeholders.

Because of the nature of the Internet, and other related digital forums, electronic commerce will have an impact on the copyright and related rights industry system depending on how it is regulated. If a strong regime whose hand touches the Internet is not set in place, it may become breeding ground for "free riders" to benefit from the works of other diligent authors. In fact, the Internet has been described as "the world's largest copy machine" since various people are able to copy large amounts of work at relatively faster speeds and with much ease. If unregulated, persons are able to make hundreds of copies and then transmit them around the world within seconds. It should also be noted that users of the internet continue to develop new techniques to defeat copyright "roadblocks."

Because the Internet is a borderless medium, there is need for an international system that all states uphold which will protect the interests of copyright and related rights holders. Whereas it is recognized that this can only be achieved with technological developments such as firewalls and encryptions, these cannot work in isolation. They need strong copyright regimes if they are to be effective.

VI. CONCERNS ABOUT THE INTERNATIONAL SYSTEM FROM DEVELOPING COUNTRIES

The greatest concerns that have always arisen as regards the implementation of the post TRIPS Copyright system have been hinged around the conflict between developed countries copyright ideals and the traditions of the developing countries.

A. ACCESS TO KNOWLEDGE

As the world continues to become smaller with the increased access to technology, developing countries need to access materials from other countries. Scholarship with substance continues to grow across the world, in both the developed and developing world and materials. Industrialisation is also built on the sharing of knowledge across nations either through

publications or other works capable of copyright protection. This sharing of knowledge is meant to boost literacy and education which are stepping stones for most developing countries to economically progress.

Critics of the above idea may argue that it is such sharing that has led to neo colonialism and dependence of developing countries onto the West. Without doubt, this proliferation of knowledge in a way spreads cultures from developed countries to the developing world. These have however found breeding ground from the fact that publishing industries in the developing world do not match the industries from the developed world. Consequently, sectors like education continue to rely on work developed and published from the Western world.

Strong copyright regimes therefore present a challenge to developing countries which may desire to use the work for educational or research purposes. Whereas most countries allow fair use[42], it does not consider where a person may derive a commercial benefit at a small scale that does not hurt the economic interests of the author but also disseminates the information for education and research.[43] This in itself frustrates the objectives of the TRIPS Agreement as stated in Article 7 thereof which provides that:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

B. CULTURAL DIVERSITY

In Africa as an example, most communities rely on shared knowledge. That is, work that is eligible for copyright is in most cases used by a whole community without restrictions. Moreover, most of the material is not in material form (for example folk songs and oral stories) and is thus not eligible for copyright protection. However, copyright protection confers

[42]The use of work protected by copyright without the author's consent as long as the use does not derive commercial benefit from the work.

[43] For example, at most universities in Africa, material is acquired from the library and photocopied for students to acquire at cheaper prices. Various photocopying businesses have since mushroomed from this practice.

exclusive individual rights upon the author of the works. This raises challenges where persons seek to gain copyright from material that was already existing in the communities. Further concerns are raised by the fact that there is no adequate compensation given to the communities for the use of their work.[44]

VII. CONCLUSION

In conclusion therefore, the TRIPS Agreement did not set in place any new copy right regime. It merely codified the existing systems and subjected them to the WTO. Latter treaties have also enumerated on the same principles as the TRIPS Agreement, only providing for emerging trends such as the use of the internet. Whereas an international system is unavoidable given the current globalization trends, the current system does not favour developing countries. The benefits they derive are only superficial and do not benefit the common man, while the concerns are from all sectors. There is need therefore for all stakeholders to review the current system to cater for all member states of the treaties.

[44]For an in study of this understanding, please see Kakooza Anthony C.K., *The Cultural Divide: Traditional Cultural Expressions & the entertainment industry in Developing Economies,* Doctor of the Science of Law dissertation 2014, University of Illinios. https://www.ideals.illinois.edu/bitstream/handle/2142/49425/Anthony_Kakooza.pdf?sequence=1.

PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: A MEANS OF ACHIEVING ENVIRONMENTAL SUSTAINABILITY IN NIGERIA

Hakeem Ijaiya*

ABSTRACT

Public participation in EIA process has been a topic of major discourse all over the world and most laws have varied degrees recognized as well as given public participation a special place in EIA process. It is in recognition of this fact that this study examines the historical background of EIA in Nigeria. The study identifies the advantages and disadvantages of public participation in EIA process. The study discusses EIA laws in Nigeria. The study observed that the provisions of the EIA Act in Nigeria appear to be quite comprehensive as it involves the public almost in all the stages of EIA process. The study found that EIA in Nigeria suffered major setbacks, the Act does not give room for public participation after the certificate has been issued and/or during the monitoring or follow-up stage, the Act did not provide specifically that developers should consult the local communities and that most Nigerians are not fully participating in EIA process. The study recommended that the Government should encourage environmental awareness programmes to be organized to educate the Nigerian masses on the need to be environmentally alert of the negative environmental impacts on their environment.

Key Words: Environmental Sustainability, Environmental Impact Assessment, Public Participation.

I. INTRODUCTION

Environmental Impact Assessment (EIA) is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human health impacts, both beneficial and adverse. The United Nations Environmental Programme (UNEP) defines EIA as a tool used to identify the environmental, social and economic impacts of a project prior to decision–making. EIA is an important instrument to balance environmental protection and economic growth.[1] It is a systematic process

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[1] Basically, EIA came in as a result of the need to balance social, economic and environmental challenges, which

of identifying, predicting and evaluating potential impacts associated with a developmental project.[2]

Public[3] participation in EIA is necessary for minimizing or avoiding public controversy, confrontation and delay in a project[4]. The paper examines the historical background of EIA in Nigeria. The paper also identifies the advantages of public participation in EIA process. The study discusses EIA laws in Nigeria and other jurisdictions. The study recommended that the Government should encourage environmental awareness programmes to be organized to educate the Nigerian masses on the need to be environmentally alert of the negative environmental impacts on their environment.

II. HISTORICAL BACKGROUND

During the decades of the 1950s and 1960s, it became increasingly clear that many industrial and developmental projects were producing, unforeseen and undesirable environmental consequence. On 1 January, 1970, the United States of America had the distinction of becoming the first country in the world to adopt legislation requiring environmental impact assessment on major projects. Since then, the growth of EIA legislation has been quite phenomenal. Today, in more than 100 countries EIA has become a requirement for project development.

Environmental Assessment is a process whose breadth, depth, and type of analysis depend on the proposed project. Environmental Assessment evaluate a project potential environmental risks and impacts in its area of influence and identifies ways of improving project design and

simply put, are to ensure sustainable development.

[2] EIA process ensures that the potential problems that would be associated to developments are dealt with even before the development itself commences.

[3] Public has been defined broadly by the EIA Act of Slovakia as one or more natural or legal persons, associations, organizations or other groups; in a word: anybody.

[4] The Department of interior Training in Indonesia described Public Participation as the direct engagement of all voices in a planned effort to make responsible and sustainable decisions. The major function of EIA is to systematically diagnose, analyze, predict and appraise the environmental impacts or consequences that might be caused by development proposals, such as construction projects, regional development plans and national policies, through careful and thorough consideration of all relevant environmental information, during the decision making process. In other words, the purpose of EIA is to integrate the goals of goals of environmental protection with social and economic development plans to prevent and mitigate unfavourable impacts of the proposed activities, as much as possible.

implementation by preventing, minimizing, mitigating or compensation for adverse environmental impacts and enhancing positive impacts.

Industrialization and urbanization in western countries caused rapid loss of natural resources. This continued to the period after the Second World War giving rise to concerns for pollution, quality of life and environmental stress.

In early 1960, investors and people realized that the projects they were under taking were affecting the environment, resources, raw materials and people. As a result countries formulated laws to safeguard the environment.

The United State of America (USA) was the first country to enact legislation on EIA. USA enacted the National Environmental Policy Act (NEPA) in 1970. Other countries like China, Nigeria etc., enacted laws on EIA.

Between 1970's and 1980's, there were growing concerns over environmental issues. This was discussed at most international conferences and a number of bilateral and multilateral agreements, such as;

(i) The Convention on Environmental Impact Assessment in a Trans-boundary Context (Espoo, 1991).[5]
(ii) The Rio Declaration on Environment and Development, 1992.[6]
(iii) The United Nation Convention on Climate Change and Biological Diversity, 1992.[7]
(iv) Doha Ministerial Declaration, 2001.[8]
(v) UNECE (Aarhus) Convention.[9]

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[5] It entered into force in1997. It was the first multi-lateral treaty on EIA. The treaty looks at EIA in a trans-boundary context. The Espoo Convention sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across borders. Apart from stipulating responsibility of signatory countries with regards to proposals that have trans-boundary impacts, it describes the principles, provisions, procedures to be followed and list of activities, contents of documentation and criteria of significance that apply.

[6] Principle 17 of the Rio Declaration calls for use of EIA as a national decision making instrument to be used in assessing whether the proposed activities are likely to have significant adverse impact on the environment.

[7] Article 4 of the UN Convention on Climate Change and Article 14 of the UN Convention on Biological Diversity cited EIA as an implementing mechanism of actualizing the aims and objectives of the Conventions.

[8] The Doha Ministerial Declaration encourages member countries to share expertise and experience with members wishing to perform environmental reviews at the national level.

III. EIA IN NIGERIA

The principal law on EIA in Nigeria is the Environmental Impact Assessment Act, 1992.[10] The Act makes EIA mandatory for development projects likely to have adverse impacts on the environment prior to implementation.[11] The EIA Act made it compulsory for certain projects to have an EIA before they can be carried out. These projects are classified into three categories, namely; Projects that require full and mandatory EIA[12], Projects where full EIA's are not so mandatory except if it is within environmentally sensitive area[13] and Projects that are beneficial to the environment[14]. EIA process in Nigeria passes through; Consideration of Alternatives[15], Screening[16], Scoping[17], Baseline Study[18], Assessing impacts[19], Mitigation[20], Public Consultation with Stakeholders[21], Review and Decision making[22], Final Decision- Making/ Authorization[23],

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[9] The UNECE (Aarhus) Convention on Access to information to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (1998) covers the decisions at the level of projects and plans programs and policies and by extension, applies to EIA.

[10] Laws of the Federal Republic of Nigeria. 2000. Before 1992 there are three independent EIA systems in operation- the EIA Decree, 1992, the Town and Country Planning Decree, 1992 and the Petroleum Act, 1969.

[11] Before the enactment of EIA Act in Nigeria, project appraisals were limited predominantly to feasibility studies and economic-cost-benefit analysis. Most of these appraisals did not take environmental costs, public opinion and social and environmental impacts of development projects into consideration. See Nwoko, C.O. Evaluation Of Environmental Impact Assessment System In Nigeria Greener Journal of Environmental Management and Public Safety, Vol. 2(1) pp 22-31,

[12] These include Agriculture/Agro Allied, Fisheries, Industry (Manufacturing), Food, Beverages and Tobacco, Infrastructure, Housing, Airports, Ports, Drainage and Irrigation, Power Generation, Petroleum, Mining, Quarries, Waste Treatment Disposals, Water Supply, Land Reclamation and Breweries.

[13] (Coral reefs, mangrove swamps, small islands, tropical rain forest with erosion). These include Agriculture and Rural Development (Afforestation/Reforestation project, small scale irrigation or drainage, Small scale agriculture, saw milling/wood logging, Rubber processing and fish processing), Mini Hydro Power Development (e.g. textile chemical industry, small scale power transmission) Renewable Energy Development etc.

[14] These include institutional development, health programmes, family planning programmes nutritional programmes, educational programmes and environmental awareness.

[15] EIA should provide an environmental input on the decisions on what is to be constructed and where it is to be located. This provides the best opportunity to avoid significant environmental effects by steering clear of environmentally sensitive locations and selection designs and processes that have a reduced environmental impact.

[16] This refers to the decision as to whether an EIA is required or not or the environmental effect a particular project would have.

[17] The purpose of scoping is to identify projects that are likely to have significant effects. The identification of key effects is usually undertaken using a combination of professional judgment and gathering of other people's opinions, particularly the determining authority and government agencies. This is where public participation in the EIA process commences.

Post-Project Authorization Activities[24] and Commissioning/ Audit[25].

Environmental Impact Assessment ("EIA") has been one of the most effective and practical tools to support the implementation of sustainable development in Nigeria.[26] EIA is also widely accepted as a mechanism for public participation in planning processes and decision-making and as a tool to provide information and data to the public regarding projects and other activities in the country.

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[18] Where there is strong evidence that a proposed development will impact on the environment negatively, a baseline study is required. This study will establish the inventory of the site itself and can include ecological survey for biodiversity, pollution impacts e.g. ground noise disturbance, archeological surveys to ascertain special sites of cultural heritage, etc. The baseline study is important as it bring about project modification or non-approval of the project in view.

[19] Here the environmental effects of a developmental proposal are predicted. A detail EIA Report is prepared. Three elements are involved. The first element is to understand the baseline conditions. The second element is to predict the magnitude of the impacts. The third element is to assess the significant of the impacts

[20] When the significant effects are identified, the developer and the consultants may then decide to bring about elimination or prediction of the impacts in order for the development to be approved.

[21] Consultation with stakeholders is essential during the EIA process. Public consultation documents seek to communicate the anticipated impacts and proposed mitigations of the project's impact and disclosure report should describe the environmental, socioeconomic and community health effects of the project.

[22] See Sections 25 and 37 EIA Act. The findings of the EIA are written up in an environmental statement and submitted to the review panel together with the application for consent for approval. The EIA review panel crosschecks the document for adequate information and evaluates it. The information is evaluated for its relevance to the decision to be made, reliability in terms of information provided and the interpretation of data and sufficient to form a sound basis for a decision. The verification exercise by the independent review body ensures that the information in the EIA report is complete, correct and unbiased.

[23] The outcomes of the final decision- making can either be that the project or one of its alternatives is approved, a request for further study/modify for future consideration or that the project is cancelled or rejected altogether. If it is approved, an Environmental Impact Statement and Certificate is issued.

[24] See Section 41 EIA Act. The regulatory body is required to carry out its statutory role of ensuring that the project as approved is implemented and monitoring the follow-up programme for mitigations at the construction, operational and post-closure stages of the project

[25] After the commencement/ commissioning of the project, an environmental audit is required to be carried out from time to time. An audit is the process of reviewing activities and records against defined standards or procedures to establish what is being done and how far the process is complying with requirements.

[26] Environmental Impact Assessment is defined as a process or set of activities designed to contribute pertinent environmental information to project or programme decision making…a process which attempts to identify, predict and assess the likely consequences of proposed development activities…a planning aid concerned with identifying, predicting and assessing impacts arising from proposed activities such as policies, programmes, plans and development projects which may affect the environment…a basic tool for the sound assessment of development proposals to determine the potential environmental, social and health effects of a proposed development. EIA means an assessment of the possible positive or negative impact that a proposed project may have on the environment, together consisting of the natural, social and economic aspects.

Failure to comply with EIA is a serious problem. For instance, The Standard Chartered Bank in Lagos, Nigeria[27] was erected without complying with Section 4(b) of the Nigeria EIA Decree 86 of May 1992. Dr. Tunji Braithwaite sometime in December, 2014 instituted an action against the Bank at the Ikeja High Court to stop the construction of a 14 story building in Victoria Island, Lagos, Nigeria for creating negative environmental impact on the environment.[28] In Nigeria, the Environmental Impact Assessment Act, 1992 has adopted the precautionary principle approach, especially based on section 2(4).

The provision of Section 2(4) of the Act requires the project proponent to bring evidences in the form of a report which indicate that the development project will not cause harm to the environment in order to achieve sustainable development and if the project is likely to harm the

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[27] Dr. Tunji Braithwaite, on Tuesday, 2014 claimed that a 14-storey building being constructed by the Standard Chartered Bank in Victoria Island, Lagos violated Nigeria's environmental laws. Dr.Tuji Braithwaite had asked the court to stop the project, which is being erected opposite his residence, due to its environmental impact. He also asked the court to grant him N10 billion as damages and an order for the 14-storey building and the multi-level car park to be demolished. Dr.Adejumo, an associate professor in the Department of Urban and Regional Planning of the University of Lagos, in his testimony for the plaintiff said an Environmental Impact Assessment (EIA) was not carried out on the building. According to him, the car park in the building which will accommodate about 120 cars on a daily basis, will lead to noise and air pollution, as well as vehicular traffic in the area. Using a visual aid, the witness said the carbon monoxide from the cars and the three power generating plants sited in the building would lead to emission of gases hazardous to human health. He said: "A simulation of what the building would look like when completed showed that it would have negative environmental impact on its immediate surroundings, including Braithwaite's residence. According to the witness "The EIA did not follow the Federal Government of Nigeria's EIA procedure, especially Section 4(b) of the Nigeria EIA Decree 86 of May 1992,"He said the construction of the project did not follow best EIA practices as residents and other stakeholders were not consulted by the bank. However, Counsel to the bank, Mr. Adeniyi Adegbomire, described the suit as a "nuisance case" which ought not to be entertained by the court. Adegbomire argued that the plaintiff claims must be particularized, adding that the project had no negative impact on the area, as being alleged. The case has not been concluded.

