MAKERERE LAW JOURNAL 2016

Journal of the Makerere Law Society (MLS)

School of Law, Makerere University

Editor-in-chief

Estella Ategeka Felicity

Journal of School of Law, Makerere University,

Kampala, Uganda

ISSN: 1996 2916

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Published by:

Panamaline Books Distributors Limited
Mabirizi Plaza, Suite L5-15
Kampala Road, Opp. Pioneer Mall
P.O. Box 10610
Kampala, Uganda
Tel: +256-713057999/753-068050/775 881861
Email: *sales@panamalinebooks.com/panamalinesales@gmail.com*
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This Journal should be cited as MAKERERE LAW JOURNAL 2016.

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EDITORIAL NOTE

Thank you for picking up a copy of the 2016/2017 edition of the Makerere Law Journal.

This edition of the Journal shall guide you on a voyage through the maze of contemporary issues that affect the cosmopolitan world we live in. The authors have ably analyzed and scrutinized the subject matter of their writings, producing articles that tease out the questions that need to be asked and tickle the mind to think out of the box.

This Journal unpacks the phenomenon that is Stella Nyanzi, throws light on the hacking offences in Uganda, instructs on the concept of bancassurance, analyzes the amendment to the Financial Institutions Act of Uganda, and weaves through the jurisprudence to resolve the conundrum surrounding terminal benefits in the presence of the tax man. The plight of persons living with albinism is highlighted herein. We are further compelled to reflect on whether disability rights in Uganda are embedded in the context of mere tolerance or in that of reasonable accommodation. In the midst of a hunger crisis that nearly resulted into a declaration of a State of Emergency, the article on National Food Security is timely. I must say, the observation on the influence of the "public court" on the criminal justice system is spot on and the questioning of the constitutionality of the 1995 Constitution must be acclaimed. The symbiotic relationship between science and the law is eye-opening.

Allow me, at this juncture, to thank my star team for neatly brushing up these articles; their tireless efforts are invaluable. Kudos to you. It has indeed been a joy working on these articles that take the law beyond what is taught in the classroom, particularly since majority of them are student's works, with such an amazing team. Heartfelt gratitude is extended to the various persons for their financial support that has enabled the publication of this Journal and therefore

placed it in the hands of the reader.

Lastly, but by no means least, I thank Hon. Justice Kiryabwire for his kind advice and wise counsel Brian Kibirango for his constant guidance and the MLS cabinet for the wonderful co-operation.

This is not just another read, it is an experience! Enjoy it.

Ategeka Estella Felicity, Editor-in-Chief

FOREWORD

I am delighted to write yet another foreword for the latest edition of the Makerere Law Journal. Every edition is special and this one particularly is because it is the first to be republished.

I thank the Editorial board for recognizing the need for an excellent piece of work and for its commitment towards the standardization and growth of this journal.

The articles in this journal are educative, informative and yet at the same time are thought provoking; clearly written with a lightness that makes for an interesting read. The subjects are without a doubt very contemporary addressing issues from computer hacking through financial law and on to constitutional and human rights. They also address issues relating to taxation, regional courts and the nexus between science and the law.I am grateful to the authors for the effort they expended into this edition. The authors are a good mix of students and Advocates. I cannot fail to marvel at the increase in number of student-written articles. This is an indicator that students of law from a very early stage are engaging themselves in critical thinking and analysis, which can only point to even more vibrancy when these students join the professional market.

I commend the Principal Emeritus of the School of Law, Dr. Damalie Naggita Musoke, the new Principal, Associate Professor, Christopher Mbaziira and the entire faculty for imparting the skill of writing in the students and the generous support accorded to the Makerere Law Journal.

The articles were enjoyable to review and I am sure that you will find that it was worth the wait.

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1. STELLA NYANZI - THE CLASSIC FAUX PAS

Alexander Twinokwesiga*

Abstract

Here's to the crazy ones! The misfits, the rebels, the troublemakers, the round pegs in the square holes, the ones who see things differently. They're not fond of the rules, and they have no respect for the status quo. You can quote them, disagree with them, glorify them or vilify them, but the only thing you can't do is ignore them because they change things! They push the human race forward. And while some may see them as the crazy ones, we see genius because the people who are crazy enough to think they can change the world are the ones who do!

The above, were the writing, or, rather, the subtitles, to what was, back then, Steve Job's Apple's new advertising and/or marketing strategy; one founded on values, one that recognised and honoured passionate, change oriented persons, and, importantly, one that, like the ever-powerful brand that is *Nike*, sold more than just their own products - shoes. We will revisit these words as we sum up.

1.1 The Issue

A. Stella The Symbol

I am on assignment to write an article for the Makerere Law Journal, The Deuteronomy, and Writers Block Uganda. The options are two; mental health and the law on suicide, or freedom of expression and internet governance, with particular focus on Stella Nyanzi. The latter is my choice,

* *Lawyer and Entrepreneur.*

for a few obvious reasons; Stella Nyanzi has by her own impressive efforts grown to become a contemporary local, continental, and international – wherever applicable - icon for the utilisation of media - social media, in making her, your or anyone's case heard and causes fronted. I mean, you cannot even say her name in bits or halves anymore.

Stella Nyanzi has been hailed, by some commentators, as the one who finally found the guts to do what the not so bold rest of us could not conceive. For that, she has, and rightly so, earned, thanks to Facebook's power of virility, a full '*followship*'. Whenever she has had the opportunity, she has reminded us, like she assured Andrew Mwenda, when he tried to respond to her assertion that he was a failure at creative writing, that "I am not for hire. My pen serves me and mine." It is her show, and she runs it. Even the Police is aware. In a press briefing, when she was briefly held for investigations and, perhaps, cautioning over her choice of language, the police spokesperson noted that she knows how to perform whenever the cameras are directed towards her.

B. Stella The Talent

Stella Nyanzi is without a doubt a talent. She, previously, posited herself as a writer, and we agreed. Some of us discovered her in July 2016, when she serialised about Ikoku, and his spear (re: penis). With sentences like "*and although the cobra has only one small eye in the centre, he sees the white tunnel of my femininity. Each time that Ikoku's spear wakes up in my honour, it aims precisely and shoots right into all my pleasure berries*." we could not help but ask, when the stories got to us; who is this? For a generation that grew up without much conversations about sex, and in an age dominated by information hungry teenagers and young adults with access to the internet, both on a quest for sexual discovery, she became an instantaneous hit. Her

footprint has reached everywhere since then.

C. Stella The Champion

Along the way, Stella Nyanzi has picked on, and championed the noble cause of providing awareness for and/or about sanitary pads. Thanks to her leadership on the #Pads4GirlsUg campaign, we have discovered experiences and revelations that we had either previously ignored or never paid any attention to. We now know, whether from Stella Nyanzi or from our private conversations on the same, know that there are girls, in remote villages who use either thorns or dry banana or rub themselves on the ground to help themselves during their recurring menstrual cycles.

She has ably illustrated what social media can do for us, those poor, always ignored pupils who were never picked on by their tutors to share what was on their minds, however much or long their raised their hands. When they did speak, however, they had good conversation ideas or responses spewing out of themselves. Twitter, Facebook, and blogs have provided the much-needed infrastructure for this to be realised, and Stella Nyanzi has made the most of it – Facebook, especially, in her case. Hers is an elaborate illustration that anyone can ably transit from a culture of limitation to one of expression with reckless abandon and no caution, and excel – reach out to many people – while at it.

D. Stella The Victimiser

In the process of expressing herself, Stella Nyanzi has strategically identified and effectively victimized several notable persons.

Due to her antics, Prof. Mamdani, her “employer”, looked helpless when interviewed by NTV Uganda’s Raymond Mujuni. Makerere University’s Vice Chancellor, Prof. Ddumba, sounded lost and helpless too when asked about

his office's handling of Stella Nyanzi's issues with Prof. Mamdani's led Makerere University Institute of Research.

Andrew Mwenda, her former classmate, was, in December 2016, described as a "bought prostitute with a price tag", one "being fucked over by the highest bidder", one whose "main sex style is the merchandise of the propaganda".

James Onen was, as Stella Nyanzi wrote, in April 2015, thought to be "sporadically indulging in fantasies with me as the nymph of a star." She added that "either he wanks to dirty thoughts of me or he is just grossly infatuated with my queer feminist awesomeness." In the same breath, he, James Onen, was also criticised. She asked; "Does it delight you to taunt attack and prod me repeatedly? Does it arouse and turn you on to revile me for naught?"

When Stella Nyanzi seemed to be done with the gentlemen, she, in January 2017, started on the ladies. On the revered Hon. Winnie Byanyima, she wondered; "How does non-violent Kizza Besigye mount or sleep in the same bed with this violent Winnie?"

Her biggest victim, by far, has been Mrs. Museveni, Janet, the First Lady of the Republic of Uganda. Of her she finds "people who go around addressing the first wife as Mama Janet" worth despising. Well, from another perspective, it would present a threat to and a competition for Mr. Museveni in as far as her sharing the title Excellence is concerned. Museveni, as we have noticed several times before, only buys His and His, not His and Hers. Also, there are, in other African countries, first ladies who go by the title Mama, and not the befitting Her Excellency.

E. Stella The Blamer

Stella Nyanzi has ably woven her causes – sanitary pads, for example – with a well-conceived blame game which seeks to portray Mrs. Museveni as the reason for the status quo that she is trying to expose and demean, and probably, eventually lead a revolution against.

"(Mr.) Museveni has never had menstrual blood between his legs. Janet Museveni has been bleeding for decades, and still does, if she is not yet menopausal." Stella wrote, before blaming a person as knowledgeable as her – Mrs. Museveni, and the rest of the government for enabling the missing of school by poor girls by their inability to illustrate their contribution to their education by providing sanitary pads for use during their menstrual cycles.

I have found, by learning from some of my closest and other not-so-close girlfriends, the so called privileged ones - unfortunately, that never before in their lives has it ever mattered that another person to ever remind them to realise the necessity of sanitary pads. They were introduced, trained, and expected to know what to do when they needed it.

Stella Nyanzi concedes the same when she references her own mother's lessons. "I started my periods when I was only nine years old. My Mother introduced me to disposable Lilia sanitary towels; and other alternatives." She, unlike the poor girls is a champion for, the same girls who, definitely, are not even aware of her qualifications and efforts to elevate them had an opportunity to appreciate the same cause she is fronting in 2017. This is not in any way in defence of those girls, the same poor girls, and boys, men and women, that we all sympathise with, are the way they are, as compared to their urban dwelling, different dreams having contemporaries, because of a dearth of both information and resources, and not necessarily because of Janet Museveni's "tiny brains" and "tiny vagina". The drastic changes in the

economy, world over, have, despite the presence of aggressive, well meaning, and like-minded companies like the sanitary pads and tampon making Always, for example, made it difficult for Ugandans and other citizens of the world to simply exist. Sadly, sanitary pads are, thus, foreign to them, these poor girls. It is, as a matter of course, a worthy cause to champion, but not one to blame another for causing. It is, also, a situation worth acknowledging, first, before we can be write vulgarities about it. People do not even have food to eat! Their needs go beyond sanitary pads. Their self-esteem, for example, is down, too, and there are several reasons that we could name for that. I once witnessed a lady's experience, and, at the very least, wrote ***Do They Have Wings?*** about it.