[28] However, the challenge has been that of enforceability of the provision of EIA in Nigeria. In *Douglas v. Shell Petroleum Development Company Limited and Others Unreported Suit No. FHC/CS/573/931* where the plaintiff who sought a declaration against the commissioning of a gas project by the defendants without complying with EIA Act was held not to have the locus standi to institute the action. This suggests to mean that governments, corporations and individuals can ignore the provisions of the Act and go ahead to carry out projects without first considering the impact such projects will have on the environment. Despite this problem of enforceability, there is still a good left in the Act. In *Sanni Abacha v. Gani Fawehinmi (2002) FWLR (PT.4) 533* the Supreme Court held that enforceability is still possible to a great extent. The court said that instead of relying on the provisions of the Constitution on enforcement of fundamental human rights (which inferably include right to sustainable environment) an aggrieved party can come under the provisions of Article 24 of the African Charter on Human and People's Rights 1986.

environment, the project proponent is required to proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment.[29]

IV. PUBLIC PARTICIPATION IN EIA

Many international organizations as well as international agreements have built-in the idea of public participation in environmental issues.[30] There are three occasions where public participation is necessary in the EIA process, namely; access to information from the early stage, access to decision making and access to justice/enforcement.

Public participation in EIA can be promoted under certain conditions. First, public involvement needs to begin before project planning and decision-making. The decision to participate must be genuine.[31] Secondly, public involvement can be used to create a project that is more suitable to, and accepted by the public.[32] Thirdly, public can be a crucial and valuable source of expertise before, during and after project planning and decision- making.

The advantages of public participation in EIA process are;

1) It improves process quality by exerting pressure on project sponsors/donors to address the negative environmental impacts of some projects.

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[29] Section 4 of the Act stipulates minimum content of environmental impact assessment as follows (a) A description of the proposed activity (b) A description of the potential affected environment, including specific information necessary for identifying and assess the environmental effect of the proposed activity (c) A description of practical activities as appropriate (d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct or indirect cumulative, short-term and long-term effects (e) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and an assessment of those measures (f) An indication of gaps in knowledge and uncertainty which may be encountered in computing the required information (g) An indication of whether the environment of any other State or local government area or area outside Nigeria is likely to be affected by the proposed activities or its alternatives (f) a brief non-technical summary of information provided.

[30] For instance, the World Charter for Nature 1982 states that " All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation". The Aarhus Convention states that " In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provision of this Constitution."

[31] Otherwise, public participation becomes a procedural exercise rather than a substantive democratic process.

[32] Suitability should depend on public opinions and needs rather than the technical feasibility of the project.

2) It draws attention to the concerns of the local people and by focusing on specific issues of local concern, the process has made more relevant and useful and even reduces conflict.
3) It induces many of the larger agencies and commercial organizations to set up special environmental units/departments to focus on EIA.
4) It extends and improves public awareness of environmental concerns.
5) It promotes the sustainability of some projects.
6) It builds and strengthens indigenous capacity and give greater access to community skills and knowledge.
7) It improves community understanding of conservation issues and responsibility for conservation outcomes.
8) It reduces cost for the developers as key issues are identified early in the process and potential delays in decision making are reduced.

The EIA process has not been strengthened to enjoy these benefits due to series of inadequacies in the system.

The challenges of EIA are;

1) Time and money. Many stakeholders[33] lack the time or financial
2) resources to engage with EIA processes[34]
3) Literacy, language and public presentation. EIA practitioners rarely use non-written means of communication, even in areas of low literacy.[35]
4) Education. Low levels of education and the technical nature of many development-related issues can be a major barrier to effective participation in EIA.[36]

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[33] Whether local people, expert institutions or other government agencies

[34] Their involvement will generally incur an immediate cost in terms of time and sometimes

[35] The lack of key materials in local language versions is a further barrier to the involvement of local stakeholders- the vast majority of impact statements are written in the language familiar to the practitioners, who are foreigners to the project area. Mass media, including local radio, television and newspapers, can help bridge such communication gaps.

[36] For example, a villager in Bangladesh, when asked whether he had participated in the EIA process for a major flood control and irrigation project that would radically alter his livelihood prospects, responded thus “If I were to be consulted what would I say? You see I’m just an ordinary man. I don’t know anything. All I know is that one has to have meals every day.” See Ross Hughes Environmental Impact Assessment and Stakeholder Involvement International Institute for Environment and Development. Environmental Planning Issues No. 111998.

5) Gender. Insensitivity to gender issues, and particularly to the lower status accorded to women in decision- making in many parts of the world, is a common constraint to effective stakeholder involvement.[37]
6) Cultural difference. These can be particularly acute where indigenous groups are stakeholders in the EIA process.[38]
7) Communication barriers between indigenous and non-indigenous approaches.
8) Physical remoteness. It is costly and time consuming for practitioners to reach small, diverse and scattered groups in remote areas, and conversely, it is difficult for the inhabitants of such areas to gain access to information relevant to development plans and EIA.
9) Political and institutional culture of decision making. In many countries and regions there is little or no culture of public involvement in decision-making.[39]

Public participation in EIA has been legislated in the laws of various countries, such as, United States, China, India, Nigeria etc.

A. UNITED STATES.

The USA was the first country to promulgate a law on environmental issues. The EIA process in USA is regulated by the National Environmental Act (NEPA) of 1969.[40] NEPA requires all federal agencies to follow the procedures outlined in NEPA and prepare a detailed statement before they carry out an environmental significant proposed action or plan[41]. Public participation requirement in USA can be found in the Council on Environmental Quality's Regulation (CEQR) meant to implement the provisions of NEPA.[42] The CEQR provides for opportunities

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[37] Major changes in attitude and conventional approaches are required if impact assessment is to make a real difference to people's lives.

[38] Communication difficulties may arise simply because of language and education, but also because indigenous groups often hold entirely different belief system and ways of perceiving issues.

[39] In some cases, public involvement is perceived as a threat to authority and is viewed defensively by many government agencies and project proponents.

[40] There are three goals of NEPA namely, Harmony between human and environment, eliminate environmental damage and promote welfare of humanity and to enrich understanding of natural resources.

[41] The Agency must prepare an Environmental Impact Statement (EIS) which makes Agencies not only to weigh the environmental impact of a proposed development but also its consequences.

[42] It is obvious that the CEQ regulations not only clarify the public's role in the NEPA process, but also broaden the scope of participation as provided in NEPA.

for public participation/involvement at every step in the EIA process.[43] The relevant provisions of the CEQR[44] on public participation are;

(a) It provides for notice and disclosure of EIA documents, public hearings, and commenting pave the avenues for public involvement in the NEPA process and agencies are required to provide public notice of NEPA- related hearings, public meetings, and the availability of environmental documents. In all instances, notice must be mailed to anyone requesting it.

(b) For proposed actions of national concern, notice must be published in the *Federal Register* and mailed to "national organizations reasonably expected to be interested in the matter". Where the effects of a proposed action are discrete, or primarily of local concern, the regulations provide several methods by which agencies can provide notice. The regulations leave it to the agencies to craft their own procedures regarding when public hearings or public meetings might be "appropriate" in the NEPA process.[45] Short of actually requiring public hearings, the regulations instruct that hearings might be "appropriate" where there is substantial controversy or interest surrounding the proposed action, or where another agency requests a hearing.

(c) Where a draft EIS is to be the topic of a public hearing, agencies must make the draft EIA available to the public fifteen days prior to the hearing. Agencies must make NEPA-related "environmental documents", including Environmental Assessments (EAs), Finding of No Significant Impacts (FONSIs), Notice of Intents (NOIs), and Environmental Impact Statements (EISs), available to the public pursuant to the Freedom of Information Act. The public is afforded no less than forty-five days to comment on the draft EISs. By contrast, the regulations do not expressly mandate a public comment period for EAs of FONSIs, although agencies commonly circulate EAs for the public.

(d) Furthermore, US courts have interpreted NEPA and the CEQ regulations to require public comment for both EAs and FONSIs. CEQ regulations do, however, mandate a thirty-day "public review" period where FONSI is controversial or unprecedented.

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[43] Except the scoping stage.

[44] See generally 40 Code of Federal Regulations (C.F.R.).

[45] This agency discretion applies to scoping meetings as well.

It is obvious that the CEQ regulations not only clarify the public's role in the NEPA process, but also broaden the scope of participation as provided in NEPA. There are opportunities for public participation/involvement at every step in the process. All NEPA-related environmental documents are available by the Agencies as they become available. Public hearing hearings, although not mandated by the regulations, are commonly agency practice, especially where controversial or otherwise significant proposals are being assessed.[46] Furthermore, opportunities for public comment on environmental documents exist throughout the NEPA process, in both the screening and EIS phase. The scoping phase is one area of the NEPA process where the agency obligation to the public is somewhat lacking.

Citizen's participation is applicable in the following ways, participation in identifying violations; Participation in settlement and participation through the citizen's suit procedure.

B. CHINA.

The EIA law of 2003 of China makes provision for participation in EIA process.[47] Despite this law, EIA in China is poor as a result of the gap between the law and practice concerning public participation in EIA process. This prompted the China's State Environmental Protection Administration to introduce measures in 2006[48] and 2008 that introduced the requirement of open government information.[49]

In 2006 the, China's State Environmental Protection Administration (SEPA) issued provisional measures for public participation in EIA (2006 Measures). The SEPA Guidelines require public disclosure of EIA information at the outset of an EIA investigation and prior to the designated time for public participation. Art. 2 and 8 provide thus;

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[46] José, L. Moorman and Zhang, *G.* Promoting and Strengthening Public Participation in China's Environmental Impact Assessment Process: Comparing China Law US NEPA, Vol 8 VERMONT JOURNAL ON ENVIRONMENTAL LAW pp 36-55

[47] The first legislation in China is the Environmental Protection Law of 1979.

[48] Provisional Measure for Public Participation in Environmental Impact Assessment,2006; Measures for the Disclosure of Environmental Information, 2008.

[49] The measures make specific requirements on corporate disclosure and also stated that every March 31st environmental authorities should publish an environmental information disclosure report to improve public access to environmental information.

(a) Developers, agencies, or the organizations that have been commissioned to conduct EIA investigations are encouraged to solicit within fifteen days to submitting EIA documents (herein after refer to as "responsible entities") to the environmental agency for approval.

(b) This initial disclosure must identify the initiating developer or agency, as well as the organization that has been hired to conduct the EIA investigation, and the "major items and methods of soliciting public suggestions and opinions".

(c) Once the responsible entity has finalized a draft EIA information and solicit suggestions and opinions through questionnaires, expert consultations, workshops, debates, and hearings about the EIA document from the public prior to submitting it for approval.

(d) Discretion rests with the responsible entity to choose the form and time of public participation, which they must then include in the notice of EIA availability, and must be made available at least ten business days prior to the time set for public participation either in the newspapers, website or in public places

(e) When the time for public comment has passed, the responsibility entity is the required to clearly explain why certain opinions were accepted and others were rejected and include these explanations with the draft EIA document when it is filed for approval.

(f) Finally, if any member of the public feels that the responsible entity has not clearly explained its decision to reject an opinion, they may send their comments directly to the environmental agency in charge of approving the EIA.

The major criticism of the EIA laws and regulations in China is the limitation as the nature of projects where public participation are permitted and even for the projects where public participation are allowed, it does not provide for same at the screening stage. There is also no strong requirement for the approving agency to take complaints seriously especially where the responsibility entity fails to solicit public opinion and the length of time given is random.

C. INDIA.

Environmental Impact Assessment (EIA) in India started as an administrative requirement in 1977-78 for multipurpose river valley projects and hydropower projects. EIA was legally notified under the Environmental Protection Act 1986, in the year 1994. However, it was only in 1997 that the EIA Notification 1994 was amended and for the first time public involvement in the environmental clearance through the public hearing mechanism was made statutory. After

two decades of EIA practice in India, the environmental clearance process moved out of the inner coterie of the government departments, the government appointed experts and project proponents to include the public in general in the environmental clearance process. Post 2000 along with various amendments of the EIA Notification 1994 a parallel process was initiated towards revising the existing environmental clearance process, which finally culminated in a new EIA Notification 2006.

In India, EIA was made mandatory in 1994 under the environmental protection Act of 1986 with the following objectives: predict environmental impact of projects; find ways and means to reduce adverse impacts; shape the projects to suit local environment; present the predictions and options to the decision-makers.

The stages of an EIA process in India include;

(a) *Screening*: First stage of EIA, which determines whether the proposed project requires an EIA and if it does, then the level of assessment required.
(b) *Scoping*: This stage identifies the key issues and impacts that should be further investigated. This stage also defines the boundary and time limit of the study.
(c) *Impact analysis*: This stage of EIA identifies and predicts the likely environmental and social impact of the proposed project and evaluates the significance.
(d) *Mitigation*: This step in EIA recommends the actions to reduce and avoid the potential adverse environmental consequences of development activities.
(e) *Reporting*: This stage presents the result of EIA in a form of a report to the decision-making body and other interested parties.
(f) *Review of EIA*: It examines the adequacy and effectiveness of the EIA report and provides the information necessary for decision-making.
(g) *Decision-making*: It decides whether the project is rejected, approved or needs further change.
(h) *Post-monitoring*: This stage comes into play once the project is commissioned. It checks to ensure that the impacts of the project do not exceed the legal standards and implementation of the mitigation measures are in the manner as described in the EIA report.

The Ministry of Environment and Forestry (MoEF) is responsible for the valuation of EIA. The project proponents submit the EIA report, environmental management plan and details of the public hearing. Public hearing is mandated after the screening and scoping of the proposed project.[50]

D. NIGERIA.

Public participation in EIA in Nigeria is governed by the EIA Act, 1992.[51] The law provides for notice and disclosure of EIA documents. The law also requires the Federal Ministry of Environment and the established Agencies to provide public notice of hearing, public meetings and make environmental documents available to the public. However, public participation in EIA in Nigeria is low. Nigerians are not fully participating in EIA.

V. PUBLIC PARTICIPATION IN EIA IN NIGERIA

Public participation in EIA in Nigeria is governed by the EIA Act, 1992. Section 7 of the Act provides that;

> *Before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity*

The procedure for achieving public participation is provided for under Sections 25[52], 39[53] and 41[54] of the Act as follows:

a) The developer submits an EIA to the Agency
b) The Agency examines the report and makes same available to government agencies, members of the public, experts in any relevant discipline and interested groups who are given the opportunity to participate in the EIA review process at a given location for at

[50] In case of large projects, consultation with committee of experts is used.
[51] Sections 7, 25, 39 and 41.
[52] Section 25 provides that the public shall have access to the mandatory report of EIA and that the public can file appropriate comments relating to the mandatory study report
[53] Section 39 provides for the notification of the public by the Federal Ministry of Environment (FME) on the availability of the report.
[54] Section 41 provides for the duty of the FME to advice the public on the course of action as it is related to the project and the extent of the mitigation measures taken.

least 21 working days on national and local dailies and announcements on electronic media

c) The review panel meetings are held in the public so that stakeholders and the public can utilize this opportunity to put forwards their views and concern for consideration[55].
d) The Review Panel or Mediation Report shall again be made available to the public for comments following which the Review Panel may either approve or reject the EIA.
e) Where the EIA is approved[56], a monitoring or follow-up programme is drawn up and still made available to the public before a certificate is issued.

The Act clearly recognizes public concern in EIA review process and spells out the procedure for notifying the public of this action and the modalities for filing comments. In addition, the Act details the stages of review where the public can be involved such as public display, mediation and review panel.

Since 1995, Nigeria laws have provided for stakeholder consultation by way of a continuous programme of public participation, public forums, the public display and review of documents and public attendance at panel reviews.

The objective of public participation in EIA is to achieve the following:

(i) Ensure public participation in the definition of environmental policy objectives and decision making.
(ii) Ensure public confidence in the administration of the environment by demonstrating the resolve of government to enforce the environmental stewardship of government agencies and organs, corporate citizenship of government agencies and organs, corporate citizens and elite organizations; and
(iii) Grant the citizenry access to environmental information and data thereby promoting the quality of environmental management and compliance management

[55] Projects that may likely cause adverse effects are referred to Ministry of Environment Ministerial Council for subsequent referral to mediation.

[56] The approving agency is the Federal Ministry of Environment (FMENV) formally known as National Environmental Protection Agency

The provisions of the EIA Act in Nigeria appear to be quite comprehensive as it involves the public almost in all the stages of EIA process. However, it suffers some setbacks, namely;

i) The Act does not give room for public participation after the certificate has been issued and/or during the monitoring or follow-up stage;[57]

ii) The Act did not provide specifically that developers should consult the local communities;[58]

iii) Nigerians are not fully participating in EIA process due to lack of legal framework[59], lack of communication between government;
and the people[60], inadequate Government capacity to foster public participation[61], lack of transparency[62], lack of awareness or low regard for public consultation[63], lack of technical capacity, knowledge and experience in environmental matters[64], non co-operation from local communities[65], etc.