F. Stella The Writer

It begs the question, now more than ever before, whether she is a writer or something else.

> I was rather impressed when, in 2015, I discovered and read some of her writings, as an academic or scholar. Her own *Knowledge Is Requisite Power: Making A Case For Queer African Scholarship* and references of her other works (there are more than 300 of those) in J Oloka-Onyango's *Debating Love, Human Rights And Identity Politics In East Africa: The Case Of Uganda And Kenya* (2015) and Mariel Boyarsky's *Staging A Conference To Expand And Reframe The University Of Washington Department Of Global Health's Approach To Sexuality* (2015) made me believe that her ground-breaking, needed work she is worth a Nobel Prize. Perhaps, someday.

However, I was, admittedly, somewhat disappointed by what I am moved to term as a neglect of her high culture, for, and her emergence on a noisy, distractive platform characterised by a low culture, such as Facebook. As

such, her presence there has, if I may, watered down her aforementioned talents, and now skills, into, not the wonderful writer, that I would prefer, but, rather, we have to admit, a serial sentimentalist.

1.2 The Application

A. The Intriguing Ugandan Culture

Foreigners have asked me what it is that is really wrong with Ugandans. They find us, amongst other unfathomable descriptions, unserious characters. I, also, have no reasonable answer to that, but, I am aware that ours is a country made up of baby, mentally indolent people who comfortable enough to only care about enjoying life. We are corrupt, sectarian, disappointed dream chasers, without any agency whatsoever.

Our heritage is one heavily dependent on an educational, cultural, and religious system which emphasise conservatism. We are not made for "revolutions" that honour "the crazy ones" (activists), detailed in the quotation at the top, for conversations had in a "vulgar" language (like Stella Nyanzi's) that is understood and accepted across the broad, and for the caution and/or consequences (imprisonment) when we are found in fault of challenging the status quo.

We cannot realise much for ourselves, unless someone, one of us, better exposed or the foreigners we prefer open up our blinded eyes, or actually do it all for us. There is, as you would imagine, a sufficient dose of laziness in as far as exerting ourselves – mentally and physically - is required.

B. Stella's Playground

Stella Nyanzi is, I want to believe, well aware of this. It is probably why she has been quick to remind whoever has tried to challenge her, that she is better educated and more intelligent than them.

Her choice of writing, sorry, sentimentalist's style is well calculated. Her choice, of a playground is, also, well thought out. First, it where most Ugandans, both those who have read her work, and those who simply

admire her appreciation of the English language live or are bound to end up. Words are wonderful toys to play with, and she is rather quite good at it. Being on a platform – Facebook - that the Government of Uganda cannot, by any means, halt, she is, thankfully or otherwise, unstoppable. She is, as a matter of course, loved and disliked in equal measure.

C. Stella And The French 'Vulgarians.'

Stella Nyanzi's writing is, to me, nothing but a vulgar display of her wealth of words. She, we should know, is not the first or last Ugandan or non-Ugandan to capitalise on political vulgarity in order to address the same issues that we have always interacted with. Kenya's Millie Odhiambo comes to mind. To deny the importance of vulgarity is to reject the revolutionary tradition, we have been taught.

Amber A'Lee Frost has defined vulgarity as "the rejection of the norms of civilized discourse." To be vulgar, Amber adds, is "to flout the set of implicit conventions that create our social decorum. The vulgar person uses swears and shouts where reasoned discourse is called for." This, Stella Nyanzi has, certainly, achieved.

Vulgarity has been employed before. In Mary Antionette's France, the pamphleteers of the day coined a word, Austrichienne, to describe the Austrian-born Antoinette. Austrichienne means or meant Austrian bitch, but also resembles or resembled the French word for ostrich. In 2017 Uganda, Stella Nyanzi has described Mr. and Mrs. Museveni with several words that we can generally term as unmentionables. She is, as the trending hash tag has reminded us, been arrested and charged with calling the President a "pair of buttocks". Indeed, each person chooses their monster(s) (re: victims). The French pamphleteers, and Stella Nyanzi did and have chosen theirs.

The pamphleteers of France were all too happy to satirize and smear the upper class with the utmost malice. Clergy, royals, and anyone else in power were slandered and depicted visually in all manner of crass and farcical political cartoons. Hundreds of agents smuggled pamphlets through a secret network to reach the tabloid-hungry French masses. In order to stem the tide of banned pamphlets about Marie Antoinette in particular, the French government actually sent spies to England to buy up the entire stock before they could make it France. It's therefore not particularly difficult to argue (as many historians do) for a causal relationship between nasty political porn and the revolution that followed, especially when the pamphlets posed such a risk to produce and obtain.

Facebook, Stella Nyanzi's playground, is the dwelling house of all low culture, all pornography, all reckless abandon. It is the cheapest/most affordable, most viral platform, and one that can ably broadcast to all the people that Stella Nyanzi sympathises with or is championing. She does not need a kingpin or international smuggler to distribute her work. Her job is, thanks to advancement in technology, as easy as elaborately parodying the regime and all its function(arie)s.

D. Stella And The Ugandan Vulgarians

Stella Nyanzi is not the only vulgar person out there. She is the popular one, and, yes, that is a given. I concluded, a long time ago, that Runyankole or Runyakitara is up there amongst the most vulgar languages.

Personally, I have been described or have heard other people being described as *"noyiragura nka amazi"* (you are as black/dark as faecal matter), and "*okuzire hati oyine ebiza aha miasho*" (you have grown so old that you have pubic hair on your face), and "*ojabirere nka amabunu*" (you are as disorganised as buttocks). Vulgarity in Uganda is as common a lingo

as breathing. So much so, that I have even heard a lady salute another with a polite "*nogambaki, iwe malaya*" (how are you, you whore/prostitute?). Vulgarity is the language of the people, our people. We should, in the instant case, all be arrested, charged, and imprisoned for our day-to-day ways.

Vulgarity, by Ugandans, has been illustrated, on the national scale, by a one Semakula Mulumba, a rude radical who famously declined an invitation to dinner in 1948 Uganda. His rudeness has been described as "more than just adolescent immaturity".

According to *Radical Rudeness: Ugandan Social Critiques In The 1940s*, Mulumba argued that "dinners and other forms of entertainments and hospitality were, Mulumba asserted, pernicious forms of corruption" and, also, that "dinners and friendly associations among missionaries and protectorate officials, and between Baganda and Britons, had allowed the British to plot among themselves, seize Ugandans' resources, seduce Buganda's leaders and block Ganda efforts toward individual and corporate progress."[1]

In 2017 Uganda, Stella Nyanzi has experienced her individual progress curtailed, for example, when she had her visa for a travel(s) abroad denied – a reason for some of her sentimental series.

E. An Embarrassment? Duh!

The most interesting bit about this faux pas (a socially awkward or tactless act) is two pronged.

Firstly, Stella Nyanzi, we would think, would be embarrassed by her method, which, she says, includes the reliance on her "words, tongue, fingers, voice,

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[1] *Summers Carol, J Soc Hist(2006) 39(3):741-770. https://doi.org/10.1353/jsh.2006.0020 (Accessed on 18th May 2017.)*

and body", and/or the usage of extreme skills such as undressing for a job (in a country with already unbelievable statistics on unemployment) and projecting her deep intellectual arguments with counterarguments and projecting her insecurities through vulgarities, characterised by the hyperbolic, vulgarised usage of lewd lingo (*"The gang-bangers are raping you so bad with their diseased protrusions, but you wander why I hurl insults at them?)*, but she is not. She should not be. Vulgarity is, as noted, the language of the people.

Secondly, we would imagine that the government would be bothered by the poor portrayal of who they are and what they represent, but, apparently, they are not. To them, Stella Nyanzi must be another "rebel" and "troublemaker" (from the opening quotation) who can be dealt with, by, for example, imprisonment, in this, their attempt at maintaining their stay in power. The best they have done, is an apology from Mrs. Museveni, and, as you would expect, an incarceration.

Therein lies the beauty. How it ends, we know not, but we can't help but wait. When we are on a connected interface like Facebook, we, who have been described as those with a lack of understanding, or those from a patriarchal society, with a rigid set of rules, are nothing but creators are watchers, or one of the two and, thus, the same.

F. A Necessary Imprisonment

Believe me or not, it was necessary that Stella Nyanzi was arrested. Here is why; it became necessary to imagine, even for a day, what a world without Stella Nyanzi would look like. With each post, her wings and influence grew. Her messages were well received, and appreciated. Without her, we would have a good enough test to determine whether her efforts would be, collectively, taken on by any other person, and as well as she has

demonstrated. Unfortunately, all I have seen, post her arrest, are her followers' illustration so their frustrations, frustrations and disappointment resulting from the arrest. I would, personally, fancy a continuation of her causes (the sanitary pads one is, thankfully, ongoing), but the politics behind her motivations is yet to be figured out by many.

Besides hurling insults criticising Mr. and Mrs. Museveni's National Resistance Movement party, a thing we all derive pleasure in, what does she really represent? It is a good question for us to ask ourselves, because, in (re)publishing or (re)publication of her postings (which would translate to possession should lead to punishment – imprisonment in Uganda's case), by sharing it on our personal Facebook timelines and other social media mediums, we are ought to be arrested as well.

1.3 The Rule

A. Stella's Lines

Stella Nyanzi is, for her "activism", charged under the Computer Misuse Act. The law has its own challenges. It for example, does not aptly distinguish between a computer and a mobile phone, the people's most common device.

For that loophole, and, thanks to Andrew Mwenda, Stella Nyanzi might get lucky. In ***Mwenda v Attorney General (Consolidated Constitutional Petitions No. 12/2005 and No. 3/2006)***, a case in which Journalist Andrew Mwenda made several comments critical of the President and the government of Uganda on his live radio talk show, the state charged him with the crime of sedition, pursuant to sections 39 and 40 of the Penal Code, because his remarks were made with the intention to bring into hatred and contempt against the President, government, and Constitution. The Constitutional Court declared null and void the sedition provisions from the Penal Code because they were in contravention with the enjoyment of the

right to freedom of expression, as enshrined in Article 29(1)(a) of the Constitution.

With the benefit of hindsight, perhaps, and reference to the opening quote, Stella Nyanzi has, and wonderfully so, set and crossed her own lines – of decency. She has not had the opportunity of radio, but a better one, that of the internet. What the internet does, is that it augments the proliferation of information. The actual results, the ones we will actually remember Stella Nyanzi for, especially when before the organs of the state, are yet to be crystallised. We can't help but wait to see how these sentimental counterarguments cum hullabaloo that is offensive communication, cyber harassment, and cyber space freedom (of expression) and the tolerance of socio-activists in the 21st century will be resolved – hopefully to set a worthy jurisprudence for many.

1.4 In Conclusion

A. Signs Of A Dying Regime

Stella Nyanzi's blame game (Oops, did I?) has concentrated on, amongst others, the breakdown of Uganda's health infrastructure, the same which, unfortunately, led to the death of her father's and mother's death. We all know of a loved one that we would not have lost, if it was not for the same broken systems.