VI. PUBLIC PARTICIPATION IN EIA IN NIGERIA AND UNITED STATES, CHINA AND INDIA COMPARED

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57 For instance in USA, a number of projects have been halted as a result of public participation even after the approval and when development has gone to an advanced stage.

58 The Act does not require companies to consult communities on all the projects they are funding.

59 The law does not provide for an effective sanction for failure to consult the public in EIA process

60 The affected public in most projects are usually in the rural areas that has no access newspapers or the electronic media.

61 Government lacks the capacity to achieve public participation in EIA process. It is not enough to make publications inviting the public to be part of the process. The Government should carry out enlightenment programmes and use social scientists to reach out to the populace.

62 It has been found that most developers are not transparent in releasing information concerning the exact impact of their projects in the EIA process and because of lack of experienced professionals in the field; the developers get away with whatever information they submit. The public generally believe that they do not have the ability to test the information or comment on it, hence they stay away.

63 Despite the fact that the EIA law of Nigeria provides that the public shall be consulted. EIA documents are drafted in technical terms thus making it difficult to solicit involvement from the general and affected public who are mostly uneducated.

64 Most members of the public especially the affected public do not have knowledge and experience in environmental matters. They also lack the technical capacity to get involved in deciding what is good or bad for the environment and hence do not take the opportunity of participating in the EIA process even where they are aware.

65 As a result of negative effects of certain developments in some areas, most local communities talk less of being part of the EIA process. The lack of co-operation makes it difficult for them to understand what exactly is being done or to avert their minds on mitigation in case of an impact.

There are a number of similarities and differences in the EIA laws of United States, China, India and Nigeria

A. SIMILARITIES

The similarities in public participation in EIA process in United States, China, India and Nigeria are;

(i) There are set time frames to enable the public's opinion, views, comments, or complaints under the laws of United States, China, India and Nigeria.

(ii) The laws of Unites States, China, India and Nigeria provide for public hearing or meetings together the opinions of public on projects being carried out in their environment.

(iii) All comments, complaints, opinions etc., are sent to the Agency, Ministry or Approving agencies respectively.

(iv) Notices or disclosures are circulated through newspapers/dailies and electronic media.

(v) EIS or EIR is required to be made available to the public before approval of the project can be granted.

B. DIFFERENCES

(i) Under the CEQ Regulations of the USA, avenues are created for public participation not only during preparation of an EIS, but also in instances where no EIS is required, even where the proposed actions are environmentally insignificant. Whereas in China and Nigeria, public participation is only required for projects where an EIS or EIR is produced or will be produced, i.e. only for projects with likely high environmental significance.

(ii) The EIA laws of USA and Nigeria provides for notice and disclosure of EIA documents, public hearings and commentaries in the NEPA/EIA process and Agencies and the Ministry in the case of Nigeria are required to provide public notice of hearings, public meetings, and make environmental documents available to the public. Whereas under the SEPA Regulations of China, it is the developer that gives Notice or disclosure and sets date and time of hearing and commenting by the public.

(iii) The EIA law of the USA provides that Notices must be mailed to any person requesting same and for publication in the *Federal Registrar* if it's a project of national concern and mailed to "While that of China and Nigeria does not give room for Notices to be mailed to any person, it only provides for Notices via the newspapers/dailies and electronic media.

(iv) Under the EIA law of USA, where a draft EIS is to be the topic of a public hearing, agencies must make the draft EIS available to the public 15 days prior to the hearing. Agencies must make NEPA-related "environmental documents", including Environmental Assessments (EAs), Finding of No Significant Impacts (FONSIs), Notice of Intents (NOIs), and Environmental Impact Statements (EISs), available to the public pursuant to the Freedom of Information Act. The public is afforded no less than 45 days to comment on the draft EISs. In China however, upon preparation of the of the EIR, the developer makes same available to the public for commenting and/or hearing at least 15 days prior to submission to the Agency for approval while the public is given 10 days to comment. While in Nigeria, it is the duty of the Ministry upon receipt of the EIS to make same available to the public at least 21 days prior to the EIA review process or hearing.

C. REASONS

The reasons for the similarities and the differences are that most economies especially the developing ones are part of the United Nations and hence try to tailor their laws to meet the international standards. However, tailoring these national laws to meet with the individual socio-cultural and economic needs of each nation became a problem as individual nations have their various challenges. The EIA law of USA is developed and there is sufficient public participation both in law and practice unlike Nigeria where there is reasonable laws but no active participation due to some inherent challenges, whereas in China, it is still very recently that the public started getting involved in EIA, as all there believe is developing their economy. The EIA law of USA provides for public participation at all stages of the EIA process except the scoping stage where it is somehow lacking and also stages the goal of public participation in the EIA process which is to provide public scrutiny whereas the EIA law of Nigeria the opportunity for public participation actually commences at the scoping stage but does not extend beyond the issuance of Certificate and the EIA law does not state the goal of public participation. In the case of China,

the public are involved at the investigating stage and prior to submission of EIR but not at the screening stage which is crucial.

VII. CONCLUSION

This paper demonstrates that substantive, early involvements in public participation can benefit the project proponent, the public and the final plan. An effective public participation programme does not happen by accident, it must be carefully planned. A proactive effort will lead to a more effective process and outcome than a reactive, minimalist approach to public involvement.

Nigeria public participation in EIA process is weak. There are many factors: lack of relevant skills and experience in public participation by the EIA team, negative perception of the public process by regulators, and poor funding of EIA process by project proponents.

One of the key components of EIA process is public participation and participation. It provides democratization of EIA process, transparency and accountability of the project. The study shows that public participation in EIA process in Nigeria is low. Therefore, the regulators of EIA in Nigeria (Federal Ministry of Environment), the EIA team/consultants, stakeholders and public must ensure that mutual trust exists between them during EIA process.

It is obvious that the EIA laws in Nigeria should be amended to give room for public participation after the issuance of certificate and commencement of project as it was the case in the United States of America. The Government should encourage environmental awareness programmes to be organized to educate the Nigerian masses on the need to be environmentally alert of the negative environmental impacts on their environment. There should be an enforceable and exemplary penalty for failure to submit and carryout EIA on any project. Finally the twenty-one days timeframe given to notify the public of the Review Panel sitting appears to be two short for any meaningful contribution of an environmental impact in a technical area to be carried out. It is suggested that the time be enlarged to 30 days so that more meaningful input and contribution can be made.

A PREDICTIVE LEGAL HYPOTHESIS ON GROWTH OF NATION-STATES: JURISPRUDENCE REVISITED

Lubowa Jeremiah*

ABSTRACT

This article molds a cogent theory in the field of jurisprudence on how to predict the growth of a nation-state, based on the empirical studies of history across the global terrain, with an emphasis on how this theory can be implemented and simultaneously used to analyze the possibility of the advancement of a nation-state. The article postulates a wide range of dimensions that find their foundations in the law, and goes ahead to express the viability of the alternative theories on development and growth of nations as contrasted with the one posited hereinafter.

I. INTRODUCTION

It is acknowledgeable that that the disparity in economic growth is real, but such has been the enormity of the task to coin a comprehensive and pragmatic theory to explain the existence of the striking differences of prosperity and the failure of others on the other hand. With the fall of the great ideological clash at global scene in 1989, a great search has been on to mold a plausible theory that can explain development disparities around the globe without obscuring detail and the peculiarities that particular nations may have. The prevent clash would correctly, be described as the clash of civilizations[1], exhibiting a multi-polarity, unlike the ended ideological clash.

II. THE JURISPRUDENCE OF POWER AND THE LAW IN INSTITUTION-FORMATION

This theory provides the tools for thinking and critical analysis about how institutions change and the consequences of such changes, the nature of this change, the role of small differences and contingency, despite the fact that such imperceptibility makes a precise prediction of the

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[1] Samuel Huttington P., THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER, Simon & Schuster, 2011.

transition of the current state of institutions in a nation difficult. The theory is operative at two key levels. At the first operative level, based on an institutional interpretation of history, a distinction is drawn between extractive and inclusive economic and political or governance institutions in a bid to foster growth of a nation. To be clear, economic institutions would include; judicial institutions that address direct economic disputes like bankruptcy based on equitable principles of the law, the financial and capital markets (bond market, stock/share markets, currency markets, commodity market, and futures market), credit issuing institutions, registration institutions, and labour regulations enforcement institutions. Governance institutions include *inter alia*, the executive and her agencies, independent agencies of the government, the legislature, and the judiciary to mention but a few. Things happen only at the behest of the oligarchy. Nations with such systems are most commonly referred to as autocracies, dictatorships, kleptocracies, absolute monarchic-orders. Though lines are drawn here, between political/governance institutions and economic institutions, a meticulous examination of institutions presents that an intersection between the political and economic institutions, be they extractive or inclusive, is more avid than not. As for extractive institutions, as a means of consolidating power, the sovereign synergistically bridges the extractive governance institutions and the extractive economic institutions. The extractive political institutions, concentrate power in the hands of a few, often part of the executive, who foment incentives to maintain and develop extractive economic institutions for their benefit and use the resources they obtain to cement their hold on to governance or political power. Linked to this phenomenon, the institutions are riddled with endemic and systemic corruption whereby anti corruption and money laundering laws are enforced selectively against individuals who pose a threat to the power of the oligarchy, advocates for change, or those that dissent from the oligarchy's position on a subject of policy. This was exemplified by the Bo Xi Lai trial.[2] Bo Xi Lai was a former communist party leader charged in 2013 with bribery, embezzlement, and abuse of power who was later sentenced to life imprisonment in September that year. The trial was a delicate balance between the Maoist left ideological orientation and the reformist right ideological orientation. It

2 See: The Bo Xi Lai Scandal: Power, Death, And Politics In China, FINANCIAL TIMES, Penguin Books Limited, 20 Sep 2012.

marked a departure from the close lid policy of the communist party government since the hearing was streamed live, though selectively in that certain segments are kept behind closed doors in an effort to lay a balancing act to prevent a backlash from the leftist Bo Xi Lai block, who if kept in the dark about the proceedings would insinuate that a conspiracy was ongoing among the reformists to unjustly tramp on Bo Xi Lai their acclaimed leader. The trial was also an attempt by Xi Jing Ping administration to fulfil their pledge to crackdown corruption among the top echelons of the communist party. Though, at a closer examination of the Chinese national psyche and perception, the trial was dismissed as a selective one and with a political motivation rather than legal justification. The rise in wealth and prestige of Bo Xi Lai was seen by some quarters of the communist party as a real threat to the politburo standing committee, the centre of power. As a portent threat he had to be eliminated. His real charge was an intention and ambition to be part of the centre of power at the time of succession through the back door.

The charges, in a nutshell, were more of a selective political enforcement than a legal justification. The establishment of the synergy between the extractive political institutions and extractive economic institutions creates a recursive loop that culminates in to a vicious circle in which the extractive institutions, once created will tend to persist and perpetuate themselves. Just as a synergy in extractive institutions nations exist to sustain the governance extraction, so does a synergy exist in inclusive institutions nations though with a different purpose/use. In inclusive institutions nations the synergy exists to bridge the inclusive governance institutions and the inclusive economic institutions to complement each other culminating in to a virtuous circle where the inclusive political and economic institutions perpetuate their existence. Whether the initiation of the circle calls for an eternal of the same, in that if a vicious circle is so established a virtuous circle shall not be initiated as the reverse. The answer to that is the preoccupation of the next level of the theory. At the second level an explanation is cultivated, to explain, historically why inclusive institutions emerged in some parts of the world and not in others and how the history has shaped those differential institutional trajectories of nations around the world.

Whereas, the synergies of economic and political institutions have an intrinsic nature of perpetuating themselves in their form (extractive or inclusive) this tendency is not absolute. The genesis of time, is such that many, the origins of societies are that extractive institutions where

the trend, especially during the era of slavery, feudalism and sometimes sovereign monarchs. It was the wave of republicanism that rocked many countries in the then new world; America, Europe that glimpses of inclusivity started to suffice on the face of the globe. The bill of rights constitution found its way on the terrain of the world. Otherwise, the norm of the globe was clenched with extractive institutions where imperial powers reigned supreme and unchecked. The trend, in many parts has been such that some nations and societies were able to break the mold and transition toward inclusive institutions. The question that therefore arises is how then can and does a society break even from the mold of extractive institutions to bosom of inclusive institutions. The theory henceforth postulates the analytical component of the theory. The segment of the theory, which can be utilized to gauge and predict the prosperity of a nation in issue. Two approaches may be postulated;

A. A legal Teleological-historicism approach.
B. A humanistic approach

III. LEGAL TELEOLOGICAL-HISTORICISM APPROACH.

The perspective, here mentioned explains the transition from extractive to inclusive institutions based on historical events but not historically predetermined although the title may subtly suggest so. It affirms that the law and its practice, is unfolding through history, to universal laws. This perspective explains how institutional changes emerge in societies and why some societies, despite having had the same kind of institutions at a particular time in history, probably due to common geographical locality, go on, as seen through the course of history, to adopt different kinds of institutions. A process termed as divergent institutional change. The converse is called convergent institutional change. The hegemonic institutional convergence hypothesis affirms that the path of the different societies on the globe to adopt institutional inclusivity stability, a single nation-state must stand out as a dominant institutional inclusivity global power, or Institutional Inclusivity Hegemony (IIH). Thus the fall of existing institutional inclusivity hegemony or the state of no institutional inclusivity hegemony diminishes convergent institutional change. When an IIH exercises leadership; either through exportation of inclusivity by international trade, coercion, or persuasion, it is actually deploying its preponderance of power. This is what I refer to as institutional inclusivity hegemony, which affirms the ability by a nation state founded on institutional inclusivity to influence international rules, relations and

institutions towards inclusivity. Such hegemony is often what propagates critical junctures of change that initiate change were the pace is languid and ostensibly static. It is an acknowledged principle that an entity on earth/the globe, will continue in its state of rest or continue in uniform motion in a straight line unless acted upon by an external force. Let me emphasize that, I mention here that the motion is in a straight line, it should not be misconstrued to mean unidirectional in one plane. Space-time, the embodiment of the past, present and future, is a construct of different dimensions and planes including the x, y, and z planes. Sometimes, even, cyclical in that owing to the fact that the forces of nature, including conflict over income and power, are a constant action on society (amalgam of institutions) on the globe stasis is a state that cannot be presumed to be a preoccupation. So, institutional change is always occurring as an ingrained fact, though at certain times in history the institutional changes are major and often spontaneous, hence eliciting the question, how does major institutional change occur? The answer to this question is critical because major institutional change is a requisite for economic change. It is the kind of institutional change that allows innovation, the sword for creative destruction, to thrive or be impeded. Without major institutional change there can be no major economic change. Major institutional change occurs when existing institutions in a nation interact with critical junctures. A critical juncture can be defined as major events that disrupt the existing political and economic balance in one or many societies. Critical juncture is a concept that begets its credence from gene mutation. This is the spontaneous change in the structure or chemical composition of a gene. The sequence of nucleotides, in that part of a DNA molecule corresponding to a single gene is altered, and this changes the order of amino acids making up the protein resulting into far reaching consequences on the development of the organism. The substance that initiates a mutation is called a mutagen the equivalent of what is referred to here, as a critical juncture.

The theory presupposes that institutions, as established by law, are the gene, the software, the pillar of society, such that when disrupted, something new emerges. History is littered with examples of critical junctures these include; Black Death in which as much as half the population of most areas in Europe during the fourteenth century, the opening of Atlantic trade routes which created enormous profit opportunities for many in Western Europe, industrial revolution (in Europe, United States of America& other parts of the world) which offered the potential for rapid but also disruptive changes in the structure of economics around the world, slave trade,

colonialism, revolutionary war, making and promulgating a new constitution or reneging on entrenched provisions of the constitution, a revolution in law, historical processes. It may be noted that generally, critical junctures themselves are historical turning points. And to fully comprehend the vicious and virtuous circles operating in the institutional framework of a nation one must study the institutional historical processes of that nation which eventually unveils the institutional differences that are actually historically structured. To answer the second question, how divergent institutional change occurs, two or more otherwise similar societies will drift apart institutionally, albeit slowly at the natural velocity of change; diverging later along their different lines. This process occurs by the process called institutional drift.

Institutional drift, transiting at the natural institutional change velocity, which is characterized by the innate outcome of the action of conflict, conflict over income and power breeds change at a pace almost microscopic and unrecognizable to the eye. The velocity may however be accelerated when, the income or resources-power conflict is greater than the ordinary. Such that the interaction between the set institutional drift and the extraordinary conflict would give rise to significant outcomes. Such significant outcomes that would emerge along the drift path are referred to as contingent-outcomes. These outcomes may be sometimes referred to as conflict-institutional drift outcomes because they are outcomes that result from significant conflict spurred or superimposed on the process of institutional drift. It must be emphasized, from the outset that, the process of institutional drift need not be a cumulative one to bear the outcomes of institutional divergence (in that the process, overtime, results into small difference where by the difference keeps widening to become larger until the difference is strikingly recognizable to any tom dick and harry. No sometimes the drift may travel, hypothetically at a velocity equivalent to that of light. This happens when the conflict superimposed on the institutional drift is not just significant but critical. That is; the when the conflict is actually a critical juncture. The phenomenon is such that, whereas, small differences as propagated by ordinary institutional drift, are perceived generally not to have a noticeable impact on institutional change since the outcomes are “small” and have a tendency of disappearing and then reappearing again, at the superimposition of a critical juncture, the outcomes thereto can have a tremendous impact, of leading otherwise quite similar societies (homologous societies) to diverge radically. It is the interplay of ordinary institutional drift and critical junctures on existing institutions leading to institutional divergence. This process can be termed as critical juncture-institutional drift.

England's historical terrain is such that a slow but sure and vigorous undoing of exclusivity was consuming all her corners. The feudalism at its height in the twelfth century, as gloved by the absolute monarchy, was striding towards inclusivity. This may be said to have started with the adoption of the first bill of rights and the great charter. Even as we see England today greater inclusivity is yet to come. On the other hand, however, France had a quicker and more spontaneous undoing of institutional exclusivity, in which the adoption of the first republic saw a desecration of the absolute monarchy and the slaughter of the king. This spontaneity as to the critical juncture of adopting inclusivity reveals the explanation why a subtle institutional divergence between France and England with the United Kingdom existed for a long time and still does today. And lends reason to why Britain is quite uneasy about joining the European Union. The created institutional differences borne from this process then form the now major institutional differences that the next critical juncture superimposed on ordinary institutional drift will affect and the process will continue. To illustrate this point let us take a historical example, despite the many similarities between England, France and Spain, the critical juncture of the Atlantic trade had the most transformative impact on England because of the small difference like the fact that because of the small differences like the fact that because of developments during the fifteenth and sixteenth century, the English crown could not control all overseas trade, as this trade was mostly under crown monopoly in France and Spain. As a result, in France and Spain, it was the monarchy and the groups strongly allied with it who were the main beneficiaries (a few) of the large profits created by Atlantic trade and colonial expansion, while in England it was groups strongly opposed to the monarchy who gained from economic opportunities thrown open by this critical juncture.

A. VISITATION OF THE CONCEPT OF GHOSTS AND THE LAW[3] AND THE IRON LAW OF OLIGARCHY

The lamentable shambles that colonialism bore on Uganda, wherein certain tribal identities were elevated over others is a classic example of institutional exclusivity and extraction. Despite the fact that the promulgation and making of the Lancaster constitution was a critical juncture, it was littered with the soils of institutional exclusivity that would take a toll on Uganda. One of these

[3] For The concept of ghosts and the law see Oloka-Onyango J., GHOSTS AND THE LAW. AN INAUGURAL LECTURE, Makerere University Printery, 2015.

characteristic features of exclusivity was asymmetrical federalism in which the institutional exclusivity of certain tribal groupings was evidently seen to raise on the national scene and culminate in to a negative growth. The efforts at reform came at such a delicate moment with the heat of the 1962 critical juncture still raging. This next critical juncture was the promulgation of the 1966 constitution sometimes referred to as the pigeon-hole constitution. The method with which this constitution was promulgated was in itself exclusive, hence casting a doubt on its capacity to deliver institutional exclusivity. This though was mildly cured by the promulgation of the 1967 constitution which made fairly positive strides towards governance institutional inclusivity. This 1967 constitution eliminated the 1962 inherited constitution characteristic of asymmetrical federalism, where in the three federal institutional powers along with the executive were equalized and made less exclusive and subject to the control by the central government.

The vicious loop of this institutional exclusivity was epitomized by the case of *Uganda v. commissioner of prisons ex parte Matovu.*[4] The *ratio decidendi* of this case could generally be stated as; if a regime obtains power extra-constitutionally but asserts her order and obedience from the bulk of the citizenry to result in to conformism, the regime is said to be legitimate as professed by Hans Kelsen in his treatise General theory of the state. But legitimacy is not legality. In the guileful name of "ideological parity"[5] and public interest, the elite regime forged a force synergy with other governance institutions most of all being the judicial institutions. The Judiciary is a lion under the throne, but that seat is occupied not by the executive presidency, but by the law and by their conception of public interest. It is to the law and to that conception, that they owe allegiance. In that lies their strength and their weakness, their value and their threat. Allegiance to "the law" means the whole body of law which emanates and obtains its validity from the *grund norm*, the constitution- 'the law' also means the rule of law and here the allegiance is to the philosophical ideal, that the country should be ruled by laws and not by humans. That power should not be exercised arbitrarily, or on the whims of rulers and their officers but should be dependent on and flow from properly constituted authority and from rules written down and approved by some form of representative assembly as a political, safeguard

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[4] [1966] EA 514

[5] See Oloka-Onyango, *Judicial power and constitutionalism* , (CBR) at 27 (1993)

against tyranny.[6] The judicial conception of public interest is threefold. The first is, the interest of the Executive (including moral welfare). It is sometimes referred to as National interest, whereby national security issues, are the primacy here. Often, this fold is at odds with freedom of expression and other directly related human rights.[7] The second, is preservation of law and Order (including social order, constitutional order or more generally, legal order). The third is the ideological fold, i.e. the ideological conceptions that the judiciary associates with the Executive presidency of the day. These are bifurcated, in to the political Left and Right ideologies. The left often concerned with the enforceability of Economic and social human rights in addition to civil liberties. Yet the Right is less concerned about Economic social rights, but vehement, about corporate matters and the control of power of trade unions by law. The intent of which, was to maintain extraction and exclusivity and to legitimize their institutional exclusivity. Though legality, was their intention the law could not explicitly sanction that. This was so because; a court of record pronounced itself on the matter hence forming a binding precedent that formed the force of the law of the land. It may inferred that the advent of a new *grund* norm, the 1995 constitution through a process of institutional inclusivity discredits the legality of the law in *ex parte* Matovu case and firmly seals this in Article 3(2). This therefore recognizes an institutional inclusivity methodology as the only legal method of changing a Ugandan regime. To impose or revert back to institutional inclusivity may necessitate coercive action. From the generous and purposive rule of constitutional interpretation, this is what the founding document of the new republic pronounces as, protecting and defending. Some scholars have referred to the jurisprudence of this case as a ghost of a sort that kept, and keeps on haunting Uganda's terrain of constitutional bhistory. The use of mythical and mystic terms to explain the vicious cycle of institutional exclusivity and extraction is at the heart of the historic deterministic approach, which generally points to no human intervention in driving the course of man's affairs. In that the jurisprudence on which it was based, one which legalized institutional exclusivity kept on sufficing in cases such as *Lutakome Kayiira & Ors v. Edward Rugumayo & Ors.*[8] The case addressed itself to the legality of an institutional exclusivity methodology in

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[6] See: Griffith J.A.G, *The Politics of the Judiciary*, Manchester University Press, at 276, 1977

[7] See: *Maj. Gen. David Tinyefunza v. The Attorney General*, (Constitutional Petition No. 1 of 1997), *Spy catcher case* (1984), Guardian case(1984)

[8] Case No. 1 1979

ousting a regime founded on institutional exclusivity. In this sense it sought to draw a distinction between actions *de facto* and actions *de jure*. Whereas the national consultative council could not remove the president through an institutionally exclusive constitution, the use of institutionally exclusive means to effect removal could not equally be given legal credence. Otherwise all immediate subsequent regimes would be deemed, according to the law to be illegal. So the iron law of Oligarchy played out again. Institutional exclusivity was granted legality, even as positive strides towards less institutional exclusivity were being made. On the other hand, Kenya, Uganda's immediate neighbour though had existing challenges of institutional inclusivity, did not have devastating critical junctures littered across the terrain of her history. This sticking difference explains the differential growth that Kenya has achieved over the years unlike Uganda. This is attributed to the less institutional exclusivity that Kenya had throughout the years; just enough to maintain order and allow constructive economic activity and hence minimal authoritarian growth. The first is the nature of the critical junctures that have interacted with that nation, including the length of interaction. Often the greater the spontaneity of the critical juncture coupled with a long time of interaction the effects of institutional change and hence differences among previously similar societies. The other, requires a sifting of the institutional drift processes in the nations in issue. The further the isolation between the previously close institutions of the societies in question the more probable and higher the degree of the institutional changes and differences.

IV. A HUMANISTIC APPROACH

This approach has a number of commonalities with the historic deterministic approach. It recognizes the aspect of institutional difference, being a result of institutional change and that conflict, is a natural order that contributes to this process. Nevertheless, there are some differences. Unlike the times of old, deterministic institutional drift was a ubiquitous player in institutional change. The explanation for this in part lies in part to the low levels of interconnectivity among humans in their different nations on the globe, in that isolation of societies and their institutions was possible and common , allowing for emergence of institutions along different lines (institutional change divergence). The current state of affairs is that institutions on the globe are more connected than ever, the telephone, social network, and internet, in that isolation to allow institutional change divergence is next to impossible.

Additionally, the phenomenon of critical juncture is increasingly becoming less dependent on historic deterministic past of spontaneity to becoming dependent on organizational and well calculated efforts by oligarchs or behind the curtain cliques to impose a dramatic change in the institutional set up of a particular society by superimposing artificial critical junctures. For example the February 2011 Mubarak Egypt spring uprising was an organized critical juncture that has ostensibly attempted to lead to institutional change. Individuals were funded on massive scale to lead protests, using social media to mobilize the protesters.[9] The excavation of the ottoman past by the ruling elite bloc of Prime Minister Erdogan Recepe Tayipp with the base of propagation being the AK party. When the negotiations between Turkey and the European Union, stalled, a fatal blow had actually been levelled against the Erdogan block dream of excavating the old ottoman empire that was molded on the governance ideology of fusion of traditional religion and the state; political Islam. This same ideology was what Erdogan, since his mayoral days had been pushing for, in Turkey and the former provinces of the old Ottoman past that he idealizes.[10] The 2005 negotiations superintended by France and Germany introduced certain restrictions, which among some quarters could be referred to as reforms, in the legal, economic, governance system of Turkey. Turkey viewed these inclusivity reforms as non-consonant with their political Islam governance model orientation, and in fact some of her counterparts, because of their inclusivity orientation and openness to the reforms joined the union even before turkey would reorient her governance model. The fact that these old ties were broken from Turkey were broken, the Erdogan block had to look elsewhere to offset the seeming demise of the exaction of the old Ottoman past. This search for counteracting demise and maintenance of the excavation dream culminated in to the role that was played by Turkey in the

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[9] See Muzammil M. Hussain, Philip N. Howard, DEMOCRACY'S FOURTH WAVE?: DIGITAL MEDIA AND THE ARAB SPRING, Oxford University Press, 2013.

[10] See: Sedat Sami, THE AGONY OF THE KEMALIST REPUBLIC AND THE RISE OF A FASCIST BROTHERHOOD: OF THE CORRUPT, BY THE CORRUPT, FOR THE CORRUPT, Xlibris Corporation, 2010 and Bremmer Ian, *T*HE J CURVE: A NEW WAY TO UNDERSTAND WHY NATIONS RISE AND FALL, Simon and Schuster, 2006.

Arab spring. Turkey was actually forging ties and allegiances with some of the old ottoman territories, which included the Middle East Arab countries, North Africa; Egypt, Tunisia, Morocco, Libya. The spring was hence intended by Erdogan turkey to re-establish the political Islam model as was in the old Ottoman past which would later form a formidable ground for regaining the old territories like the Balkans that had joined the European Union. Little wonder that the first protests that attempting to bestow political Islam for example in Egypt where Morsy a political Islam ideologue ascended to power were greeted with cheers by the Erdogan block. The ideological clash, with proponents of the inclusivity theory and extractive military centered theory bore the Arab Autumn, as the aftermath of the spring revolution.

Growth under extractive institutions is possible. An instance in which it happens it is referred to as authoritarian growth. The growth that is generated by these elite holders is just to sustain regime longevity and allow elitist extraction for self aggrandizement; rarely does it include the transformation of the state or positions and conditions of the general populace of the nation. For authoritarian growth to occur certain preconditions must exist. The extractive institutions that have achieved the minimal transformative growth in nations have done so with the existence of a certain minimal degree of governance centralization.

Authoritarian growth need be examined at the varying types and levels of institutional totalitarianism that exist. At the pinnacle, the first kind of totalitarianism is total totalitarianism wherein both economic and governance extractive institutions coexist. In such a nation, State economic planning is an essential part of state political control and the two are intrinsically fused. Second to this level, is the type, mild totalitarianism. This is classified in to two kinds; mild economic totalitarianism and mild political totalitarianism. Under mild economic totalitarianism, the economic institutions are extractive, but the political institutions are inclusive. Mild political totalitarianism professes that inclusive economic institutions exist in the nation in spite of extractive political institutions. The possible extractive political institutions may also be sub- categorized in to extreme political extraction and pluralism suppression. Under extreme political extraction the elite holder hold power without allowing a broad spectrum of the nation to participate freely and independently. The only time individuals outside their oligarchy are allowed to participate is when their deliberate intention is for the 'recruit' to act as a pawn to the oligarchy pursuant to the interests of extraction. It is also characterized by a length hold on

to power. Wherein, the governance institutions are gripped almost in perpetuity. On the side, pluralism suppression, involves a vehement suppression of civil and liberties. This though is a rarity as is with mild economic totalitarianism since, as eluded to earlier the extractive character of economic institutions flows directly from the extractive nature of governance institutions. Since the sustenance of the elite oligarchy thrives on extracting from the existing economic institutions.

From the iron law of oligarchy[11], extractive institutions as examined earlier have an incessant tendency of recreating themselves under different guises through the synergies that rolls out the vicious circle. The vicious circle implies that changing institutions is much harder than it first appears. For example the fact that the extractive regime of President Mubarak was ousted by population protest in February 2011 did not guarantee that Egypt would move on to a path to more inclusive institutions. Instead extractive institutions recreated themselves. The ousting of the elite holders of power in Egypt, who operated on an institutional exclusive and extractive governance ideology, in which civil liberties were trumped upon, the vicious perpetuation of this exclusivity carried on like a ghost incarnate. Morsy's ascension to power saw a new form of institutional exclusivity ideology take shape, that is to say political Islam under the flagship of the Muslim brotherhood. The opportunity for a critical juncture to propagate positive evolutionary change also turned out to a dead end. The immediate aftermath of the new revolution and especially November 2012 saw multiple institutional exclusivity attempts such as enacting constitutional decree and declarations that were literally exclusive of some Egyptians especially non-Muslims. The spring then became an autumn. It flared up into a regional proxy war. The parties therein where the proponents of the inclusivity theory, those that wanted to contain the institutional exclusivity theory of political Islam from spreading in to their territories and those that supported the institutional exclusivity theory of a military centered government. This goes to show the gnashing viciousness of the institutional exclusivity theory, in which the society that is occupied by institutional authoritarianism entangles itself in vicious cycle of the same even as the attempts to inclusivity are made. At such moments the growth is negative, since disorder and chaos reign supreme and hence no progressive economic activity can go on.

[11] See: Frederic P. Miller, Agnes F. Vandome, John Mc Brewster, IRON LAW OF OLIGARCHY, VDM Publishing, 2010.

So, even though it may be true that policy implementation towards inclusive institutions may be an enormous task that in some cases may not culminate in to success, this does not relegate the inclusivity theory to unfeasibility.

Thomas Friedman, the arch modernization theorist, went so far as to suggest that once a country got enough McDonald's restaurants, democracy and institutions were bound to follow.[12] So, as their incomes and educational levels continue to raise one way or another, all other good things, such as a democracy, human rights, civil liberties, and secure property rights should follow. Over the past 70years, most countries, even some with extractive institutions, have experienced some growth, and most have witnessed notable increases in the educational attainment of their workforces although it can no clearly be said that inclusive have followed naturally. Some followers of the modernization theory argue that exportation of inclusivity can aid the introduction of inclusive institutions in the countries with exclusive institutions. The Hubert Bush years in the US, were directed towards trade in the foreign relations with China.[13] The idea was that as china traded freely with the west, it would grow, and that growth would bring inclusivity, as affirmed by the theory of modernization. Yet the rapid increase in USA.-china trade since the mid 1980s has had little for Chinese institutional inclusivity and the even closer integration that is likely to follow during the next decade may do equally little.