Uganda's shame of an election(s) has also featured in her postings. If we had all chosen to not participate in it in the first place, we would not be that engrossed in bothering ourselves with the rot that they are. One of the solutions to unseating this government is, I find, showing them that we do not even care about their schemes. Participation in their programs is tantamount to enslavement. I tried with **I Have Decided Not To Decide**.

The Kasese Killings, the waste of national resources (like gold in Karamoja), and the land grabbing in Acholi-land have also been noted. Land grabbing is, however, nationwide, with skirmishes in Kayunga, for example, and the rest of the country. There is, simply, not enough land for every one of us. Our population has overshot and surpassed our never planned for national resources. We cannot, in a few words, lay all blame on a few hapless individuals. They may play a part, and need help for it, but these challenges are beyond them. I have argued before that for this regime to end, it will inevitably do so when the so called 1986 revolution is complete. We will have to return to the same levels of anarchy, poverty, disease, hopelessness et al that we were in before 1986. If you are too comfortable to need someone to enlighten you on these realities, then you are in need of a lot of help. We may speak on it, or not, but we do not need to elevate any other person above the mediocrities and failures of our land. We all need to play our roles, our active roles in collectively criticising the government and all its ills – every other day. They do know that he challenges that beset them, too. We hope that they can read the signs. We have to be active enough in engaging them to take the necessary action(s).

B. Damn you, Censorship!

Amber A'Lee Frost wrote, in *The Necessity For Political Vulgarity*, that vulgarity should be among the grammars of the left, just as it has been historically, to wield righteously against the corrupt and the powerful. Civility, Amber wrote, is destructive because it perpetuates falsehoods, while vulgarity can keep us honest.

On my aforementioned juxtaposition of low and high culture, Amber wrote that "the left will always need its journals and academic writing, but there are times when it is both right and proper to terrify the bourgeoisie with

your own fearlessness."

It, therefore, makes sense to entertain both the vulgar and the not so vulgar to maintain an agreeable sense of tolerance towards one another as it would be beneficial to the administration and accountability of our democracies.

C. A Footnote On The Pages Of History

Mr. Semakula Mulumba might have gotten away with insulting the Protestant Bishop, the local governor, Sir John Hall, both to Baganda and British audiences, and internationally, to the United Nations and the Soviet bloc and Stella Nyanzi might get away with insulting the First Family to whoever can access and read a word of either English and Luganda, but what will we really remember them for? Well aware that there are those who have come before her, and that, with her help, she might not be the last one, it is my fervent hope that Stella Nyanzi does not end up as a mere footnote on the pages of history, when, eventually, left all alone, by her numerous fanatics, but as one who might change the way we perceive things, just like the company she keeps in the opening quote.

2. INTRODUCTION OF BANCASSURANCE IN UGANDA OPPORTUNITIES AND CHALLENGES

Ainembabazi Madonna Vicky and Mugabe Deus*

Abstract

Bancassurance is a concept new to Uganda but not the world in general. In light of the concept's debut in the Financial Institutions Amendment Act of 2016 this article is written to explore the opportunities and challenges of Bancassurance. We delve a little into the questions often asked about the concept: From the requirements needed to carry out a Bancassurance business, its regulation and supervision, the reasons for the merge between the banking and insurance sectors as opposed to any other sector, to where the two sectors stand in terms of Uganda's economy. What succeeds this discussion is the elaboration of the opportunities and challenges of Bancassurance as they affect the customer, the insurance company and the financial institution.

2.1 Introduction

Quizzical looks and raised eyebrows are generally the most likely reactions one is bound to get at the pronouncement of the term *Bancassurance.* It is a new concept in Uganda, one that has had its legal debut in **Section 115D**[1] of the Financial Institutions Amendment Act of 2016 (hereinafter referred to as The FIA 2016). This activity was, prior to 2016, prohibited by **Section 37(1)** of the Financial Institutions Act 2004 which in effect provided that financial institutions were not to engage in trade commerce and industry activities among which was insurance. What then, is bancassurance? The FIA 2016 has defined it to mean using a financial institution and its branches, sales

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1 The section provides for the requirement of written authorization before carrying out bancassurance after consultation with the central bank in the manner prescribed by the Insurance Regulatory Authority and goes ahead to define what bancassurance is.

network and customer relationships to sell insurance products."[2]

Globally, bancassurance is said to have started in the 20th century with France and Spain being the first countries to embrace it[3]. When they set out on their first attempt it was mainly to bypass the middleman for loan protection and insure their own banking customers[4]. The UK is said to have been the pioneer in this realm albeit amidst whispers because Barclays Life, a subsidiary of Barclays Bank, was never a success and nor was the concept of Bancassurance in general[5]. Spain went into bancassurance in the 1980s and France in the early 1970s[6]. Uganda has made the move and the empowering sectorial legislations have been[7], and others[8] are in the process of being, amended and enabling regulations made[9] leading us to the analysis of the prospective benefits that arise from this move and the challenges we are bound to encounter.

It is important to note before exploring the challenges and benefits, the questions that often arise at the mention of the term bancassurance. The curious mind would ask; why the merge between banking and insurance and not any other sector? What is required to enter into bancassurance? How does the bank benefit from this? What products are sold in bancassurance and how? Who regulates and supervises bancassurance operators? What is the licensing body? Is it legal for the insurance companies to benefit from

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2 Section 115D (4); the wording limits the definition to the purposes of that particular section. The Insurance (Bancassurance) Regulations 2016 have however taken it on as the conclusive definition by incorporating it into Regulation 3.
3 Marjorie Chevalier, Carole Launay and Berangere Mainguy, "Analysis of bancassurance around the world" Focus (2005) http://www.scor.com/.../focus/ Accessed on 30th December 2016.
4 Ibid, page 2.
5 Ibid, page 2.
6 Ibid, page 2.
7 For instance section 37 of the Financial Institutions Act 2004 was amended by section 115D of The FIA 2016 to allow financial institutions to engage in insurance business.
8 Insurance business in Uganda is regulated by the Insurance Act cap 213. This was amended in 2011 by the Insurance Act (Amendment) Act, Act No.13 of 2011. The changes in the FIA 2016 need to be incorporated in the Insurance Act. At the time of writing, such a law is to be found in the Insurance Bill 2016.
9 Including the Insurance (Bancassurance) Regulations, 2016.

the customer database (know your customer) of the bank? The queries are vast but the succeeding discussion is a brief effort in giving an overview of how bancassurance operates, its benefits and challenges.

The amendment inaugurated the concept of bancassurance but it is only the Insurance (Bancassurance) Regulations, so far, that provide a bit comprehensively for all persons involved in bancassurance and such other related activities i.e. those using the branches and sales network of a financial institution to sell insurance products[10]. The Insurance (Bancassurance) Regulations 2016 substantively provide for regulation of bancassurance business and will be extensively relied on to elucidate what the law is, in relation to conducting bancassurance.

A. *What Is Required To Carry Out Bancassurance Business?*

Before conducting the Bancassurance business, the Financial Institution is required to apply for authorization from the Insurance Regulatory Authority (hereafter IRA) in a format and manner prescribed by the IRA after consultation with the Central Bank.[11] But to undertake such business, prior written authorization by the Central Bank is required.[12] Where the Financial institution is applying for the first time, the application must be accompanied by a non-refundable registration fee of five hundred thousand Uganda shillings.[13] The application must be accompanied by, a board Resolution of the Financial Institution and the relevant board approvals to carry out Bancassurance; a letter of no objection from the Central Bank; a certified copy of the current banking license from the Central Bank; written agreements with an insurer; particulars of the proposed Principal Officer[14]

10 Regulation 2 of the insurance bancassurance regulations.
11 Financial Institutions (Amendment) Act 2016, section 115D (2).
12 Ibid, section 115D (1) and also Regulation 7(1) (b) of the Insurance (Bancassurance) Regulations, 2016.
13 The Insurance (Bancassurance) Regulations, 2016, Regulation 6(2).
14 According to the Regulation 11(1) the Principal Officer acts as a representative of the Bancassurance Agent in all matters relating to the business of Bancassurance and is responsible for general control,

and Specified Persons[15]; insurance cover; evidence of payment of a Registration Fee to the Authority and any other document or information that the authority may require.[16] The regulations lay out some factors to guide the authority whose grant of authorization to carry out bancassurance is discretionary and once granted the span of the authorization lasts a year[17].

B. Regulation and supervision of Bancassurance business.

The regulations provide that one needs to apply to the IRA for authorization with a non-refundable fee of five hundred thousand Uganda shillings[18]. Consider the wording of the statutory instrument; authorization not a licensing is required to carry out bancassurance. Black's law dictionary[19] has defined *authorize* from which authorization is derived as giving legal authority or to empower. License on the other hand has been defined as a permission usually revocable to commit some act that would otherwise be unlawful or a document or certificate evidencing such permission[20].

The insurance company and the financial institution would need licenses to carry out the business of insurance and financial institutions business respectively but bancassurance requires authorization. No person can carry on the business of insurance or reinsurance without a valid license granted for that purpose.[21] The license is granted by the authority[22] after an application by the intending person in a form prescribed by the authority.[23] The licensing for insurance business can be granted to a person intending to

direction, management and supervision.

15 These according to Regulation 11(2) are responsible for soliciting and procuring insurance business on behalf of Bancassurance Agent.

16 The Insurance (Bancassurance) Regulations, 2016, Regulation 7 (1).

17 Regulation 8(2).

18 Regulation 6 supra

19 Black's law dictionary 8th edition page 143.

20 Supra page 938.

21 Under section 28(1) Insurance Act Cap 213 as Amended by Insurance (Amendment) Act, No 13 of 2011.

22 Ibid, Section 32.

23 Ibid, section 29.

carry on either life insurance or specified non-life insurance.[24] In the latter case, the subject matter is clearly stated under the Insurance Act. The subject matter of a life insurance is human life.[25]Under the Insurance Act, the applying person must also be a body corporate.[26] The applicant must also fulfil minimum capital requirements[27] to be eligible to conduct insurance business. For Financial Institutions to operate in Uganda, they must apply for a license which is granted by the Central Bank.[28]

A query would arise as to whether it is in order for the bank to carry out bancassurance even after getting the requisite authorization under the Bancassurance Regulations in light of the provisions of section 28 (1) of the Insurance Act. The wording of the provision prohibits one who is not licensed from carrying on insurance and reinsurance activities. It is submitted that this section does not in any way prohibit bancassurance which requires authorization and not a license which are two different things. Secondly, by definition bancassurance is not equivalent to conducting mainstream insurance. Therefore, where an authorization has been granted, no further requirements as to license are important.