A. *INSTITUTIONAL DIVERGENCE AND HEGEMONIC ESTABLISHMENT*

The Chinese case study does raise several interesting questions about the future of Chinese growth and, more important, the desirability and viability of authoritarian growth. By the current look of things it may be said that, Chinese growth as structured on the authoritarianism model, is finite and therefore cannot be said to sustainable. It cannot propel China for posterity. The year 2013 witnessed a general slump in the growth of china stabilizing at approximately 7% gross

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[12] See: Oliver Woshinsky, EXPLAINING POLITICS: CULTURE, INSTITUTIONS, AND POLITICAL BEHAVIOR, Routledge, 2008, at 331.

[13] The United States Foreign Broadcast Information, *Daily Report: Soviet Union, Issues 33-38*, The page 26, Service, 1989

domestic product, after a decade phenomenal double digit growth.[14] From the hypothesis, this slump is attributable to the fact that the control by governance institutions over the economic institutions of china, had for long relied on forcibly generated growth while creative destruction was impeded. The condensation of the steam of the forcible growth has ushered in the slump. The impediment of creative destruction, a characteristic feature of sustainable growth certainly had to lead to these results, for growth by its nature is not static. When the authoritarian growth limit is reached the option is only transition to inclusivity or else the country begins by having a reduced growth rate- a slow down and later a digression. Therefore the Chinese authorities to maintain the status boom must push for positive strides towards a transition. It may be the case with the advent of xi Jing ping as the new leader of China.

Through the last decade, many voices within the Chinese communist party are recognizing the dangers on the road ahead and are tossing the idea that political reform that is to say a transition from extractive institutions to more inclusive institutions-is necessary. The china trek of modern institutional history has been an evolutionary one progressing form extractive institutions to less extractive. On the face of it major radical reforms in china towards more inclusive economic institutions started in the reign of Deng Xiaoping.[15] This marked a radical departure from the more extractive institutions during the years of Chairman Mao as epitomized by the Cultural Revolution. Though the reforms are perceivable, it should also be noted that china is still firmly gripped with institutional extraction and exclusivity and the reforms that have been made are often selective and astutely skewed to ambivalence. Often instantiated when a futuristic danger hovers across the horizon. There was a real sense in 1989 during the Tiananmen Square demonstrations[16] massacre. Among many quarters the general attitude was that the incident would usher greater opening and inclusivity and perhaps even the collapse of the communist regime. Military tanks were sprung on to the demonstrators, who today in history are viewed as victims of a brutal episode in Chinese history. From then on, it might be said that Chinese

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[14] See OECD, *OECD Economic Surveys: China* , 2013.

[15] See: Wei-Wei Zhang, IDEOLOGY AND ECONOMIC REFORM UNDER DENG XIAOPING, 1978-1993, Routledge, 1996.

[16] See: Jefrry Hay, THE TIANANMEN SQUARE PROTESTS OF 1989PERSPECTIVES ON MODERN WORLD HISTORY, Greenhaven Press, 2010.

institutions became more extractive and exclusive. Reformists, such as Zhao Ziyang, who while serving as general secretary of the communist party granted support to the Tiananmen demonstrators, were punged, and the party clamped down on civil liberties and press freedom with even greater force. Zhao Ziyang was confined to house arrest for more than 13 years, and his public record was most certainly but gradually erased so that he would not suffice as a symbol even for those who longed for political change. As of today, the party's control over the media, including social media and internet is severe. Much of this is achieved through censorship: media outlets know they should not mention Zhao Ziyang or Liu Xiabo, the government critique who was demanding greater inclusivity and democratization, who is still languishing in prison after he was awarded the Nobel peace prize. In 1989, when Jiang Zemin, became the general secretary of the communist party, he pronounced himself on the party, position on entrepreneurs by labelling them as self-employed traders and peddlers [who] cheat, embezzle, bribe and evade taxation.[17] This is indeed a biased generality that connotes a thick revulsion towards inclusivity especially in the economic institutions. The big brother Orwellian censorship apparatus is used by the communist party to monitor conversations and communications, close websites and newspapers, and even selectively book access to particular new stories on the internet. A classic example was during the 2009 Hu Jintao corruption spectacle. The communist party apparatus sprang in to action and was not only able to obstruct Chinese media from covering the case but also managed to selectively block stories about the case in the New York Times and Financial Times websites.[18]

V. CONCLUSION

The Occupy Wall Street movement[19] was a reactionary force composed of a well-educated workforce as a product of inclusive institutions over time, to the pockets and specks of exclusive

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[17] See:Wei-Wei Zhang, IDEOLOGY AND ECONOMIC REFORM UNDER DENG XIAOPING, 1978-1993, Routledge, 1996

[18] See: Deibert Ronald *et al,* ACCESS CONTESTED: SECURITY, IDENTITY, AND RESISTANCE IN ASIAN CYBERSPACE, MIT Press, 2011.

[19] See: Sarah Van Gelder, THIS CHANGES EVERYTHING: OCCUPY WALL STREET AND THE 99% MOVEMENT, Berrett-Koehler Publishers, 2011.

economic institutions in the United States that culminated into the 2008 financial crisis. The 1%, 99% exposed the gnashing inequality and exclusion that was unclothed bare to the consciousness of the 99%. This goes to show that inclusivity is a work in progress and no nation can claim have accomplished the task of ensuring inclusivity in the nation. The trustees of the institutions must always look out for any scintilla of institutional exclusivity or extraction and annihilate on sight.

POLICE FORCE AS AN INSTITUTION IN THE ADMINISTRATION OF JUVENILE JUSTICE IN NIGERIA: AN EMPIRICAL DISCOURSE

Abdulraheem-Mustapha Mariam A.*

I. INTRODUCTION

Juvenile justice system is designated for children and youth and considers offences committed by children under the age of eighteen as delinquent acts rather than crimes as it is legally used for adults' offenders.[1] In line with this specialty, juvenile justice system demands police friendliness and this accounts for the philosophy that the juvenile justice institutions should act in the "best interest of the child" by promoting their well-being.

The Nigeria Police force is an important institution worth considering for juvenile justice administration in Nigeria especially at the entry point of a child offender in the administration of criminal justice. The Nigerian legal instruments recognise the establishment of the Police force for the maintenance of peace and order in the country. In the realm of juvenile justice system, the Nigerian legislations particularly Sections 207 to 211 of the Child Rights Act, (CRA), 2003 provides for the establishment of a "Specialized Children Police Unit" within the Police force for child offender in order to ensure that the child offender's first contact is well-managed in such a way as to respect his/her legal status, promote his/her well-being and avoid harm to him/her with due regard to the circumstances of the case. However, despite the enactment of the CRA, the creation of "Specialized Children Police Unit" has neither been complied with nor has there been any sufficient training and retention in paradigm of juvenile justice throughout Nigeria Police force. Hence, this study seeks to analyze the strengths and weaknesses of existing juvenile justice legislations. The study also examines the statistics relating to implementation of these laws, identifies the areas of fragmentation in the juvenile justice system and makes suggestions for a more cohesive legislation in future in Nigeria.

II. METHODOLOGY AND DESIGN OF THE STUDY

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[1] See Rendleman, D.R. *Parenspatriae*: From Chancery To Juvenile Court (1971) 23, SOUTH CAROLINA LAW REVIEW 23:205-59 in Yemi Akinseye-George, JUVENILE JUSTICE IN NIGERIA (Centre for Socio-Legal Studies, Abuja, Nigeria, 2009). See Parts XIII and XX of the Child Rights Act, 2003.

A mixed method research[2] was adopted in this study. This comprise of both qualitative and quantitative approaches. The study makes a content analysis of the adequacy or otherwise and the non-effective implementation of the existing legal and institutional frameworks on Police force in the administration of juvenile justice in Nigeria. A descriptive survey was carried out through close ended questionnaires and in-depth interviews to determine whether administration of juvenile justice in Nigeria as undertaken by the Nigeria Police force sufficiently empowered to anchor a legal regime of juvenile justice and to investigate the overall effects of non-compliance of the law on juvenile offenders in Nigeria. Frequency distributions with simple percentage were employed and the study context cut across the six geo-political zones of Nigeria.[3] Purposive sampling technique[4] was adopted and the target population was randomly selected from the Police force, parents and NGOs. Fifteen (15) key informants each from the population were sampled from each city for the purpose of administering questionnaires and 36 key informants were interviewed in the six cities of the geographical zones. A total of 180 key informants returned the questionnaire out of the selected population of 270.

A. BACKGROUND INFORMATION OF THE PARTICIPANTS QUESTIONED

Participants	Unit of Analysis	Occupation	Location
Key Informants 1-60	Juvenile and Women's Centre	Police force	Bauchi(10), Enugu (10), Ilorin (10), Kaduna (10), Lagos (10), Port

[2] A mixed method research is an approach to inquiry that combines or associates both qualitative and quantitative forms. It involves philosophical assumptions, the use of qualitative and quantitative approaches, and the mixing of both approaches in the study. It is used in this study in order to strengthen the overall results that will be greater than either qualitative or quantitative research. See Creswell, J. W., & Plano Clark, V. L., DESIGNING AND CONDUCTING MIXED METHODS RESEARCH. (2007 Thousand Oaks. CA: Sage)

[3]The cities in which the sampling was drawn include Bauchi, Enugu, Ilorin, Kaduna, Lagos and Port Harcourt. The criterion for the selection was based on the six geo-political zones of the country excluding Federal Capital Territory, Abuja and the states were founded on the fact that they were cosmopolitan and industrial cities compare to other states in each of the zones. Significantly, the rate of arrest of juvenile offenders in these cities is likely to be higher within their geographical zones.

[4] Purposive sampling technique was adopted primarily because of the non-availability of a sampling frame for the target population.

			Harcourt (10)
Key Informants 1-60	Parents	Civil servant, Business men and women, Teachers	Bauchi(10), Enugu (10), Ilorin (10), Kaduna (10), Lagos (10), Port Harcourt (10)
Key Informants 1-60	Civil Society and Children Network Organisations	Psychologist, Sociologist, Lawyers, Guidance and Counsellors	Bauchi(10), Enugu (10), Ilorin (10), Kaduna (10), Lagos (10), Port Harcourt (10)

Background Information of the Participants Interviewed

Participants	Unit of Analysis	Occupation	Location	Age
Key Informants 1-12	Juvenile and Women's Centre	Police force	Bauchi(02), Enugu (02), Ilorin (02), Kaduna (10), Lagos (02), Port Harcourt (02)	30≤45
Key Informants 1-12	Parents	Civil servant, Business men and women,	(02), Ilorin (02), Kaduna (10), Lagos (02), Port Harcourt	35≤65

		Teachers	(02)	
Key Informants 1-12	Civil Society and Children Network Organisations	Psychologist, Sociologist, Lawyers, Guidance and Counsellors	(02), Ilorin (02), Kaduna (10), Lagos (02), Port Harcourt (02)	25 ≤ 65

B. REVIEW OF LITERATURE, LEGAL AND INSTITUTIONAL FRAMEWORKS ON POLICE INSTITUTION IN THE ADMINISTRATION OF JUVENILE JUSTICE IN NIGERIA

The juvenile justice policy in Nigeria is largely governed by the constitutional mandate given under Chapter four of the Constitution[5] that guarantees special attention to children through necessary and special laws and policies that safeguard their rights.[6] The implication of this provision appears to be that the Constitution of Nigeria recognizes the vulnerable position of children and their rights to protection. However, it would seems that extant national laws that seek to translate this constitutional aspiration into reality vis-à-vis the treatment of juvenile offenders, generally and especially in custodial institutions, is limited to some specific aspects of children's rights, which are grossly inadequate as they concern other areas of human rights.[7] As the ground norm which provides basis for the government/institutions, juvenile justice administration, the rights and protection of the juvenile must be examined in the light of the Constitution.[8] It is based on this preposition that the Children and Young Persons Act and the Child Rights Act were enacted by the Federal government.

[5] See generally Chapter Four of the Constitution of the Federal Republic of Nigeria 1999, Cap C23 LFN, 2004
[6] These rights will be discussed extensively in the next section of this chapter.
[7] See Lloyd A. A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction To The African Charter On The Rights And Welfare Of The Child' (2002) 2 AFRICAN HUMAN RIGHTS LAW JOURNAL, at13.
[8] This is amply demonstrated by the Court of Appeal's decision in the celebrated case of *Karimatu Yakubu v. Alhaji Paiko* Appeal No. CA/K/80s/85 – unreported, Court of Appeal, Kaduna where the Court allowed the appeal in favour of a teenage girl on the ground that her right to consent in marriage and to marry her suitor was of paramount consideration even under the Shariah family law notwithstanding her father's right to exercise the power of Ijbar (compulsion), according to the Maliki school of Law widely followed in Northern Nigeria.

Prior to the Nigerian ratification of the Child Rights Convention (CRC)in 1991, child right issues were guided by various legislations at both Federal and State/Regional levels.[5] Notable among these were the Children and Young Persons Act, (CYPA), 1958 (as amended), the Police Act, 1979 and the Child Rights Act (CRA), 2003. The CYPA in its Section 3 deals with rights of juvenile to freedom of movement through bail. For instance, where a juvenile offender is apprehended with or without warrant by a police officer, the child is entitled to be released on bail.[9] While Section 5 of CYPA enjoins "the Inspector General of Police to make arrangements to prevent so far as practicable, a child or young person (until the age of 17) while in custody, from associating with an adult charged with an offence." This is in consonance with Article 37 (c) of CRC. This provision is to prevent the criminal contamination or indoctrination of young offenders by adult criminals. Besides, such measures are desirable for the protection of young offenders from abuse and exploitation by adult criminals. Section 4 of the Police Act, 1979 established the Police force for the maintenance of peace and order in the country and to prevent crime, apprehend criminals and prosecute the offender irrespective of whether the offender is an adult or juvenile.

Section 207 of the CRA provides for the establishment of a specialized unit of the Police force to regulate the apprehension and investigation of alleged child offenders by specially trained police officers.[10] Sections 204 to 259 deal extensively with the policy framework, institutional provisions and the procedures for Juvenile Justice Administration in Nigeria.[11] It establishes the guidelines, rules and prohibitions regarding the apprehension, treatment, judicial processes and detention of child offenders. It also makes far-reaching provisions for institutional reforms in the

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[9] It is important to note that this bail condition, however, does not apply to a person: (a) accused of homicide or other grave crimes or (b) to situation where "it is necessary in the interest of such person to remove him from association with any reputed criminal or prostitute" or (c) to a situation where "the officer has reason to believe that the release of such person would defeat the ends of justice". The last condition (c) appears too vague and may be abused to unnecessarily deny bail to young offenders.

[10]See Owasanoye B., Wenham M., Street Children and Juvenile Justice System in Lagos State of Nigeria, HUMAN DEVELOPMENT INITIATIVE. 2004, at 31. Here, the police have the first opportunity to divert child offenders from the formal Court system followed by the prosecutors and then the Magistrates and Judges who are empowered to operate a model of justice that is restorative then rehabilitative and in the least retributive.

[11] Those provisions aim at enhancing capacity and use of programmes for diversion and appropriate sentence of children by stipulating that every role player exercising discretion under the child justice system must be specially qualified and trained particularly the police, probation/social workers, Magistrates, Judges, Lawyers and any other person who makes a determination on child offenders.

police, the judicial system and social policies regarding the enforcement and protection of the rights of the child.

This study argues that despite the enactment of the CRA, the creation of "Specialized Children Police Unit" has not been complied with.[12] The facilities and services in the juvenile institutions in different States of the federation are found to be varying, lacking and there is no positive effort by the government to standardize them. There is no index of performance measurement of the institutions in the area of juvenile justice. Therefore, there is no way of knowing the quality of performance of these segments of juvenile justice. This confirms with the studies of Alemika and Chukwuma, Tamuno, Bashir, Alemika and Akano[13] that, "one of the problems of juvenile justice administration in Nigeria is that in many cases, children offenders are only taken into custody by the Police for questioning as witnesses, in which case they are not entitled to a lawyer." Besides, "the creation of special unit within the Police Force despite the enactment of the Child Rights Act has not been complied with nor has there been any sufficient training and retention in paradigm of children justice throughout Nigeria." More so "the Police force is in fact indifferent towards the laws on juvenile justice system." There are a number of incidences violating the procedure for the handling of juveniles by the police. In fact the indifference of the police towards this law is a most disappointing feature. "The basic idea of this law has not been internalized by the police due to insufficient training and orientation." "Instances of bringing the ages of juveniles into the adult range while writing the False Information Report (FIR) by the police are often heard." Handcuffing and keeping the juvenile in police lock-up are not unusual.[14] This is also in tandem with the study of Chinwe and Akpan who observed in their research findings of juvenile justice administration in Nigeria that in practice, juvenile justice administration in Nigeria is more punitive than reformative and rehabilitative.[15]

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[12] HUMAN RIGHTS MONITOR, Administration of Juvenile Justice: the Example of The Borstal Training Institution
Kaduna, 1997.