C. Why the merger between banks and insurance companies and not any other sectors?

The convergence between these two activities may be explained by the saving nature of insurance products such as life insurance which is similar to savings accounts for banks[29]. This characteristic of life insurance may

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24 Ibid, section 5.
25 Prudential Insurance v IRC [1904] 2 KB 658.
26 Insurance Act Cap 213 as Amended by Insurance (Amendment) Act, No 13 of 2011.
27 Ibid, section 6.
28 Financial Institutions Act, 2004, section 10.
29 B. Lorent, "The link between Insurance and Banking Sectors: An International Cross-section Analysis of Life Insurance Demand" CEB Working Paper No. 10/040, August 2010, Centre Emile Bernheim Research Institute in Management Sciences, Solvay Brussels School of economics and Management. Available on http://www.solvay.edu/EN/Research/Bernheim/latestupdatesofCEBWorkingpapers.php Accessed on June 23rd, 2016.

explain the reason why life insurance products are the most sold products under bancassurance. The factors that affect insurance density[30] are closely related to the banking sector thereby justifying the merge or convergence of the two sectors. Among these factors is solvability, banking regulations and banking sector efficiency. It may thus be concluded that Insurance thrives on the success of the banking sector thus the move to merge and use banks as a means of selling insurance products.

The legal framework governing insurance and banking is divergent and so are the bodies regulating them. The IRA[31] regulates insurance business and the Central Bank regulates the financial institutions business[32]. The regulatory bodies of the insurance and banking would need to strike an administrative and legal balance to deal with the convergence of these two industries that we have come to know as Bancassurance.

D. The status of Insurance and Banks in Uganda

Bancassurance involves the banking and insurance sectors which renders it crucial to consider where the two sectors stand. The banking sector is according to the *Business Monitor International BMI*, adequately capitalized and much better able to withstand credit shocks given the regulatory measures taken by the Central Bank. The *Uganda Economic Outlook* prepared by Deloitte, in the sectoral perspective of the economic review, stated that the insurance sector had had a 28% growth with the Gross Written Premiums rising from Uganda Shillings 502 billion in 2014 to 611 billion in 2015. The *Uganda Insurers' Association* also spelt out some of the challenges that were hindering the growth of insurance in Uganda to include the low levels of sensitization, the perceived high cost of insurance, the

30 According to B. Lorent (Supra) at page 5, Life insurance density is the life premiums per capita.
31 Established under section 14 of the Insurance Act cap 213 as amended by Insurance (Amendment) Act, Act No 13 of 2011.
32 See long title of the Financial Institutions Act 2004.

image problem of insurance companies one of them being the perception that the claims are not paid, low levels of disposable incomes and the lack of tailored products.[33] Among the steps the insurers have taken to overcome these challenges has been research to collect information to enable the development of market specific products[34]. Furthermore, IRA forecast the progress of the insurance industry on the basis of use of means such as technology and bancassurance[35].

2.2 Opportunities And Challenges

They are better explored from the perspective of the different stakeholders involved in the trade; the customer, the insurance company, and the financial.

Before specifically delving into the opportunities it is apposite to address the question, whose agent is the financial institution in the conducting Bancassurance? As of necessity, insurance companies usually employ agents. In *Re Norwich Equitable Assurance Society, Royal Insurance Co.'s Claim*,[36] Kay J said, "An insurance company acts by agents. Its directors are agents, it effects all its policies by agents. Everyone knows that these companies have agents all over this country and, if they have foreign business, all over the world". An Insurance Agent is a person appointed and authorized by an insurer to solicit applications for insurance or negotiate for insurance coverage on behalf of the insurer and to perform other functions that maybe assigned to him or her by the insurer in consideration for a commission.[37] The insured also uses intermediaries called brokers. These are independent agents appointed by the assured to carry out various functions, including advice and placement, post contractual assistance and

33 http://uia.co.ug/insurance-in-uganda-today as on 1/01/2017.
34 Supra.
35 Deloitte, Uganda Economic Outlook 2016 at page 9.
36 Re Norwich Equitable Assurance Society, Royal Insurance Co.'s Claim, (1887) 57 LT 241 at 246.
37 Insurance Act Cap 213 as Amended by the Insurance (Amendment) Act, Act No 13 of 2011, section 2 (n).

claims handling.[38] An insurance broker is defined as a person not being an insurance agent, who acts as an independent contractor for commission or remuneration, who solicits or negotiates insurance business on behalf of an insured other than himself or herself.[39]

The definition of an insurance broker in the Insurance Act forbids a person from acting under dual capacity as an insurance broker and insurance agent. The Bancassurance Regulations 2016, define bancassurance as the use of a financial institution and its branches, sales network and customer relationships to sell insurance products.[40] The Insurance Bill, 2016[41] under section 3 (2) bancassurance includes an arrangement where the financial institution acts as an agent. It would seem that the Financial Institution acts as an insurance agent. The inquiry does not stop there. The relationship between the Financial Institution and the client, Insured, appears to be that of an insured and insurance broker. A few illustrations will show this:

Firstly, Suppose Kidega goes to DFCU Bank and while there, he is shown products from Jubilee Insurance Co. The Bank employees help explain everything in the product to Kidega. Kidega, a rich man, has never been to school and having appreciated the products on sale, specifies his needs and the bank employees help him get a perfect cover for his shopping mall from Jubilee Insurance. For whom is DFCU acting in this scenario? Can it be said that DFCU is only an agent for Jubilee Insurance Co.? Under the regime of the Insurance Act, DFCU is an agent of Jubilee Insurance Co. But can it deny being Kidega's broker? In ***Christine Mawadri T/A Maisha Creative Agencies v Brit Syndicates-2987 (Lloyds Underwriters) and AON (u) ltd***[42],

38 Colinvaux's Law of Insurance, 9th edition 2010, Sweet & Maxwell, at Page 669-670 para 15-026.
39 Insurance Act Cap 213 as Amended by the Insurance (Amendment) Act, Act No 13 of 2011, section 2 (o)
40 Regulation 3. See also section 3 of the Insurance Bill, Bill No 11 2016.
41 Bill No 11, 2016.
42 Christine Mawadri T/A Maisha Creative Agencies v Brit Syndicates-2987 (Lloyds Underwriters) and AON (u) ltd HCT-00-CC-CS-376-2009.

Justice Kiryabwire said, "…that anyone who undertakes a contract of insurance for the assured is his agent." His lordship found that a lawyer, Mr. Ecumi, who had helped the plaintiff fill the proposal form, was an insurance broker. His Lordship quoted Raoul and Colinvaux in their book The Law of Insurance 4th Edition paragraph 15-16 page 296 for this proposition. Section 73 of the Insurance Act[43] requires, however, that insurance brokers must be bodies corporate. A Financial Institution would fall within this proposition since every Financial Institution must be a company if it is to be licensed to conduct banking business.[44]

Secondly, suppose also Kidega is told by DFCU employees that his particular specifications cannot be insured by Jubilee Insurance Co. That after the loss, Kidega finds out that actually Jubilee Insurance Co. could have insured him, can it be said that he has no remedy? It was held in ***Sarginson v Moulton***[45] that where a broker negligently advises his client that insurance cover for a particular risk does not exist, the broker will be liable for the client's loss if subsequently it is found that the insurance cover could have been found. We doubt that Kidega would have no remedy against DFCU specifically from the relationship of broker and client. It is the law of insurance that an agent employed in the course of forming an insurance contract has to act with proper skill and care and this is a question determined on the facts of each case. In ***Chapman v Walton***[46], Tindal CJ said,

> "*The action is brought for want of reasonable and proper care, skill and judgment shown by the defendant under certain circumstances in the exercise of his employment as a policy-broker. The point, therefore, to be determined, is not whether the defendant arrived at a correct*

43 Insurance Act cap 213 as amended by the Insurance (Amendment) Act, Act No 13 of 2011.
44 Section 4 (2) of the Financial Institutions Act 2004.
45 Sarginson v Moulton (1942) 73 LI. L.R 104.
46 Chapman v Walton (1833) 10 Bing 57 at 63.

conclusion reading the letter, but whether, upon the occasion in question, he did or did not exercise of reasonable and proper care, skill and judgment…For the defendant did not contract that he would bring to the performance of his duty on this occasion an extraordinary degree of skill, but only a reasonable and ordinary proportion of it."

It would therefore be difficult for DFCU to argue that it is not liable for an improper conduct of its job as a broker of Kidega. Of course under the general law of negligence, DFCU would be liable for negligent misstatement. In ***Hedley Byrne & Co Ltd v Heller & Partners ltd***[47] Lord Reid stated that one who has been approached to give information about another has three options to take. Firstly, he may decline to give the required information. Here no liability attaches. Secondly, that he may just give the requested information but with a disclaimer. Thirdly he may just give the information without any disclaimer. His lordship held that if one took the third option, he would be liable for the loss due to that misstatement. But whatever can be said about the rule in Hedley Byrne (supra), the decision in Sarginson (supra) strongly points to the Financial Institution acting as an insurance broker.

But let us extend the facts above a little further. DFCU having got the right policy for Kidega and helped him sign, Kidega fails to pay the premium. Oder JSC in ***Oriental Insurance Brokers v Transocean (u) ltd***[48] said that as a general rule, the insured is liable to the broker for premium as money paid on his behalf whether or not they have been paid over by the broker to the insurer. Clearly DFCU must be able to sue for the premium. If it does, then it is proper to say that in Bancassurance business the Financial Institutions also act as insurance brokers albeit the definition that states that they are

47 Hedley Byrne & Co Ltd v Heller & Partners ltd (1964) AC 465 HL.
48 Oriental Insurance Brokers v Transocean (u) ltd SCCA No.55/1995.

insurance agents.

The court of highest authority in Uganda ruled, "Generally, the principles of law of agency applies to the relationship between the broker and the insurer on the one hand and between the broker and the insured on the others. Where the insurer holds out the broker as his agent, the broker has ostensible authority to bind the insurer as his principal."[49] The logical conclusion therefore is that the Financial Institution, while admittedly an insurance agent, will on several times find itself for all purposes and intent an insurance broker.

We now list some of the opportunities that will be obtained from the introduction of Bancassurance.

A. To the Customer

According to Dr. Nandita[50] the advantages of bancassurance are that the customer gets risk coverage at the bank itself, the availability of advice on financial planning whose outcome would be the informed choices the customer would make based on the bank's advice and the easy renewal of the policy by way of executing standing instructions with the bank and finally the one stop shop experience for the customer where they would get more than one financial service under the same roof.[51] The end result would be a bank that can offer banking, insurance, lending and investment products to its customers[52]. This definitely is convenient for the insured.

Since the distribution costs are lower than in a traditional distribution network, the consumer can usually get cheaper insurance products than

49 Oder JSC in Oriental Insurance Brokers v Transocean (u) ltd SCCA No.55/1995.
50 Dr. Nandita Mishra, "Integral Review - A Journal of Management, Vol.5 No.1, June-2012.
51 Dr. Nandita Mishra, "Integral Review - A Journal of Management, Vol.5 No.1, June-2012 page 61.
52 Iman & Zarrabieh, "Bancassurance Growth in Iran: A Case Study at Saman Bank" at page 2.

through traditional channels.[53]

Under the law of insurance, an insured person must honestly disclose that information which is material[54] to the insurer.[55] This is because the contract of insurance is a contract uberimae fide where one person, the insured, has information known to him or herself and not the other, the insurer.[56] The law requires that such information not known to the other party to the insurance contract must be disclosed. But the law also provides that an insured need not disclose that which the insurer knows. Lord Mansfield said, "There are many matters as to which the insured maybe innocently silent-he need not mention what the underwriter knows-*scientia utrique par pares contrahentes facit*. An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew; what way so ever he came to the knowledge."[57] The bancassurance arrangement allows the insurance company to rely on the due diligence carried by the bank.[58] This means that the insurer cannot rely on the defense of non-disclosure of a material fact, to reject a claim, if that fact should have been discerned by the bank.

B. For the banks

The opportunities lay in the extra non-interest income. Opportunity under bancassurance presents itself to the bank in form of an extra non-interest income. Remuneration is provided for in the Insurance Bancassurance regulations and the bank acting as the agent of the insurance company is entitled to such remuneration.

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53 Marjorie Chevalier, Carole Launay and Berangere Mainguy, "Analysis of bancassurance around the world" Focus (2005) 6 http://www.scor.com/.../focus/ Accessed on 30th December 2016.

54 According to Hardy Ivamy in his book, "General Principles of Insurance law" (1993) 6th edn, Butterworth at page 147, "whether a particular fact is material depends on the particular circumstances of the particular case". And according to Lord Sumner in Yorkshire Insurance Co ltd v Campbell [1917] AC 218 at 221, the question, if a fact is material, is a question of fact.

55 Economides v Commercial Union Assurance Co plc (1998) QB 587, [1997] 3 ALL ER 636.

56 Carter v Boehm (1766) 3 Burr 1905.

57 Carter v Boehm (1766) 3 Burr1905 at 1910.

58 Regulation 17 of the Insurance (bancassurance) regulations 2016.

While the customers have been associating with the bank for traditional transactions, there will be an increased association with the bank for more than the conventional banking business. This may in turn create for the bank a level of customer loyalty and the penetration of the existing insurance customer base.

An interesting issue arises from the fact that the insurance company can rely on the due diligence of the bank. This creates legal liability for the Bank for misrepresentation towards the bank. Thus if Kidega goes to DFCU and the latter conducts a due diligence on the property of Kidega which is wrong, Kidega will argue that such information he was not bound to disclose[59] and the insurer will have to indemnify him. The question that arises simply is; does the insurer have any rights against DFCU? DFCU would be liable for negligent misstatement. In ***Caparo Industries plc. v Dickman***[60] the House of Lords held that where a person prepares document with full knowledge that they will be relied on by another, they will, if it is just reasonable and fair, be liable for the loss resulting from reliance. DFCU would avoid such legal consequences by adopting the rule in ***Hedley Byrne & Co Ltd v Heller & Partners ltd.***[61] In this case, the court held that where one gives information that he or she reasonably contemplates will be relied on by the recipient he or she is liable under negligent misstatement unless he or she disclaimed liability.

C. For the Insurance Company

Bancassurance presents the opportunity to aid insurance companies in developing insurance products based on the information that banks have

59 Of course in Insurance Kidega would have to pass the test of a reasonable assured as stated by Fletcher Moulton LJ in Joel v Law Union and Crown Insurance Co [1908] 2 KB 863 at 884 where his lordship said, "If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so."

60 Caparo Industries plc v Dickman [1990] 2 AC 605, [1990] 1 ALL ER 568.

61 Hedley Byrne & Co Ltd v Heller & Partners ltd [1964] AC 465.

about their customers. The legal question that would arise in this case is whether this would breach the bank's duty to nondisclosure of customer information. **The *Tournier v National Provincial and union Bank of England*** [62] guidelines would apply in giving bancassurance agents exceptional treatment with regard to this issue. The bank, according to this case may disclose information where it has been compelled by the law. Regulation 17 of the Insurance (bancassurance) regulations allows the insurer to rely on the due diligence carried out by the bank to. Banks according to ACCENTURE have an unarguable advantage over other financial institutions because of the information about their customers they have access to[63]. In Uganda, it is a requirement to include the element of ongoing monitoring of accounts and transactions and customer identification requirements in the Bank's Know-Your-Customer rules and procedure in ***Section 7*** of the Financial Institutions (Anti-money laundering) Regulations[64]. When sufficiently analyzed this information would spot the right opportunities to sell to the right people to the benefit of the insurer and the customer the end user of the insurance product.[65]

When an insurance company relies on the bank's due diligence, this creates a legal hardship where a claim is made and could have been met by the defence of non-disclosure. According to Hardy Ivamy, "Actual knowledge is not essential if the insurer knew that he had the means of knowing the fact."[66] Exploiting the due diligence of banks would clearly whittle down the defence of non-disclosure. This could lead to losses especially where the bank has supplied a disclaimer on the information given.

For the insurance company, there is the financial opportunity to capture

62 Tournier v National Provincial and union Bank of England [1924] 1 KB 461.
63 ACCENTURE, "How Bancassurance Can Dominate The UK Life Insurance Industry".
64 Statutory Instrument No. 46 2010.
65 ACCENTURE, "How Bancassurance Can Dominate The UK Life Insurance Industry" at page 4.
66 Hardy Ivamy, "General Principles of Insurance law" (1993) 6th edn, Butterworth at page 157.

premium from bank financed assets[67]. The benefit embedded herein is made possible by the co-branding of bank and insurance products such as a home loan that comes with a fire policy. The home being an asset will provide premium to the insurance company through the fire policy. Creation of new products by the Bancassurance Agent is prohibited by the Insurance (bancassurance) Regulations[68] making co-branding of products of the two sectors the next viable alternative.

The Uganda Insurers Association gave the image problem or credibility of insurance companies as one of the hindrances of the progress of insurance in Uganda, however under bancassurance, the insurance company has the opportunity to thrive on the good reputation of the bank and gain credibility by its association with the bank. Thus "An insurance company can establish itself more quickly in a new market, using a local bank's existing network."[69] The ease with which the customer will access their funds and direct them to renewing the policies or paying premiums will lower the lapse incidents for the insurance companies.

Another advantage is that the Insurance Company will have a chance to benefit from the wide client base of banks. Through this new distribution network, the insurance company significantly extends its customer base and enjoys access to customers who were previously difficult to reach. This is obviously a fundamental advantage; it is itself enough to convince an insurance company to ally itself with a bank.[70]

Chevalier, et al, have argued that the insurance company also benefits from the reduction in distribution costs relative to the costs inherent in traditional sales representatives, since the sales network is generally the

67 ACCENTURE, "How Bancassurance Can Dominate The UK Life Insurance Industry".

68 Regulation 10.

69 Marjorie Chevalier, Carole Launay and Berangere Mainguy, "Analysis of bancassurance around the world" Focus (2005) 6 http://www.scor.com/.../focus/ (Accessed on 30th December 2016).

70 Marjorie Chevalier, Carole Launay and Berangere Mainguy, "Analysis of bancassurance around the world" Focus (2005) http://www.scor.com/.../focus/ (Accessed on 30th December 2016).

same for banking products and insurance products. These cost savings have been recognized by many bancassurance operators around the world and are therefore carried over into the costs included in contracts. This means that products can be sold more cheaply.[71]

71 *Ibid.*

3. ALBINISM, DISABILITY AND THE CASE FOR GENETIC TESTING AS A MEANS OF PROMOTING ENJOYMENT OF RIGHTS

Aaron Joel Kaleeba*

Abstract

PWA's (Persons with Albinism) in Uganda and around the world have over time suffered numerous human rights violations that have hindered their full and active participation in communities in which they are. States have taken measures to try and combat the challenges that these people face, but to say that the violations have been alleviated is to tell an outright lie.

This paper will define what the condition of albinism is. It will then go on to discuss whether or not albinism is a disability as well as highlight the various rights violations that persons with albinism face. The discussion herein highlights the measures in place for combating the violations and focuses on genetic testing as a means of fighting the rights violations and further promoting the enjoyment of the same. Lastly, it will propose recommendations that may go a long way in addressing the challenges that persons with disabilities face in the enjoyment of their human rights.

3.1 Introduction.

Albinism is a rare non-contagious genetically inherited difference present at birth.[1] Albinism results in the lack of pigmentation in the hair, skin and eyes

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causing vulnerability to the sun and bright light. The term 'Persons with Albinism' (PWA) is generally preferred while referring to these persons, over the term 'albino' because the former puts the person before the condition rather than equate him to it.[2] Persons with albinism, especially in Uganda and Africa, where the skin complexion of the people is brown or chocolate, then appear different because their bodies do not secret melanin. The word albinism comes from the Latin word 'albus' meaning 'white.” [3] Because of this difference in color of skin, PWA's have become subject to various human rights violations as this paper will indicate later. The condition of albinism is a genetic disorder caused by the mutation of genes.[4] It must be understood that it is an inherited condition that is passed on from parents that are carriers of the gene to their children. When both parents carry the albino 'sick' gene, there is a one out of four chance that their offspring will have albinism and a one in two chance that their offspring will become a carrier.[5] Because of the absence of genetic testing in Uganda and in most African countries, many parents do not know that they are carriers of recessive albinism genes until they give birth to a child with albinism.[6] It is from this lack of knowledge that the myths about PWA's are constructed and it forms the basis for the rights abuses inflicted on these persons. There are majorly two kinds of albinism.[7] The first is ocular albinism, where only the person's eyes are affected. The second type is subdivided into four other types. OCA 1, OCA 2, OCA 3 and OCA 4. The OCA 2 is the most common type of albinism worldwide and the most common in sub-Saharan Africa.[8] The

1Report of the Human Rights Council Advisory Committee on the study on The Situation of Human Rights of Persons Living with Albinism, Presented at the 28th Session of the Human Rights Council, 31st March 2015. para 8.
2 Children with Albinism: Violence and Displacement- Report to UNCRC 2014, Pg. 8.
3 Understanding Albinism: An Inherited And Manageable Condition, Human Rights Media Center, October 2013.
4Okoth, Josue, What Would Be Done About 'Albinos' Safety' in New Vision, 16th February 2017.
5Ibid.
6supra note 3 at P.30.
7ibid at P21.
8Ibid.

OCA1 meanwhile is the most severe type with a complete lack of melanin production throughout life.[9]

With that said, it is imperative to note that there are three groups of people in so far as this subject is concerned and a scientific approach in addressing the challenges that PWA's face can come in handy.

3.2 Albinism as a Disability

There is often debate as to whether PWA's can be categorized as person with disabilities. It is not uncommon for people to suggest that these persons do not fall under the category of PWD's as some sources refer to it as a 'disease'[10] and in this context then, PWD's would not qualify as PWD's within the definition of PWD's. However, other sources classify the condition of albinism as a disability but one that is manageable.[11] This paper makes the case that albinism is a disability.