[13] Alemika E.E.O. and Chukwuma I.C., Juvenile Justice Administration in Nigeria: Philosophy and Practice,
Tamuno T.N, Bashir I. L., Alemika E. E. O. and Akano A. O., eds.) POLICING NIGERIA: PAST, PRESENT AND
FUTURE *(*Malthouse Press Ltd., Lagos, 1993).

[14] See Ahire, P. T., Native Authority Police In Northern Nigeria: End Of An Era? in Tamuno T.N *et al* (eds.), *Id.*

[15] Chinwe R. N. and Naomi E. N. A., RESEARCH FINDINGS OF JUVENILE JUSTICE ADMINISTRATION IN NIGERIA, (Constitutional Right Project, (CRP), Lagos, 2003).

This study further argues that presently, Nigeria has two types of legislation on the issues of child offender.[7] The CYPA had been in use and is still being used by some States in the administration of juvenile justice in Nigeria[8]and this hampers the uniformity of CRA on national level. The Child Rights Act prescribes for the creation of different institutions for the custody, adjudication, trial and treatment of juveniles. The non-setting up of such institutions in some states is a major setback to the successful implementation of the Child Rights Act.

III. PRESENTATION OF DATA ANALYSIS AND DISCUSSION OF FINDINGS

This section examines the fieldwork conducted in respect of the Police institution, parents and NGOs in the administration of juvenile justice in Nigeria and whether the legal and institutional frameworks are adequate and effective in addressing the challenges faced by juveniles in the Police stations in Nigeria. The respondents were required to express their opinions on a 5-point Liker type scale (5= strongly agree (SA), 4 = Agree (A), 3 = Disagree (D), 2 = Strongly Disagree (SD) and 1 = Undecided (UD)).

S/NO	ITEMS	SA	A	SD	D	UD	TOTAL
1	Respondents' views on whether there are Children Cells in Police Station in Nigeria	10 5.6%	18 10%	80 44.4%	65 36.1%	07 3.9%	180 100%
2	Respondents' views on whether Laws and Policies on the Rights of the Child are adequate to address the role of Police in juvenile justice administration	11 6.1%	14 7.8%	90 50%	60 33.3%	05 2.8%	180 100%

3	Respondents' views on whether juveniles arrested were protected against maltreatment by the Police	10 5.6%	18 10%	80 44.4%	65 36.1%	07 3.9%	180 100%
4	Respondents' views on whether the juveniles in detention are separated from adult suspects	35 19.4 %	45 25%	50 27.8%	45 25%	05 2.8%	180 100%
5	Respondents' views on whether there are adequate functional programmes in Nigerian Police stations	08 4.4%	10 5.6%	100 55.6%	60 33.3%	02 1.1%	180 100%
6	Respondents' views on whether crime control through policing and tracking of delinquent youth would help to instil discipline on the youth	100 55.6 %	60 33.3%	05 2.8%	13 7.2%	02 1.1%	180 100%
7	Respondents' views on whether exposure of youth to discipline in Police stations would curb juvenile delinquency	90 55%	60 33.3%	15 8.3%	13 7.2%	02 1.1%	180 100%
8	Respondents' views on whether the refusal to enact	90	60	14	11	05	180

	Child Right Law by some States adversely affect Police force in the administration of juvenile justice	50%	33.3%	7.8%	6.1%	2.8%	100%
9	Respondents' views on whether the enactment and implementation of Child Right Law by some states improve juvenile justice administration	100 55.6 %	60 33.3%	05 2.8%	13 7.2%	02 1.1%	180 100%
10	Respondents' views on whether there is enough Commitment by Government on Police force to anchor Juvenile Justice Administration in Nigeria	10 5.6%	11 6.1%	65 36.1%	85 47.2%	09 5%	180 100%
11	*Respondents' views on whether the Police force is adequately funded*	08 4.4%	10 5.6%	100 55.6%	60 33.3%	02 1.1%	180 100%
12	*Respondents' views on whether adequate funding of the juvenile justice institutions would have positive impact on juvenile justice administration*	90 50%	60 33.3%	14 7.8%	11 6.1%	05 2.8%	180 100%

The data presented in the table above reveals that numerically, 145 (80.5%) respondents believe that there are no children cells in the police stations in Nigeria. The implication of this finding is that children are being kept in the same cell with adult offenders. This position is also in line with the findings from the above table at another interval where the majority of the respondents representing 52.8% (95) were of the views that juveniles in detention were not separated from adults' suspects. It is interesting to listen to the concurrent statements made by some respondents about the Nigeria Police force thus: "we do not have separate police cells for child offenders; we do put them behind the counter or in an empty adult cell."[16]

The data presented in the table also reveal that majority of the respondents 83.3% (150) strongly disagree and disagree that laws and policies on the rights of the child in Nigeria are adequate to address the role of police in juvenile justice administration. This is further confirmed by some of the respondents interviewed that the effectiveness of Police force in the administration of juvenile justice in Nigeria is poor. This finding also confirms the studies of Alemika and Chukwuma, Tamuno, Bashir, Alemika and Akano[17] that, the existing laws and policies dealing with the personnel, funding and structures of Police institutions in Nigeria are inadequate. This assertion is in tandem with other findings in the table above where majority of the respondents representing 83.3% (150), 88.9% (160) at different intervals strongly disagree and disagree that there is enough commitment by government on Police force to anchor the administration of juvenile justice in Nigeria. This is so because the Police force is not adequately funded. Majority of the respondents representing 83.3% (150) from the above table strongly agree and agree that adequate funding of the juvenile justice institutions will have positive impact on juvenile justice administration in Nigeria. When the respondents were questioned on whether the refusal to enact the Child Right Law by some states adversely affects juvenile justice administration in those states, the overwhelming majority of 150 (83.3%) respondents strongly agree and agree. For example when some of the respondents were told to freely comment on

[16] Interview conducted in Bauchi, Enugu, Ilorin, Kaduna, Lagos and Port Harcourt Police Headquarters dated 12th February, 2014

[17] Alemika E.E.O. and Chukwuma I.C., Juvenile Justice Administration In Nigeria: Philosophy And Practice, in Tamuno T.N *et al* (eds.) POLICING NIGERIA: PAST, PRESENT AND FUTURE

their responses in an interview,[18]some of them said thus: "In fact, the inability to implement the Child Right Law by some states in the federation affects juvenile justice administration." This assertion is in tandem with the findings at another interval where the majority of the respondents representing 160 (88.9%) were of the views that the enactment and implementation of the Child Rights Law by some states will improve juvenile justice administration in Nigeria.

IV. CONCLUSION

Juvenile justice administration in Nigeria grossly neglect the rights of the child due to lack of adequate enforcement, monitoring and administrative mechanisms. Also, the level of implementing the Child Rights policies and rules are very low due to lack of public awareness. It is instructive to note that the coverage of the Nigerian laws on juvenile justice system is quite inadequate as a large number of children technically fall outside the purview of these laws. The empirical verification carried out by the study identified a number of areas where legal and policy frameworks are either inadequate or not enforced, creating widespread problems for children across the country.

The study contends that the significance of the law regulating juvenile justice, demands that the police are required to provide care, protection and individual assistance to child offenders including social, educational, vocational, physical, medical and psychological assistance having regard to his/her age, sex and personality. This is because any action taken by the police officer in the handling of a juvenile case has the potential to change the child's life in a positive direction. It is this study's argument that this will only be possible when there are special units within the Police force and there are officials specially skilled in handling juvenile cases as contemplated by the CRA.[19]

V. RECOMMENDATIONS

1 There is need to have a 'child-friendly' juvenile justice system with appropriate procedures and protocols in place for the Police to ensure the protection of juveniles and to ensure that the system works in the best interest of the child.

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[18] Interviews conducted in Ilorin dated 18th and 20th February, 2014

[19] See Ahire, P. T., NATIVE AUTHORITY POLICE IN NORTHERN NIGERIA: END OF AN ERA? in Tamuno T.N, *et al* (eds.), supra.

2. As a matter of urgency the federal and state governments must commence capacity-building programmes for the development of a new, informed and well-motivated corps of Police officers with specialized skills for administering the provisions of the Child Rights Act or Child Rights Law as the case may be.
3. Efforts at enforcement of Nigerian Laws on Child Rights have been hampered by factors such as inadequate trained work force, low-level infrastructure, lack of awareness, wrong interpretation of laws by enforcement officers and paucity of funds. The challenge for the Government, therefore, is to provide adequate infrastructure in order to enhance the capacity of relevant state officials to enforce the law.

4. Government should adequately strengthen the existing laws and policies dealing with the personnel, funding and structures of juvenile custodial institutions in Nigeria while government should ensure sufficient budgetary allocations for juvenile justice administration in Nigeria.

5. States that have not enacted the Child Rights Law should be encouraged to do so in order to ensure adequate juvenile justice administration in Nigeria.

THE LAW AS A TOOL FOR SOCIETAL TRANSFORMATION*

Ocen George**

ABSTRACT

This essay is in agreement with the assertion that Law is a vital and an effective tool of transformation in society. The arguments are premised on the economic social and political aspects zeroing down onto national security, a defective justice system, the banking sector and gender issues, defects in the social justice system. There is an analysis of the situation outside Uganda and then a conclusion.

I. INTRODUCTION

It behooves one to start this article with an exposition of what 'societal transformation' means. It would be barely helpful to handle every word of that phrase singly because they are generally commonplace. Societal transformation merits definition only because it is the gist of this essay, and as such, we have seen no better definition than that by professor Kakooza. It would be adulteration to substitute any words of our own. He says, "(societal transformation) is an evolution in or of a given society from one state of affairs to another in that same society. I take this evolution to be pragmatic, progressive, meaningful and durable."[1]

He further urges that transformation of society cannot occur by chance but must be based on policy and implementation strategies religiously executed by the authorities concerned.[2] The denotation in 'policies' and strategies is an aspect of involvement of the law in societal transformation. Statutes, cases and decrees are all indispensable in setting out policies and also in guaranteeing their effective implementation. As a rejoinder at this point, what aspects of society need to be taken from one state of affairs to another? In our opinion these are the political, social and economic aspects. For convenience we shall concentrate on Uganda, the law as a tool has transformed her in these ways:

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[1] Kakooza M.N, RELEVANCY OF LAWYERS IN TRANSFORMATION OF SOCIETY,KIU Publishers,Kampala:2004,p.2

[2] *Id.,* at 2.

II. POLITICAL ASPECTS

'The pearl of Africa', that was Uganda in a colonialist's eyes until it became stained by blood. *Pearl of Blood*[3] is a report on the post-independence atrocities in Uganda. Detention without trial, arbitrary murders and total lawlessness are mere euphemisms for the savagery that had engulfed the political sphere of the nation: an officer of the law too angry to whip someone cuts off a piece of their buttocks and forces the prisoner to eat it[4]; or he passes a machete lightly on a prisoner's skin and the officer himself licks off the blood[5]; or still a deranged young militant screams I am *nyangawu* (Swahili for hyena) and pleads with his superiors that they should let him kill someone (who he specifically identifies by name).[6] However, "recalling our history which has been characterized by political instability[7]" and these non- fictitious happenings the 1995 constitution was passed. Today we can travel across the nation in the night without a fear of being forced *en route* to disembark by ramshackle looking officers and assaulted on basis of our tribal backgrounds, this constitution in Kanyeihamba JSC's words, 'is the alpha and omega of anything organized and decent in Uganda.'[8] This fulfils transformation and the law is the effective mantle throughout.

The decline into savagery above was markedly realized in the 1971-1979 regime of Idi Amin Dada. However, the human rights and personal dignity violations in the preceding and proceeding regimes of Apollo Obote cannot be under looked. *Uganda v. Commissioner of Prisons*Ex Parte*Matovu* was decided in the wake of the 1966 constitutional crisis. The offence committed by one Matovu was being vocal in Lukiko session. Needless to say the victim was held incommunicado under emergency regulations of disputed validity. On this question of validity Sir Udo Udoma set a precedent of validating unconstitutional changes of government in Africa. Sir Udo Udoma was a celebrated champion of the African struggle against white domination in his native Nigeria. It can be stated that he was a Pan Africanist of the truest description. Yet we submit that faced with the stern dictatorship of Obote, he compromised. As a result he undid what he had done, that is, he polluted the self-rule for which he had so earnestly

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[3] The Uganda Commission of Inquiry into the Violation of Human Rights, *Pearl of Blood,* UPPC, Entebbe:1994
[4] *Id*., at 19.
[5] *Id*., at 46.
[6] *Id*., at 15.
[7] Quotation from the Preamble of the 1995 Constitution.
[8]Kanyeihamba JSC in The Presidential Election Petition of 2006

fought back in Nigeria especially in its South Eastern area of Ibibo.[9] It is like the proverbial killing of the person you rescued at sea. That was the Ugandan society then, characterized by compromise of values for survival's sake. Those who stuck to it, namely Benedicto Kiwanuka, disappeared never to be seen.

The tool used to establish the status quo then was the theory of *a revolution in law* as propounded by Hans Kelsen.[10] Every change of government in Uganda in the face of any existing constitution has not been as envisaged by that constitution. The *Udoma validation* has been a comely fallback position for the sitting courts in case any challenge is brought. This was witnessed in Tinyefunza v Attorney General. In the legal and political sphere, this precedent therefore lurks like a ghost that needs to be expunged. Professor Joe Oloka Onyango has taken an undeniably personal dedication to captain the ghost busters in the band heading to exterminate these ghosts. This is evident in his 1995 paper titled *Expunging the Ghost of Ex Parte Matovu*, and very recently in his inaugural lecture titled *Ghosts and the Law*[11]. Both pieces are critical of doctrines that becloud judges' minds and or that restrict their discretions. In all, *Ex parte* Matovu is of pivotal concern. These have been published by the newspapers of highest circulation, public awareness of this aspect is not naturally expected in non-lawyers, but such publication has made it possible. The doctrine of political question is nearly defeated (as will be shown shortly); with such efforts as above we suggest that society will soon be bereft of the haunting by the *Ex parte* Matovu ghost.

III. ECONOMIC ASPECTS

In the economic realm, it was the presidential Decree that expelled Asians and appropriated their assets to blacks that saw the sky rocketing of inflation in Uganda. The early 1990s were distressed by collapses of several banks and in Professor Mukubwa's words 'these affected not only individual entrepreneurs but the economy as a whole. Besides, the taxpayers had to foot the

[9] Udo Udoma, IN THE SHELTER OF THE ELEPHANT ROCK, Nigerian Village Square, Ibibo, 2009.

[10] Kelsen, H. (1945) GENERAL THEORY OF THE LAW AND STATE, trans. A. Wedberg, repr. 1961. New York: Russell and Russell

[11] Oloka-Onyango. (2015), GHOSTS AND THE LAW: AN INAUGURAL LECTURE, Makerere University Printery: Kampala

repayment of the customers who had lost their deposits in the fallen banks.'[12] Ever since the enactment of the Financial Institutions Act 2004 not a single Ugandan has lost a penny due to collapse of a bank. Insider lending, over much risky ventures among other factors that cause banks to collapse have been ironed out. As a result Uganda's per capita growth is constant and inflation is not double digit again. Our economy is surely strides away from where it lay rotting a little while ago because one man decrees operate no more, but constitutionally debated statutes.

IV. SOCIAL ASPECTS

Mwalimu Julius Nyerere in 1984 painted the picture of Africa as he saw it then, speaking of women he said, 'women in Africa toil all their lives on land that they do not own, to produce what they do not control, and at the end of the marriage through divorce or death, they can be sent away empty handed."[13] Our society is undeniably structured along lines of patriarchy. Professor Sylvia Tamale etches the point that patriarchy and capitalism are the major aspects of the contemporary society; she states that the two service each other. This maintains the status quo of subjugation of women. The male reign supreme and equality is practically dispensed with. The women are not compensated for labours expended within the home. The husbands being poorly paid under capitalism have their frustration mitigated by the unpaid labour of wives which aids them to run the home.[14] Arthur Larok[15] exposes the truth and ugliness thereof as contained in this proposition; ' if she opens the gate for you, call it gateman and add a salary to it, if she cooks for you call it chef and attach a salary to it, if she washes call it laundry girl and attach a salary to it as well.' This proposition could extend to several paragraphs leading but to one conclusion; the average man would not be able to afford the woman's services if it were translated to monetary terms. Yet after *FIDA Uganda v. AG*, and *Law and Advocacy for Women in Uganda v. AG* cases, the equality and equity values that were first espoused in the constitution[16] gained conscious and pragmatic application. Women can now plead same grounds

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[12] Mukubwa G.P Tumwine, ESSAYS IN AFRICAN BANKING LAW AND PRACTICE, Fountain Publishers, Kampala 2009,
at 12.

[13] Tanzanian President Julius Kambarage Nyerere, African Preparatory Conference, Third World Conference on Women, 1984.

[14] Tamale,S. (2015) Family Law Lecture Series, Makerere University.