The CRPD[12] observes that disability results from interaction between persons with impairment and attitudinal and environmental barriers that hinders their full and effective participation in the society on an equal footing with others. PWA's lack melanin. The lack of melanin in the eyes results to bright light and significant visual impairment.[13] This lack of melanin facilitates multiple eye defects. Some of these include photophobia, foreal hypoplasia among others.[14] The practical effect of this is that most PWA's are myopic. Hassan Mulondo, 32, the General Secretary of the Uganda Albino Association, observed that while in school, the teacher gave him a backseat, yet he had a challenge with his eye sight.[15] This revelation,

9Ibid.
10supra at note 4.
11supra at note 3 at P. 5.
12Para (e) Convention on Rights of Persons with Disabilities.
13Report of the Independent Expert on the Enjoyment of Human Rights Of PWA's para 35; presented at the 31st Session of the Human Rights Council, 18th January 2016
14supra note 2 at P.8
15Surviving Amidst Stigma, albinos (sic) tell their stories, Daily Monitor Thursday Oct. 17 2013.

coupled with the definition in the CRPD goes to confirm the fact that PWA's by virtue of the fact that they lack melanin, upon interaction with numerous barriers, will suffer visual impairment. This automatically qualifies them as person with disabilities. The CRPD, in its definition, provides that disability must be a 'long-term' impairment. However, in other treaties, disability is an impairment; physical, mental or sensory, whether 'temporary' or 'permanent'.[16] It is my contention therefore, that whether the visual impairment is 'temporary' or 'permanent', it amounts to a disability. Suffice to say, however, that the visual impairment that PWA's have often cannot be corrected.[17] As earlier said, because of the visual impairment, PWA's have been classified as 'legally blind' and therefore unable to access the frameworks available to PWD's.[18]

Therefore, because albinism is a disability, PWA's are prone to the rights violations often directed towards PWD's. they are subject to discrimination, inhumane and degrading treatment, and their dignity is often blatantly violated. Classifying PWA's as PWD's will go a long way in bringing their issues to the forefront as it puts them in the bigger category of minorities and makes their case better as people in urgent need of attention and redress in so far as respect for their rights is concerned.

3.3 Rights Violations

Article one of the Universal Declaration of Human Rights provides that all humans are born free and equal in dignity and rights. It goes on to require all human beings to act towards each other in the spirit of brotherhood. To PWD's, it cannot be said that their fellow human beings have acted in the spirit of brotherhood. Their rights have, more often than not, been violated even by their closest relations. The quality and condition of life to which

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16 Art. 1 of the inter-American Convention on Elimination of all forms of Discrimination against PWD's
17supra note 13
18ibid.

they are subject is despicable and goes against numerous human rights declarations.

One of the biggest violations against PWD's is premised on the aspect of discrimination. Discrimination against PWD's means any distinction or restriction on the basis of disability, record of disability, conditions resulting from previous disability, perception of disability whether present or past which have the effect or objective of impairing or nullifying the recognition, enjoyment or exercise by a person with disability of his or her human rights or fundamental freedom.[19] This elaborate definition is provided for in almost similar terms in the Convention on the Rights of Persons with Disabilities (herein after referred to as the CRPD).[20] The genesis of discrimination against PWD's is found in the name calling.

In Uganda, PWD's are often referred to as '*namagoya*' in the local dialect in disregard of their names.[21] In countries like Malawi they are often referred to as '*mzungu'*, '*yellowman*', 'napwere'.[22] In South Africa, they are referred to as '*umlunga*', '*wit*', '*kafir*', '*leswati*' (animals), '*inkawu*' (apes).[23] Referring to PWA's in these terms is a blatant violation of their rights to dignity as protected under Article 24 of the Constitution of Uganda. To refer to someone as an animal, ape and the like, is to disregard the fact that they are human. There is no greater attack on one's dignity such as this.

PWA's have further faced rights abuses that stem from the fact that they are not seen as 'full humans' as will be indicated here. The discrimination earlier alluded to extends from the name calling onto grave violations such as murders and trafficking of body parts.

19supra note 16.
20ibid at Art 2.
21supra note 15.
22supra note 2 at P.8.
23Ibid.

The enjoyment of the right to life of PWA's is the most violated and abused right. PWA's are hunted down, mainly for ritual practices. It has been widely reported that PWA's are hunted and physically attacked due to prevailing myths that their body parts, when used in witchcraft rituals will induce wealth, good luck and political success.[24] Albino (sic) hunters in some African countries kill PWA's for their blood, hair, genitals and other body parts that witch doctors say bring luck.[25]

The fact that PWA's live with a death threat hanging over their lives is testimony of violation of their right to life. The case of *Salvatori Abuki V A.G*[26] extended the interpretation of the right to life to include the right to a livelihood. Furthermore, court in *Sudan Human Rights Organization V Sudan*[27] was of the view that the right to life should include the condition of life in which a person lives. A person living in fear of being killed cannot be said to be enjoying their full rights. The threat to life is a barrier on the basis of disability that prevents PWA's from being fully included in the society.

The discrimination against PWA's serves to inhibit the enjoyment of rights to family and community life. The discriminations that PWA's suffer facilitate their exclusion from their families and communities. Antonio Baligowa, 29, upcoming artiste, noted that he did not see his father like the rest of his siblings because he was rejected when he was two years old because his father said that in his clan, they did not give birth to albinos (sic).[28] At two years, therefore, Antonio was subjected to a life with no family on the basis of his disability. The violation of these rights further serves to denying children their basic rights and needs that facilitate their

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24supra note 13 at para 16.
25supra note 3 at P. 12.
26(Constitutional Case No. 2 of 1997) [1997] UGCC 5 (13 June 1997).
27Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, 279/03-296/05, African Commission on Human and Peoples' Rights, May 2009, available at: http://www.refworld.org/cases,ACHPR,51b890c24.html (accessed on 5 May 2017).
28supra at note 15.

survival in life. Gyesibye Idi's wife Namukoma observed that when she gave birth to an albino (sic) baby girl, she was bewildered to the extent that she refused to breast feed the baby![29] She thought she would be breastfeeding a spirit![30] Such is an example of the stigma that PWA's face. Such testimonies are early revelation of what goes on in the families and communities where PWA's are thought of as far from human beings, rather as spirits and generally not of the same fabric as people with pigmented skin.

This paper may not exhaust all the violation of rights that PWA's face but makes the case that these persons face discrimination and barriers that restrict their participation in society on equal basis with others every day. Added to their challenges, PWA's around the world are unable to enjoy the full range of human rights and the same standards of equality, rights and dignity as others.[31] It is because of these persistent violations that the need to act arises. The failure to act would go against the very spirit of the Universal Declarations of Human Rights that advocates for the spirit of brotherhood amongst all peoples.

3.4 Challenges

Before making a prescription as to the solution of the rights violations, this section of the paper attempts to dissect these rights violations to which it seeks to prescribe a solution.

The genesis of human rights violations stems from myths that the people have about the PWA's. These myths are founded on the limited knowledge about the issue and its impact on the enjoyment of human rights by PWA's.[32] The myths and disbeliefs are many and racy in nature. Some people believe that albinism is a punishment from God or a curse.[33] To others, PWA's are

29 Carrying the Cross of 10 Albino (sic) Children, New Vision on 8th September 2014.
30 Ibid.
31supra note 13 at para 14.
32supra note 1 para E.
33supra note 3 at P.10.

ghosts or copses that come from the devil.[34] Further yet, some people believe that PWA's are not fully human and that they do not die but rather disappear. The list goes on and on. The myths are so deeply embedded within communities that PWA's have become an ignored lot not only in Uganda but also elsewhere in Africa. The gravity of the problem flows from the reaction of people when they interface with PWA's. Olivia Namutebi, Audit Manager, Post Bank observed that people used to tell her mother to dip her in some sort of alcohol in order for her skin to turn.[35] Such is the extent of the lack of knowledge and the extent of misbeliefs about PWA's.

As if that is not enough, because of the myth that body parts of PWA's are highly potent in ritual practices, there are instances of grave robberies to obtain parts of the deceased for one to use in their practices![36] The myths extend into trade of body parts of the PWA's. Herein therefore, lies the problem. The societal constructs about PWA's is the root cause of the violations. These constructs may be blamed partly on the lack of knowledge as earlier stated. This paper will on this basis therefore suggest a way of redressing this lack of knowledge which will in the long run perhaps facilitate enjoyment of rights.

3.5 Measures to Combat Rights Violations

Measures have been suggested as a means to combat the rights violations that PWA's face in respect of their positions as PWD's. The CRPD under Article 4 enjoins states parties to undertake measures to ensure and promote the full realization of all human rights and fundamental freedoms of all PWD's. States are enjoined to take all 'legislative', 'administrative' and other measures for implementation of rights. Article 8 of the CRPD further suggests that states parties must take measures to raise awareness aimed at

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34Ibid.
35supra note 15 at P.10.
36supra note 3 at P.13.

combating stereotypes against PWD's, engaging in widespread awareness campaigns is one of the best ways to combat the myths and disbeliefs that exist about PWA's within the communities. In the Ugandan context, it cannot be authoritatively stated that these awareness campaigns have been undertaken.

Other measures have been suggested and employed by states to address the rights violations that PWA's face. Some of these include clear laws and implementation of the same, active public education, multi-pronged approaches that involve protection and accountability and publicity of prosecution.[37]

The interest of this paper, however, is founded in the suggestion of the Independent Expert on the Enjoyment of Rights of PWA's in her report to the 31st Session of the Human Rights Council.[38] She suggested that the question of addressing these rights violations must be looked at and attempts made to address it in a 'scientific perspective'. It is important to note at this point that the aspect of addressing this challenge in a scientific perspective has not been so widely traversed. Because of that, this paper intends to propose that taking up genetic testing coupled with the awareness raising model ensures the enjoyment of rights of PWA's.

3.6 The Case for Genetic Testing

It has already been noted herein that albinism is a condition that results from mutation of genes and that it is a hereditary condition.[39] It has also been stated that the violation of rights of PWA's face stems from the lack of knowledge and the myths within the communities.[40] On this basis, therefore, this paper makes the case that genetic testing; mass genetic

37supra note 1 at para IV.
38ibid at para 61.
39Para 1 of this article.
40Ibid.

testing of people at that, can be under-taken to counter the deep seated lack of knowledge and as an attempt to dispel the myths and misbeliefs amongst the masses. Genetic testing is a type of medical test that identifies changes in chromosomes, genes or proteins.[41] The results of a genetic test can confirm or rule out a suspected genetic condition or help determine a person's chances of developing or passing on a genetic disorder.[42] Carrying out indiscriminate genetic testing will confirm to people whether or not they carry the albinism gene. As earlier on discussed, parents, for the most part, do not know that they are carriers and are often taken aback when their offspring have albinism.

It is the contention of this paper that genetic testing coupled with wide-spread awareness campaigns as mandated by Article 8 of the CRPD can go a long way in dispelling the myths and misbeliefs that exist as at present. It cannot be stated enough that the cause of these rights violation are deep seated myths that people harbor. Indiscriminate genetic testing by states and state agencies will dispel myths that PWA's are half human, that they do not die and that they possess special powers; among others. This paper strongly states that when people know, their perception about PWA's will change, gradually and otherwise. Instances such as those suffered by Olivia Namutebi [43] of being abandoned on grounds that PWA's did not exist in her father's clan would be scaled down.

This approach must, however, not be a singular model. It must be accompanied by massive education and awareness raising campaigns in order for the masses to understand in clear terms that albinism is not a curse, a punishment, but rather a condition that results from mutation of genes and that it is manageable. Dispelling the myths would then facilitate a

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41 https://ghr.nlm.nih.gov/primer/testing/genetictesting (accessed on 8th May 2017).
42Ibid.
43supra note 15.

change in attitude amongst the people which will in turn promote the enjoyment of rights of PWA's.

This paper also makes the case that the promotion of genetic testing will empower people and facilitate the enjoyment of their sexual and reproductive health rights. Reproductive health has been defined as a state of complete physical, mental and social wellbeing, not merely the absence of disease or infirmity in all related matters relating to the reproductive system.[44] It therefore, implies that people are able to have a satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide when, and how often to do so.[45] The last component includes the right of men and women <u>to be informed</u>[46] among others. The crux of genetic testing lies in the right of people to be informed and be empowered on matters relating to the enjoyment of their reproductive rights. It has been suggested that the aspect of reproductive rights rests on the recognition of the basic rights of all persons to decide freely the number, spacing and timing of their children and to have the information_and means to do so.[47] When genetic testing is carried out, PWA's and their families can be able to make proper decisions as to the enjoyment of their rights in so far as reproduction is concerned. Reproductive rights involve three main components.[48] The focus of this paper is on the second which emphasizes the right to the highest standards of sexual reproductive health that contains access to comprehensive health services and abortion where it is not against the law. The third emphasizes the right to make decisions concerning reproduction free from coercion and violence. Persons, through genetic testing, will and must be empowered to make decisions in so far as

44 program of Action, adopted at the ICPD, Cairo 1994 at para 7.3.
45Ibid,
46 Reproductive Rights are Human Rights- UN Human Rights Office of the High Commissioner, Danish Institute of Human Rights
http://www.google.com/url?q=http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf
(accessed on 6th May 2017).
47ibid at P.23.
48Ibid.

reproduction is concerned, in exercise of their inherent rights.

It is also important to note, distinctly, that the second component touches the aspect of abortion but provides exclusion, limiting it to only countries where abortion is legal.

In Uganda, abortion is illegal and is only permitted in circumstances where it poses a danger to the mother or better put, in circumstances of health risks.[49] A blanket outlawing abortion inhibits enjoyment of sexual and reproductive health rights. Justification for this can be found in some of the violations perpetrated against PWA's. A myth exists that PWA's cannot get or spread HIV and that sexual intercourse with a PWA can cure HIV.[50] The effect of that myth will be that many female PWA's will carry unwanted pregnancies. The criminalization of abortions will leave unsafe termination of pregnancy as the only safe recourse for them. This should not be the case. Unsafe abortion is the cause of many needless deaths among women, especially in rural areas.[51]

The state must create openings in the arena of abortions and permit persons to make decisions as to when and when not to give birth and for the purposes of this paper, those PWA's that are raped in satisfaction of these myths. abortion laws that do not put women at the center of decision making about whether to remain pregnant serves to preserve the patriarchal power at the expense of women's equality and human dignity.[52] The roads to this direction can facilitate the full enjoyment of sexual and reproductive rights of PWA's.

This point can also be stretched to include all those who undergo genetic

49 Article 22 of the Constitution of the Republic of Uganda 1995.
50supra note 3 at P.11.
51 Charles Ngwenya, Using Human Rights To Combat Unsafe Abortion: What Needs To Be Done? (accessible at http://www.chr.up.ac.za/africlaw/charles_ngwenya.pdf).
52ibid

testing. Providing safe abortion would facilitate free decision making as to when and when not to have a child and promoting the enjoyment of rights in this process.

3.7 Recommendation

This paper recommends that proactive measures be taken to educate the masses in lieu of the provisions of the CRPD as to the rights of PWA's and more stringent legislation be enacted to specifically protect the rights of these people. This paper also suggests that the issue of genetic testing be taken up expeditiously and that state actors should work to dispel all myths about PWA's and to ensure that mass education is adapted to further cement cause of the condition of albinism in the communities.

An amendment in the law concerning abortions in order to promote the reproductive and health rights of PWA's ought to be considered and further, the need to clip the ultra-sexual tendencies of certain characters who take advantage of PWA's as well as to empower PWA's to make decisions about their reproduction welfare.

3.8 Conclusion

This paper has highlighted the human rights violations that persons with albinism face and has suggested genetic testing in combination with awareness as models for addressing rights violations and promoting enjoyment of the same and dispelling the myths and misbeliefs about persons with albinism in the community.

4. AN ANALYSIS OF COMPUTER HACKING OFFENCES IN UGANDA

Rukundo Solomon*

Abstract

In Uganda computers are beginning to form an integral part of the social and economic life of the people. Computer based social media such as Facebook, WhatsApp and Twitter are increasingly getting more subscribers in Uganda. E-commerce is now a reality as Internet banking has become increasingly popular with most banks introducing it and the push towards effective *e-Government is now in full swing*. Concomitantly various forms of computer misuse and abuse have emerged and key among them is hacking. There have been a number of reported incidents of defacing of government websites, hacking into emails, social media and other Internet accounts. Hacking diminishes the confidence that people have in the integrity and security of computer systems which is necessary for a vibrant e-Commerce and e-Government environment. This is a species of crime that criminal legislation in Uganda was not able to adequately deal with. In reaction to this, Parliament passed the Computer Misuse Act (CMA) which among other things criminalised hacking in a number of its provisions. This paper seeks to justify the introduction of these new offences arguing that there are a number of incompatibilities between hacking and the nature of traditional criminal law justifying the creation of a new offence. It analyses the nature, adequacy and relevance of these offences introduced by the CMA, how they fit in Uganda's wider penal law and computer regulation regimes.

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4.1 Introduction

A. Hacking in Uganda

Hacking is on the rise in Uganda and a number of incidents of hacking have been reported and recorded. In March 2009, Uganda's defence ministry website was closed after hackers calling themselves "the Ayyildiz team" published anti-Israel messages on it.[1] In 2010 the official website of State House was pulled down after a hacker calling himself 'Kaka Argentine' posted a picture of the Nazi German dictator Adolf Hitler with a swastika.[2] The image stayed on the site for more than 24 hours before the site was pulled down. In 2011 a group calling themselves "HackersUganda" hacked into the Uganda Investment Authority (UIA) web site and posted a message protesting against the proposed give away of Mabira forest, the largest forest reserve in Uganda, to an investor for development.[3] In March 2012 the website of the Ministry of Works was pulled down after a hacker posted a picture of opposition leader Kizza Besigye seated on a stool in a rather pensive mood.[4] In August 2012, the international hacker group "Anonymous" hacked into the Office of the Prime Minister's website in protest against the Anti-Homosexuality Bill.[5] In January 2013 MTN Uganda, a leading telecommunications company which also offers money transfer services via telephone was hacked into by former employees leading to a loss of over 3.1 billion shillings (USD 900,000).[6] In February 2013 a member

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*1 **Uganda hit by anti-Israel hackers**, BBC News, 9 March 2009, http://news.bbc.co.uk/2/hi/africa/7932544.stm Accessed on 16/09/2016.*
*2 Risdel Kasasira, **Hacker posts Hitler photo on State House website**, Daily Monitor, May 31 2010, http://www.monitor.co.ug/News/National/688334-929108-brnt54z/index.html Accessed on 16/09/2016.*
*3 John Njoroge, **Save Mabira activists hack into Investment Authority web site**, Daily Monitor, August 17 2011, http://www.monitor.co.ug/News/National/-/688334/1220290/-/bjyc13z/-/index.html (Accessed on 16/09/2016).*
*4 Emmanuel Gyezaho, **Ministry pulls down website after hackers post Besigye photo**, Daily Monitor, 1/3/2012, http://mobile.monitor.co.ug/News/-/691252/1356694/-/format/xhtml/-/9ccfm0/-/index.html (Accessed on 16/09/2016).*
*5CIPESA, **State of Internet Freedoms,** p 12.*
*6 Edward Anyoli, **Report on MTN mobile money fraud accurate – witness**, New Vision, 16/07/2014, http://www.newvision.co.ug/new_vision/news/1342734/report-mtn-mobile-money-fraud-accurate-witness#sthash.K2UTcr6b.dpuf (Accessed on 14/09/2016).*

of parliament lost over Shs 300 million (USD 90,000) to hackers who hacked into his e-mail and corrupted communication between him and his suppliers in China making him pay money into false accounts.[7] In July 2013 it was reported that the Uganda Investment Authority website had once again been hacked into with the hackers replacing some useful information about Uganda with a clown wearing a scary mask with greyish woollen gloves in fitting attire for Halloween night.[8] Recently in 2016 it was reported that there were four attempts by hackers over a period of ten months to siphon away 81 billion shillings (USD 25,000,000) from the central bank.[9] The Uganda Police Annual Crime and Road Safety Report of 2012 stated that a total of 62 cases of hacking occurred in in that year alone in which about 1.5 billion UGX (USD 579,000) was lost through hacking victims mails among other means.[10] The Uganda Police Annual Crime Report of 2014 reported 35 cases of hacking and noted that e-mail hacking was the most highly reported cybercrime in the country resulting in losses of 11.86 billion shilling (USD 3,600,000).[11] It should be noted that majority of hacking victims will not report the intrusion[12] for a variety of reasons for example financial institutions are unlikely to report any cyber intrusion for fear that this will

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*7 Stephen Otage, **Forensics lab for computer crime opened in Kampala**, Daily Monitor, 11/03/2013, http://www.monitor.co.ug/News/National/Forensics-lab-for-computer-crime-opened-in-Kampala/-/688334/1716526/-/1590cm1z/-/%2523 (Accessed on 14/09/2016).*

8 Jeff Mbanga, A hacked website and Uganda's investment story, The Observer, 16 July 2013, http://www.observer.ug/viewpoint/83-staff-writers/26437-a-hacked-website-and-ugandas-investment-story (Accessed on 16/09/2016).

*9 Jonathan Adengo, **Defence, UNRA targeted in foiled Shs81b Central Bank cash thefts**, Daily Monitor, http://www.monitor.co.ug/Business/Defence-UNRA-targeted-in-foiled-Shs81b-Central-Bank/688322-3111838-jf3xok/index.html (Accessed on 14/09/2016).*

*10 Haguma Jimmy, **Cybercrime Barometer, a Uganda Police Centenary Plus Awareness Campaign Paper Overview**, http://www.upf.go.ug/cyber-barometer/ (Accessed on 16/02/2016).*

*11 The Uganda Police, **Annual Crime Report 2014**, http://www.anppcanug.org/wp-content/uploads/Resource_Center/Annual_Reports/Police/R_P_annual_report_2014.pdf (Accessed on 16/09/2016).*

*12 Less than 10% of computer crimes are reported and of all the crimes that are reported, fewer than two percent get convicted. It was found that 53% of the victims had never told anybody, 34% reported incidences to the System Administrators while 13% told their friends: Florence Tushabe, and Venansius Baryamureeba, **Cyber Crime in Uganda: Myth or Reality?**, World Academy of Science, Engineering and Technology, International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering Vol:1, No:8, 2007; Robert J. Sciglimpaglia, Jr., **Computer Hacking: A Global Offense**, 3 Pace Y.B. Int'l L. 199 (1991)Available at: http://digitalcommons.pace.edu/pilr/vol3/iss1/8 (Accessed on 19/09/16).*

cost them their clientele who will inevitably lose faith in the integrity and security of their system.[13]