[15] Larok, A, MARRIAGE AND DIVORCE BILL: A CIVIL SOCIETY PERSPECTIVE, Kampala, 2010

[16] Articles 21, 31,32 and 33.

for divorce as men, bride inheritance is outlawed. The affirmative action has enabled many to access university education and deliberate inclusion of women Members of Parliament has placed them in the political field. Today therefore they are sufficiently empowered to purchase their own necessities, to some extent. Affirmative action is gradually lifting the girl-child from her quagmire of early and or forced marriage and of non-existent property rights among others. Total upliftment is still afar off. With operation of the Law Reform Commission and the parliament, we are insured that achievement of emancipation as much as is a hard battle; is not just a mirage.

The contemporary mindset of Ugandans on rape among married couples is amusing and alarming at the same time. Their interpretation of it is thus, 'during the act, every after two minutes, for those of us who last longer than that, you should ask her, "baby are you fine?" because she may withdraw her consent at any time and anything thereafter becomes rape.' By this absurdity their object is to allegorize the fact that legislation against marital rape is devoid of practical sense. 'The "I do" by the Alter [in Uganda] means sex anyplace, anytime, anyhow.' The sentiment in the first quote is of a Member of Parliament who is part of the elite of society; we suggest that the same exist among the non-elite in awful and cruder ways. We are of the mind that if a law or a decision pushes a country in the direction it was already going then the large societal forces will operate almost absolutely in its favour. So resolutely does society abhor counter progressive laws, or those that transplant undesirable 'western standards' to it. We are headed towards an ambiguous place where Ugandans are committed to both woman emancipation and patriarchy: we may not mind female representation and or a female speaker of parliament, but we just cannot ingest the definition of marital rape. What then is the way forward? The patriarchal construct of society and the chauvinistic construct of minds can only be defeated by one means- the compulsion of the law as backed by efficient sanctions. Those in adversity to provisions of such a law are to be caught up in the vortex of massive approval by the rest of society. This approval is guaranteed by the fact that a majority trust is assumed from the populace in the government to make good laws─laws that lead not necessarily where they want to go, but where they ought to go. Clause 114(1)(2) of the Marriage and Divorce Bill places a sanction on marital rape. If this is passed into law its adversaries will realize that such patriarchy leaves women languishing in the gutter of trauma where there is meant to be pleasure, that is, in

sexual intercourse; this bill must be passed into law and society shall be miraculously transformed.

One of the validation points of the ex parte Matovu precedent was the political question doctrine; it was then used to deny a citizen his civil and political rights. However, the effect of this doctrine over the years has been to deprive people of their social, economic and cultural rights (SECRs). The constitutional court was challenged to decide whether the right to health existed in Uganda. In light of exasperating negligence by government servants leading to deaths of mothers expecting and those in labour, CEHURD was moved to bring this application against the Attorney General[17]. The court refused to pronounce itself on this issue. We searched for the rationale of its decision in the realms of innate wisdom; (with due respect) it was nowhere to be seen. On further search, in between lines of the judgment, lo and behold! There it was hidden in the ambit of the political question doctrine. Because provision of health services was governed by government policy, the court would not meddle in government business. 'The court could not review and implement…health policies.' By the strike of that pen Uganda was condemned to non-functional hospitals deprived of beds, machines, water, light, personnel among others. Impunity was orchestrated in favour of the government. The status quo in health facilities, which was (is) admittedly appalling was impliedly approved and why? Because it was a political question, and so being, it was to be determined by other arms and not the legislature.

This particular case (at the time of writing) is to be reviewed by the court again as per a directive of the Supreme Court.[18] Here there is visible a ray of hope. The Supreme Court expresses sentiments in assumable sympathy to the merits that were ignored by the lower court. For instance, the lower court held that issues raised showed no requirement for constitutional interpretation. The Supreme Court however seems to think that some acts and omissions of the government in this particular case can be questioned on whether or not they violated the constitution. With the authority of Article 137 it therefore ordered a retrial on the merits. If perhaps the lower court rules against the merits, that ruling is very likely to be overturned. And if it is overturned, the spectacle is very pleasant to envisage: a Uganda where government is compelled by courts to improve health provision and services. The maternal mortality of 310 per

[17] *CEHURD and Others v. Attorney General,* 2011.
[18] *CEHURD and Others v. Attorney General.* SCA No.1 of 2013.

100000 live births[19] could be reduced to negligible. This is embedded only in imagination for now; it is a pleasant case of how the law would transform a social aspect of society. This has worked elsewhere as will shortly be shown, it therefore is not a wild goose chase, nor a childish fantasy.

V. THE STORY ELSEWHERE

The comparative analysis with other countries is an interesting study. In Uganda corporal punishment was outlawed. Singapore however is world renowned for its strict enforcement of corporal punishment as a sanction. In the1970s an American boy was sentenced in Singapore tothree months in jail and six (6) strokes of the cane for rowdy behaviour. The American press and government pressed hard on Singapore and the boy was not caned. On his return he resumed his brutality and exercised it even on his father. Singapore at the time had the lowest rate of petty crimes in the world arguably because corporal punishment is feared.[20] The Singaporeans of the war period were hooligans just like any other nationality; this punishment is what has put them astride others. In Uganda, the reverse is true.

In south Africa the government has been successfully compelled to supply housing for the homeless and has been successfully obliged to step up medical services to her citizens in Rwanda 64 percent of the National Assembly is female and therefore it has the most emancipated parliament in the world. All were achieved by laws in statutes and or as handed down by the courts. In the United States, the case of *Brown v. Board of Education* as well as other statutes and regulations legislated against segregation and led to integrated schools.

VI. CONCLUSION

Much as Uganda has had a despicable past, there has been an obvious improvement in the nature and effectiveness of her laws. As such, the social, economic and political situations prevailing today are so much better than those that prevailed in early post-colonial times. The decrees of the 1970s are not in the least as desirable as the 1995 Constitution. Therefore, although flaws exist, our gaze is still fixed on the same laws that permit them to remedy them through

[19] United Nations Statistics, 2010.
[20] Kuan Yew, L. FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY:1965-2000, Harper Collins: New York, 2000

amendment, fresh enactment or through efficient implementation. World over speculation is rife as to whether this avenue will ever attain perfection. Some have likened the assumption of perfection of law to be something of Canute quality, referring to the Anglo-Saxon King who ordered the sea waves to stop. We reserve any opinion on that, but state emphatically that for transformation of society, the law is indispensible.

"THEY'VE SAID TOO MUCH!" THE SUB JUDICE RULE: DO WE STILL NEED THIS LAW IN UGANDA TODAY?

Kagere Judith Babirye*

ABSTRACT

"*A free press can, of course, be good or bad, but most certainly without freedom, the press will never be anything but bad."- Albert Camus.*

This article entails an analysis of the Sub judice rule in Uganda; it's legal framework, how it affects the laws on freedom of expression, access to information, and the media. To understand the Sub judice rule, one needs to have a critical look at freedom of expression and access to information alongside the Independence of the Judiciary in Uganda. Only then will one see how irrelevant this law has become.

I. THE LAW ON FREEDOM OF EXPRESSION IN UGANDA

The Ugandan Constitution[1] upholds the rights of media and right to access information in Articles 29 and 41. Article 29(1) [a] provides that every person shall have the right to freedom of speech and expression to include freedoms of the press and other media; Article 41 in turn, states every citizen has the right to access information in the possession of the state or any other agency of the state except where the release of the information is likely to prejudice the security or the sovereignty of the state or interfere with the right to privacy of any other person. In addition, in laying out its principles and objectives, it directs "all organs and agencies of the state, all citizens, organizations and other bodies and other bodies and persons in applying or interpreting the Constitution [to act] for the establishment and promotion of a just, free and democratic society." This is also the rationale behind the Access to Information Regulations[2], 2011 & The Press and Journalist Act.

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[1]Uganda Constitution 1995.

[2]Access to Information Act.

International instruments that uphold the right to freedom of expression include; the European Convention on Human Rights[3], in Article 10 that declares the freedom of expression and to hold opinions and impart ideas without interference, Article 19 of the International Convention on Civil and Political rights further emphasizes this by stating; Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Similarly in the JOINT DECLARATION by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression and Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information and in Article 19 of the Universal Declaration of Human Rights. The USA, also includes the freedom of expression in their First Amendment Rights.[4]

Freedom of expression has been upheld in judicial decisions of *Charles Onyango Obbo v AG, David Tunyeifuza v. AG*; Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participation in the democratic process and in order to enable him to intelligently exercise his right to make a choice, free and general discussion of pubic matters is absolutely essential. Everyone has a fundamental right to for his own opinion on any issue of general concern. He can form and inform by any legitimate means.

II. JUDICIAL INDEPENDENCE

Judicial independence has been defined as the assumption that judges are not subject to pressure ad influence and they make impartial decisions based solely on the evidence and law[5]. The notion of Judicial Independence can be said to be of utmost importance in upholding the function of the Judiciary. Judges are seen to be very impartial when carrying out their duties; ruling on

[3]European Convention on Human Rights.
[4]USA Constitution.
[5]Durhaim's Law dictionary.

the Law, facts, and evidence. Judicial Independence is guaranteed in Article 128 of the Constitution.

The extent of Judicial Independence can not only be seen through court decisions[6], but an analysis of the judicial structure as a whole, from appointment of judicial officers that fit the proper criteria of Chapter Eight of our Constitution, the office of the Judicial Service Commission in Article 146; their remunerations, tenures and oaths. The public must have confidence in the judiciary system; Justice must not only be done, but seen to be done. The Uganda Judicial Code of Conduct emphasizes this by stating how judicial officers should maintain the values and principles of Independence, Impartiality, Integrity, Propriety, Competence & Diligence and Equality. It is also upheld in the Security of tenure[7] and remunerations of the Judges.

Article 144 stipulates that judges can only be removed from office by the President on grounds of inability to perform their functions arising from infirmity of body or mind, misbehavior, misconduct or incompetence. The Court system structure as laid out in Chapter Eight[8] further safeguards independence of the Judiciary with the Supreme Court[9] as the final court of Appeal, the Court of Appeal which doubles as the Constitutional court[10] and the High Court having original appellant jurisdiction.[11]

Judicial Independence in itself over rules the Sub judice rule. Judges are Independent and impartial, so how can it be explained that their decisions will be influenced by reporting of court proceedings and public knowledge of the case before court? In this way, the sub judice rule is seen to only affect the rights of freedom of Expression. Uganda, in addition, does not have the jury system, so it is difficult to see how the judge in court cases may be influenced to become partial.

III. THE SUB JUDICE RULE

[6]Judicial Independence Undermined;- A Report on Uganda. International Bar Association September 2007.
[7]Article 144; tenure of office of judicial officers.
[8]Article 129; the Courts of Judicature.
[9]Article 132; Jurisdiction of the Supreme Court.
[10]Article 137; Questions as to the interpretation of the Constitution.
[11]Article 139; Jurisdiction of the High Court.

The sub judice rule regulates the publication of matters which are under consideration by the court. Unless a case is active, there is no risk of committing strict liability contempt, but it is important to remember that 'activity' is a necessary and not a sufficient condition. Stories can be written, even about active cases, as long as they do not pose a substantial risk of serious prejudice.[12] In law, *sub judice*, Latin for "under judgment", means that a particular case or matter is under trial or being considered by a judge or court. The term may be used synonymously with "the present case" or "the case at bar" by some lawyers. In England and Wales, Ireland, New Zealand, Australia, South Africa, Bangladesh, India, Pakistan, Canada, Sri Lanka and Israel it is generally considered inappropriate to comment publicly on cases *sub judice*, which can be an offence in itself, leading to contempt of court proceedings. This is particularly true in criminal cases, where publicly discussing cases *sub judice* may constitute interference with due process.[13]

In English law, the term was correctly used to describe material which would prejudice court proceedings by publication before 1981. *Sub judice* is now irrelevant to journalists because of the introduction of the Contempt of Court Act 1981. Under Section 2 of the Act, a substantial risk of serious prejudice can only be created by a media report when proceedings are active. Proceedings become active when there is an arrest, oral charge, issue of a warrant, or a summons.

The rule of Sub judice is intended to achieve a fair trial; its rationale is the protection of dignity of courts and their integrity so public has more confidence in their decisions.[14]

In Uganda, there seems to be no one principle statute dealing with operation of the Sub judice rule. It is important to take a look at how other countries have treated the Sub judice rule.

A. SOUTH AFRICA

In South Africa, the basic rule was that anyone who published a statement which had the *tendency* of influencing the merits of a pending court matter was guilty of the offence of

[12] MEDIA LAW: The rights of Journalists & Broadcasters Goeffrey Robertson & Andrew GL Nicol 2nd ED 1990.
[13] A ''comment'' on ''NO comment'': the Sub judice rule and accountability of judicial officials in the 21st century; Lorne Sossin.
[14] AG v. Times newspaper 1991 2 WLR 994.

contempt of court. The South African Supreme Court of Appeal in 2007 espoused a much more lenient approach to the rule in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions.*[15] Its approach was based on the fundamental right of freedom of expression which, as from 1994, provides substantially more freedom than in the apartheid years. In pre-constitutional times, an act of parliament could not be declared invalid on grounds that it was in conflict with basic human rights, parliament having been the supreme legislative body. Under the 1994 and 1996 Constitution, parliament is no longer sovereign. The Constitution, as applied by the Constitutional Court, is the highest source of rights and duties.

In the *Midi* matter the Cape Director of Public Prosecutions demanded that Midi Television provide it with film footage relating to a murder, which Midi had in its possession. Midi was not willing to do so and the Cape High Court ordered it to hand the footage to the director. Midi appealed to the Supreme Court of Appeal arguing that it was under no legal obligation to hand the footage to the prosecution. The Supreme Court of Appeal upheld the appeal and stated that there was no law which compelled the broadcaster to hand the footage to the prosecution.

In its judgment the Supreme Court of Appeal, however, also expressed a view on the influence of the constitutional right to freedom of expression, introduced in 1994, on the sub judice rule.

B. KENYA

In Kenya, the ruling by Justice Isaack Lenaola, barring public discussions on whether the two Ocampo suspects should or should not vie for presidency after their cases were confirmed by the ICC, clearly demonstrated how old rules can undermine the rights and fundamental freedoms as laid down in their Bill of Rights; a key chapter of their new Constitution. Judge Lenaola ruled that anyone who feels aggrieved by the order should present himself at court on 17th February 2012 when the case comes up for motion. This leaves a paradox; the suspects can tell the public about their intentions for Presidency since they have not been injuncted, but the public cannot discuss the merits or demerits of their candidacy since this is sub judice; and risks being jailed for a period not more than six months. A rather sad outcome for a country that has come so far.[16]

C. The USA

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[15] 2007 5 SA 540 (SCA).
[16] Allafrica.com Kenya: Sub judice rule an Impediment 6 February 2012.

In The United States, the freedoms of expression have been indisputably upheld in the First Amendment of the USA constitution. It is on this premise that the United States holds extremely wide latitudes for the criticism of court and sub judice rule. The USA discarded the offence of "scandalizing the court" and has since the decision in *Schenk v. United States*[17] preferred to apply the test of "clear and imminent danger" when the question of free speech and courts is evoked.[18] This is because their Constitution upholds the freedom of expression above the compromise of impartiality of the court officials. Section 401 of the United States Constitution declares that court has no power to punish constructive contempt, words spoken or written other than those uttered in or very near court and resistance to any lawful writ, process of order of the court.[19]

D. UGANDA

In Uganda, the Rules of Procedure of the Parliament of Uganda[20] Rule 64(5) on sub judice states that: the Speaker shall make a ruling as to whether a matter is sub judice or not before debate or investigations can continue. Under sub section 2 of the same rule, "A matter shall be considered sub judice if it refers to active criminal or civil proceedings and in the opinion of the Speaker, the discussion of such matters is likely to prejudice its fair determination."

Rule 9 of Code of Conduct for judges, magistrates and other judicial officers states that judges or magistrates should strictly adhere to the sub judice rule. They should not discuss court matters that are pending in any court and should discriminate other persons from doing so.

In case law, sub judice rule was emphasized in court in the cases of Joseph *Zygenda v. Uganda.*[21] Court stated, A subordinate court is bound by the rules of SUBJUDICE once a suit filed prior to the complaint is pending hearing a fortiori it arises from malicious and vexatious complaints. In Alternative Dispute Resolution cases, it was discussed in the case of *Dott Services Ltd v. Attorney General* where it was held that That CAD/ARB/25/2012 is sub judice in view of the pendency of Misc. Applications 88 & 87/2013 in view of the insistence of the Arbitrators to

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[17](1919) 249 UD 47.
[18]Vinod A. Bode, Scandalsing the court (2003) 8 SCC (Jour) 32.
[19]Section 401 USA Constitution.
[20]Rules of procedure for Parliament 2006.
[21]Cr. Appeal No.15 1989

conduct the said proceedings and even proceed to set the date for delivery of the award the Arbitrators are in violation of the *Sub judice* rule. The case of *Kizza Besigye v. AG*[22] is another elaborate example.

Recently in Parliament, the DPP wrote a protest note to the Speaker[23] claiming that the investigations into the OPM matter breaches the sub judice rule because principal suspects like former principal accountant Geoffrey Kazinda[24] and others were already committed to court.

[22]Const. Petition No. 7 2007.
[23]Kadaga orders PAC to halt OPM Probe. www.newvision.co.ug
[24]H/C Anti Corruption Div. 2012.

THE NEXUS BETWEEN TAX POLICY AND SOCIO-ECONOMIC TRANSFORMATION: UGANDA'S DILEMMA

Muhereza Allan Murangira*

ABSTRACT

It is often averred that tax is the price we pay for civilization, therein underlines the principle that for any society to transform from one stage of development to another, a cost must be paid. I seek to examine the aspect of tax as the price we pay for the social economic transformation in Uganda. World over, any policy implementation is done through laws, therefore the need to examine Uganda's tax legal regime as a tool to implement the tax policy aimed at fostering socio economic transformation. Tax is sources of revenue in Uganda but is also used to promote strategic activities like investment, encourage exporting, and reduce inequality among others. Uganda's tax policy in many ways facilitates revenue loss through inter alia allowing tax avoidance and evasion, tax incentives and exemptions, poorly negotiated double tax treaties. This in turn leads to frustrated socio-economic transformation. Thus if Uganda is to fast track on its development plan of transforming Uganda into a middle income country by 2020, then it has to rigorously review its tax policy and laws.

I. INTRODUCTION

Uganda has no formal written tax policy[1]but one is now being developed at the ministry of Finance. However, the informal tax policy in Uganda is tailored to cover regional and international tax practices[2], broadening the tax base[3], closing loopholes in the International tax rules[4], strengthening tax administration (registration, assessment, auditing, enforcement of

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[1] Gerald Namoma, Uganda's Tax Policy, Ministry of Finance paper presentation

[2] For example the East African Customs Management Act that governs customs duty in the East African Community of which Uganda is a member.

[3] Like the recent amendments in the Income and VAT laws raising the income and Turnover thresholds to 150million shillings to cater for the large informal sector that do not fall within the regular taxation methods.

[4]On the 4th November 2015, Uganda signed the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters,* an international instrument against offshore tax evasion and avoidance. (becoming the 8th country to do so in Africa and the 90th in the world).

collection, dispute resolution, *inter alia.*)[5] And tax incentives (Exemptions, deductions, Credits, rebates *inter alia.)* The tax policy[6] in Uganda is enforced through tax laws; a good tax system should be defined so as to meet the requirements of equity in burden distribution and efficiency in resource use[7]. It is therefore important to know how the tax policy has affected the collection of revenue which in turn is used to fund government programs, income inequality (increase of decrease thereof), and the promotion (or demotion) of economic activities which all facilitators of socio-economic transformation.

II. TAX LEGAL REGIME IN UGANDA

The 1995 Ugandan Constitution as amended provides that's taxes can only be imposed with an Act of parliament[8] and where the any person or authority is given powers to waive or exempt tax, parliament shall play an oversight role as by law provided.[9] Therefore taxes are creatures of statutes. The Uganda Tax system broadly comprises of income tax, taxes on services and transactions, on local production, and foreign trade.[10] And these four broad categories of taxes are imposed by tax laws[11] as required law. Besides the constitution are tax laws[12]in form of Acts of parliament. These are used to enforce whatever policy the government intends to apply in Tax management. It is important to note that in 2014, parliament enacted a law to provide for a Code to regulate the procedures for the administration of specified tax laws in Uganda and to harmonise and consolidate the tax procedures under existing tax law[13]. Thus easing tax administration, there are Regulations and guidelines under the respective tax Acts all with the same sole purpose of making the administration of tax collection easier.

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[5] Parliament enacted the Tax Procedure Code Act 2014 to cater for all the procedural law related to administering of all taxes in Uganda. This is to enable the Uganda Revenue Authority to easily and effectively administer all taxes under the same law.
[6] Tax policy refers to the choice of tax instruments, the rates at which taxes are set, the nature of exemptions and the assignment of taxes to different levels of government.
[7]UGANDA'S TAXATION POLICY: Implications for Poverty Reduction and Economic Growth, Review Report No. 9, September 2008
[8] Article 152 (1), 1995 Constitution as Amended
[9] Ibid. Article 152 (2)
[10] David J. Bakibinga, REVENUE LAW IN UGANDA, Law Africa Publishing (U) Ltd. 2012 edition, pg 10
[11] Income Tax Act as amended, Cap 340
[12] Ibid, Income Tax Act, Excise and Duty management Act, Value Added Tax Act, *inter alia*.
[13] The Preamble, Tax Procedure Code Act 2014

III. HOW TAX POLICY AIDS (OR DERAILS) SOCIO-ECONOMIC TRANSFORMATION

A. *TAX AS A SOURCE OF REVENUE*

Tax is one of the main sources of government revenue contributing up to about 75% to the national budget 2014/2015[14] most revenue monies go to funding social welfare programs that eventually facilitates social and economic change. However Uganda's tax revenue to GDP remains at 15%[15], a figure that is so low compared to our neighbours. *Ceteris paribus*, an increase in tax revenue should ordinarily lead to social economic change since more government programs like infrastructural development, health and education (these are essential to the human resource), and maintaining peace and security would be funded; which when all taken together would create an enabling environment for people to prosper. Therefore in a bid to increase government revenue through taxation, government has undertaken major tax policy reviews to increase the tax bases which include *inter alia*tapping into the informal sector.[16] And increasing taxes on certain commodities and introducing new ones where they weren't initially there. Since taxes are creatures of statues, tax laws are often amended or enacted to cater for this change.

However, these measures undertaken to increase the tax base have in one way or the other also caused stagnation in development. Most indirect taxes are inherently regressive, that is, they make the low income earners pay more than their high net wealth counterparts, thus an increase on imposition of indirect taxes on essential commodities leave majority of the people with less disposable income which translates thus less transaction, thus legally promoting inequality. Our tax laws further are not strong enough to handle tax evasion (all those activities which are responsible for a person not paying the tax that the existing law charge) and avoidance (some act by which a person arranges his affairs that he is liable to pay less tax than he would have paid but

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[14] NATIONAL BUDGET FRAMEWORK PAPER FY 2014/15- FY 2018/19, Pg 44

[15] Ibid

[16] The increasing of the Turnover threshold from 50million-150million shilling for informal presumptive taxpayers was to cover taxpayers that fall within that range that the formal taxation system would ordinarily apply to. In addition to that, The Uganda Revenue Authority in the process of registering traders in the informal sector for Tax Identification Numbers (TIN) so as to facilitate tax administration.

for the arrangement[17]) thus leaving a lot of money outside what is taxable and in the end, government is forced to borrow money which the people have to pay back at an interest.[18]

B. TAX AS TOOL OF REDISTRIBUTION ON INCOME

Tax is one of the ways government uses to redistribute income from the high net worth persons to poor persons. This is done through a progressive taxation system where persons pay according to their capabilities, that is, the rich pay more than the poor. The money realized from the said tax would then go on and be used to provide welfare services like education and health. However, trends show that there is a study decrease in trade taxes and an increased reliance on indirect taxes[19]and as seen earlier, indirect taxes are inherently regressive in nature and thus eventually promote inequality than stop it. Secondly, when high net income persons avoid and evade tax through illicit financial flows schemes like transfer pricing (mainly done by multinational corporations), money laundering *inter alia,* the tax burden thus shifts to the poor that can be indirectly taxed. This eventually leaves the rich richer and the poor poorer. An example can be seen in the recent amendments that raise the presumptive taxable turnover from 50million to 150million Ug Shillings. This enables a person pay 1.5% of the turnover (125m-150m Ug Shs) or 2,062500 Ug Shs[20] yet a person that earn 150m Ug Shs being taxed in the regular way[21] would definitely pay much. Needless to say that a person that earns about 150m Ug Shs is not a poor person thus the generosity of the law as per what they pay is to the detriment of the poor thus increasing income inequality.

C. TAX AS TOOL TO PROMOTE (OR DEMOTE) OF ECONOMIC ACTIVITIES

Here my major focus will center on tax incentives as an example and restrictive taxes on commodities the government considers harmful. Tax being one of the costs business incurs, governments often use it encourage economic activities by granting tax incentives with the intention of stimulating investment in the country. Tax incentives and exemptions are revenue forgone by the government in order so as to encourage investment. These are mainly provided

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[17] David J. Bakibinga, REVENUE LAW IN UGANDA, LawAfrica 2012, at 195.
[18] Six trillion shilling (about 25% of the entire national budget)was included in the 2015/16 budget to pay government debts
[19] Tax Justice Network-Africa, *Africa Rising?- Inequalities and the Essential role of fair taxation*, at 54.
[20] Income Tax Act, Cap 340, Section 4(5), and Part I of the Second Schedule.
[21] Ibid, Section 4(1).

for under the Investment Code, 1991, the Income Tax Act and the Value Added Tax Act.[22] The Income Tax Act (ITA) specifies businesses and individuals that are exempt from corporate income tax and withholding tax[23]. Most significantly, Companies exporting finished consumer and capital goods – when exports account for at least 80% of production – are exempt from corporate income tax for ten years among others. Tax incentives are also granted in Uganda's extractive sector to which the oil sector is now a constituent. Many a time government signs agreements with companies guaranteeing them either fewer taxes or no taxes at all in order for them to establish business in Uganda. In a bid for government to win over investors from her other neighbouring 'competitors', government has legislated to give companies lower tax rates or signed agreements with the same force of law under international law through the doctrine of *Pacta Sunt Servanda.* This competition has led to what experts call the 'race to the bottom'[24]where countries in East Africa are reducing their tax rates towards zero so as to attract investors. Tax incentives result in a loss of current and future tax revenue, create differences in effective tax rates and thus distortions between activities that are subsidized and those that are not, could require large administrative resources[25]*inter alia*. And in many cases, companies do not invest because of the tax incentives[26], they invest because of other conditions that make it possible for them to do business and make a profit. These include *inter alia* availability of raw materials, cheap labour, and infrastructure, market for the goods, and peace and security. Tax incentives are only are only a bonus to the companies. Thus by removing or reducing tax incentives, the Uganda tax base will be widened. This can only be done through the review and amendment of our tax laws. This has already been test through the protracted legal battles between the government and oil companies (Tullow Oil Uganda ltd and Heritage Oil) where after Uganda won case[27] in the tax appeals tribunal that was to the effect that Heritage was liable to pay capital gains tax on the sale of its shares, the government made amendments in the Income

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[22]Cap 340 and 349 respectively of laws of Uganda.
[23] Section 21(1).
[24]Tax Justice Network-Africa, Tax Competition in East Africa: A race to the bottom? Tax incentive and revenue losses in Uganda, at 11.
[25] *Id.*
[26] Until recently, Somalia had not tax administration system and thus had zero tax rates but very few or no person invested there because of the zero tax rates. Therefore if it were entirely true that tax incentives attract investment, Somalia would be an investment hub by now.
[27] *Tullow Uganda Ltd & Anor v. Uganda Revenue Authority*, Tax Application No.4 of 2011.

Tax Act[28] to remove ambiguities that lead to tax avoidance like in such a scenario. Given that there is no clear policy on tax incentives and their management, it is hard to assess the real impact they have had on our economy and development since there is no general stakeholder monitoring and evaluation done on the tax incentives given over the last two decades.And therefore the debate continues as to whether tax incentives really are major stimulants of investment and economic growth.

Tax is also used to discourage certain activities and commodities for example taxes sports betting, alcohol, cigarettes, and second hand motor vehicles among others. This is done through the imposition or increase of taxes on these commodities or services through tax bills passed every financial year. Therefore if tax regime is well managed, there is a rebuttable presumption that this will foster socio economic development and the same will be averred if the tax regime is poorly managed

D. TAX AND DEBT MANAGEMENT

Like any other country, Uganda has a public debt, which stands at 7.5 billion USD (as per June 2014, making it 28% of Uganda's GDP)[29] that has accumulated over time. It comes about as a result of low levels of both tax and nontax revenue[30].it therefore follows that *ceteris paribus* if tax revenue increase, the national debt would go down. This is can be done through fighting of illicit financial flows.[31] Uganda on average loses over 700 million USD (about 2.5 trillion shillings, which is the annual budgets for Health, Agriculture and Education combined) annually to illicit financial flows. These illicit financial flows include tax evasion and avoidance, transfer pricing, use (or misuse) of double tax agreements, money laundering *inter alia.* The new Tax procedure Code Act[32] tries to give the Uganda Revenue Authority powers to fight tax evasion by creating offence to the regard. Uganda's tax statutes tax a resident's income regardless of whether it's from an illegimate sources or not, this thus is a good development as money laundered into Uganda is taxed. However, the money that is laundered out is not taxed and thus Uganda loses out on this revenue. Tax revenue is still lost when companies, especially

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[28] Income Tax Act, Section 108, now repealed and reenacted in section 16 of the Tax Procedure Code Act of 2014.
[29] Uganda Debt Sustainability Analysis 2014, Ministry of Finance, Planning and Economic Development.
[30] The Tax revenue to GDP ratio is about 12% according to the Uganda Revenue Authority, meaning that tax revenue contributes less to the budgeted and allocated resources.
[31] This is any money that is illegally taken out of the country.
[32]Part XV of the Act.

multinationals transfer their profits to other jurisdictions through transfer pricing. This is where companies, while dealing with their subsidiaries or parent companies pays more than the market price thus reducing their profit margins in Uganda thus reducing the taxable income, the money remained in the same company.[33] It is thus averred that if Uganda tightened its laws on illicit financial follows, then 700million USD would be saved annually and thus could clear its public debt in 11 years. Alternatively, Uganda would not borrow 700million USD annually for 11 years, therefore efficiently and effectively managing its public debt.

E. TAX AND SOCIAL JUSTICE

Many often at times the state avers that it cannot provide quality social services to the people due to lack of revenue to do so. However the state can subside some if these services through reduction of taxes on the essential inputs that facilitate the attainment of these social services and thus making them affordable to the majority. For example if the government reduced or removed taxes on scholastic materials, they would be affordable to most parents and thus make it easier to for children to go to school. That way, the government would be providing affordable education. The same can be done for other social services like heath inter alia. The challenge would be where to get the forgone revenue on subsidization; this can be raised from reforming the tax incentive policy by reducing or abolishing blanket[34], by efficiently and effectively taxing the mining and extractives sector or even increasing on restrictive taxes. Thus by so long as there are tax alternatives elsewhere, government can use tax as a tool of providing social justice.

IV.CONCLUSION AND RECOMMENDATIONS

Uganda has made great strides in fast tracking her social economic agenda; she can however do better if it makes tax justice a priority step in raising revenue to fund the said development but also in attainment of equity and equality among her people. The tax justice agenda therefore, if given the necessary attention can foster the development we seek.

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[33] For example MTN Uganda has been accused by URA of dodging taxes through transfer pricing. It was discovered that between 2003 -2009, MTN Uganda paid 3% of its annual revenue to MTN International in Mauritius in 'management fees' yet MTN International had no staff at all.

[34] Tax Incentives that are given to a whole sector without specifics, For example like not taxing Agricultural input. This can be changed to not taxing the major tax inputs but taxing those that may have an effect on the environment *inter alia.*

It is also worth noting that with a young dependent population[35], rampant youth unemployment[36], and slow growth, Uganda needs revenue to fund her development agenda but also needs to provide tax justice[37] to its people. Therefore the government has to balance the need for tax revenue for development with administering a fair and equitable tax regime. Tax justice can deliver both the revenue and development. If tax is deployed as a tool to redistribute income, facilitate economic growth, manage debt, and subside social services.

Additionally, Higher Institutions of learning can help the government fast track the attainment of tax justice through contribution to the formation of the tax policy in Uganda. This can be done through encouraging and inspiring research in tax related areas, this leads to the creation of more knowledge which can be based on to make pro people tax policies and laws. Through the research papers offered at these institutions of higher learning, tax knowledge can be generated to assist in the enactment and implementation of tax laws and policies that benefit the people.

Secondly, higher institutions of learning can train and equip students with knowledge and skills to be tax officers. Currently there is an acute deficit of tax officers[38] and therefore these higher institutions can address this issue. For example the Course unit of Revenue Law and Taxation offered at the School of Law, Makerere University should be upgraded from an elective to a core course unit since the issue of tax is so fundamental that it applies to everyone.

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[35]60% of the total population is below the age of eighteen years of age and thus not in production and still dependents, National Population and Housing Census 2014, Uganda Bureau of Statistics

[36]ibid

[37] Tax Justice simply means equity and equality in the tax policy and regime.

[38] URA has over 1,256 tax officers to a population of about 38 million people.

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