A. Inadequacy of Traditional Criminal Law

With the emergence and ubiquitous spread of computers and our increasing dependency on them, the application of traditional criminal law to abuses such as hacking is uncertain or inappropriate and at best inadequate. There are a number of incompatibilities between the crime of hacking and the crimes dealt with under traditional criminal law. While some cybercrimes are simply old crimes 'wrapped in gigabytes and modems'[14] such as theft and fraud, hacking is an entirely new species of crime.[15]

Using the Internet, hacking can be done from an apparently safe distance, from a different and possibly less rigorous legal system than the one in which the victim lives and the crime takes place.[16] In one of the earliest studies on cybercrime in Uganda it was established that major cases involved inter-country hacking and fraud.[17] Another peculiarity of hacking as an offence is the potential damage that one single individual or group of individuals can cause with relative ease. Unlike traditional offences where the damage done by a criminal is restricted to those he has direct access to, through hacking an individual with nothing but a laptop can do damage on a massive scale with very little apparent effort. The 2013 MTN Uganda hack cost the telecommunications company over 3.1 billion shillings (USD 900,000)[18] but also did considerable damage to the faith customers had in

*13 The Uganda Police, **Annual Crime Report 2014**, http://www.anppcanug.org/wp-content/uploads/Resource_Center/Annual_Reports/Police/R_P_annual_report_2014.pdf (Accessed on 16/09/2016).*
14 Warren P. and Streeter M., Op Cit P 9.
15 Warren P. and Streeter M., Op Cit P 9.
*16 Peter Warren and Michael Streeter, Op Cit p 8; Robert J. Sciglimpaglia, Jr., **Computer Hacking: A Global Offense**, 3 Pace Y.B. Int'l L. 199 (1991)Available at: http://digitalcommons.pace.edu/pilr/vol3/iss1/8 (Accessed on 19/09/16).*
17 Florence Tushabe, and Venansius Baryamureeba, Op Cit.
18 Edward Anyoli, Op Cit .

the integrity of its mobile money transfer system. With the emergence of e-Government hacking into any one of the government agency systems can have potentially a devastating impact, as the integrity of these systems is their major value. In 2012 the Uganda Revenue Authority system was hacked leading to a loss of 2 billion shillings in taxes.[19] An attack on any of the computer systems running the airport, power grid and water supply could have disastrous consequences.

Thus hacking can only be adequately dealt with in the global networked society in which we live through a networked response that departs from the traditional jurisdictional limitations of criminal law.[20] International co-operation in the pursuit and prosecution of cybercriminals and to strengthen research activities that will explore new techniques and procedures to combat the rate at which cyber crime spreads and the ease with which it can be conducted.[21] A number of cases relating to hacking and electronic fraud have involved foreigners.[22] In two cases of cybercrime dealt with by the police in 2014, collection of information from United Kingdom and United States of America through INTERPOL was vital to apprehending and prosecuting the perpetrators.[23]

B. The Computer Misuse Act 2011

The Computer Misuse Act (CMA) deals with the potential criminal activity that can be carried out or aided by means of a computer. The CMA's declared purpose is to 'make provision for the safety and security of

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19 Edward Anyoli, Op Cit; ***Uganda vs Guster Nsubuga & Others*** *HCT-00-AC-SC-0084-2012.*

20 For example the paedophile David Ward was trapped when he offered a German officer from the federal police the BKA a trade in paedophile pictures. The officer passed on this vital information to the British cyber police using established international procedures designed to ensure that cross-boundary crimes are dealt with swiftly. Warren P. and Streeter M., Op Cit p 100.

21 Florence Tushabe, and Venansius Baryamureeba, Op Cit.

22 ***Ivan Ganchev & Others vs Uganda*** *CACrA No. 155 of 2013 where the appellants had been convicted of unauthorized access of Computer Data without authority contrary to section 12(1) of the Computer Misuse Act involved three Bulgarians.*

23 The Uganda Police, ***Annual Crime Report 2014****, http://www.anppcanug.org/wp-content/uploads/Resource_Center/Annual_Reports/Police/R_P_annual_report_2014.pdf (Accessed on 16/09/2016).*

electronic transactions and information systems; to prevent unlawful access, abuse or misuse of information systems including computers and to make provision for securing the conduct of electronic transactions in a trustworthy electronic environment and to provide for other related matters.' The central goal of this legislation is to create a vitalising viable and vibrant environment for the development and practice of e-commerce.[24]

The provisions of the Act are based on and are to be construed within the context of: Draft East African Framework for Cyber Laws 2008 (Draft EAC Framework), Council of Europe Convention of Cyber Crime 2001 (Convention on Cybercrime) and the United Nations Convention on use of Electronic Communications in International Contracts 2005.[25] In its report[26] on the electronic transactions law, the Uganda Law Reform Commission also considered the following legislation: the UK Computer Misuse Act 1990, the Singapore Computer Misuse Act Cap 50A, South African Electronic Communications and Transactions Act No 25 of 2002 and the UK Data Protection Act 1998. All these conventions and statutes are relevant to a proper interpretation of the offences relating to hacking created under the CMA.

4.2 Hacking Offences under the Computer Misuse Act

A. Unauthorized Access

Section 12 provides for the criminalization of unauthorized access thereby creating the basic hacking offence.[27] The criminalization of unauthorized access is in keeping with the Draft East African Framework for Cyber Laws 2008, which requires unauthorized access of a computer system to be

*24 Uganda Law Reform Commission, **A Study Report on Electronic Transactions Law**, (Law Com Pub, No 10 of 2004), Para 1[Hereinafter ULRC, **Study Report**].*
25 Parliament Hansard, Tuesday, 29 June 2010; The Council of Europe Convention of Cyber Crime 2001 and the United Nations Convention on use of Electronic Communications in International Contracts 2005 are annexures to the Draft East African Framework for Cyber Laws 2008.
*26 ULRC, **A Study Report.***
*27 ULRC, **A Study Report**, Paras 5.3 and 5.8; Jonathan C. Op Cit., p 63.*

prohibited.[28] Prior to the introduction of the CMA, only a few sector specific laws dealt with hacking. For example section 191 of the East African Community Customs Management Act[29] (EACCMA) prohibits gaining and attempting to gain unauthorised access to Customs computerised system. Thus where ASYCUDA and MOVIS, the computerised systems of Uganda Revenue Authority, were accessed and modifications and alterations were made to the data, this was held to be a breach of the EACCMA.[30]

B. Intentional Access or Interception of a Program or Data

Section 12(1) of the CMA provides that a person who intentionally accesses or intercepts any program or data without authority or permission to do so commits an offence. "Data" means electronic representations of information in any form[31] and a program is data representing instructions or statements that, when executed in a computer, causes the computer to perform a function.[32] Section 12(1) in effect criminalises two apparently different acts done without authority in relation to data or a program: the first is accessing and the second is intercepting.

C. Accessing

'Access' is defined in section 2 as 'gaining entry to any electronic system or data held in an electronic system or causing the electronic system to perform any function to achieve that objective'. This offence mirrors that of 'illegal access' in article 2 of the Convention on Cybercrime and is akin to housebreaking under sections 280 and 281 and criminal trespass under section 286 of the Penal Code.[33] It covers the basic offence of dangerous threats to and attacks against the security of a computer system. In conformity with the Convention on Cybercrime it criminalises the mere

28 Paragraph 2.1.3 of the Draft East African Framework for Cyber Laws 2008.
29 East African Community Customs Management Act 2004, RE 2009.
30 Uganda vs Guster Nsubuga & Others HCT-00-AC-SC-0084-2012.
31 Section 2 of the CMA.
32 Ibid.
*33 ULRC, **A Study Report**, Para 5.5.*

unauthorised intrusion, the simple act of gaining access to a system; even if the offender does no further act i.e. does not take or modify any data.[34] This is because the mere accessing of the computer or network threatens the legal interest of integrity of computer systems.[35] The rationale for this is that such intrusions may give access to confidential data and secrets, or even encourage hackers to commit more dangerous forms of computer-related offences like computer-related fraud or forgery.[36] Criminalisation of mere unauthorised access thus represents an important deterrent to many other subsequent acts against the confidentiality, integrity and availability of computer systems or data, and other computer-related offences.[37] Also, as a result of the growth of e-commerce and the computerisation of many large corporations, the private data of quite a number of individuals is held by various institutions such as banks,[38] hospitals,[39] and telecommunication companies[40] in electronic form. Businesses maintain records such as employee personnel records, client records and so on in electronic form for convenience. Hacking into a system and simply viewing this data can amount to a breach of privacy for the individuals concerned. Thus the criminalisation of the offence of mere access also stems from the right to privacy.[41]

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34 Cybercrime Convention, Explanatory Report, Para 44.
35 United Nations Office On Drugs And Crime, (2013) ***Comprehensive Study on Cybercrime****, United Nations, New York, February, p 82.*
36 Cybercrime Convention, Explanatory Report; Para 44.
37 United Nations Office On Drugs And Crime, Op Cit.
38 Section 6 of the Anti-Money Laundering Act 2013 requires banks and similar institutions to keep extensive records regarding their clients.
39 ***L.L. vs France*** *(no. 7508/02),* ***Z. vs Finland****, Judgment of 25 February 1997 and* ***Anne-Marie Andersson vs Sweden****, Judgment of 27 August 1997 are three examples from the European Court of Human Rights where medical data protection was at issue.*
40 Section 8 of the Regulation of Interception of Communications Act 18 of 2010 requires the personal information of subscribers to be registered. This includes the subscriber's full name, residential address, business address, postal address and identity number.
41 Article 27 of the Constitution of the Republic of Uganda 1995; ***Mukasa and Another vs Attorney-General*** *(2008) AHRLR 248 (UgHC 2008); In* ***S. and Marper vs the United Kingdom*** *[GC], nos. 30562/04 and 30566/04, § 41, 4 December 2008, the European Court of Human Rights stated that the protection of personal data is of fundamental importance to a person's enjoyment of his right to respect for private and family life.*

The word 'access' is considerably broad as there is no limitation on the manner in which the offender might cause the computer to perform any function to gain entry. Simply switching a computer on without authorisation, or attempting to enter a password would both fall within the section.[42] Similarly, the person who tries to access a computer remotely will be caught by the section. The section may also apply to the sending of malware as the installation of such programs necessarily requires the computer to perform a function.[43] It can even be extended to apply to the interception of data as the person is causing the computer to function with the intention of securing access to data which he or she is not authorised to access.[44] Thus a basic form of unauthorised access may be simply logging on without permission.[45] A more sophisticated form may involve hackers using networks to gain remote access, sometimes via computers in a number of jurisdictions. Such hacks may be 'user level', where the hacker has the same access to the system as an ordinary user of the system, or 'root level' or 'god' access, where the hacker has the same rights as the system administrator and can view or modify data at will.[46] When the Uganda Revenue Authority computer system was hacked in 2011 the hackers gained access to the system by installing spyware onto a URA computer and were able to register vehicles on its database without paying the requisite taxes.[47]

The UK equivalent of section 12(1) was considered in ***Attorney General's Reference (No.1 of 1991)***.[48] The defendant had previously been employed as a sales assistant. He returned to the premises to purchase an item. Details

*42 Jonathan C., Op Cit: In **Ellis vs DPP** [2002] EWHC 135 a Newcastle student had been told he could only use open-access computers but he used non-open access computers which were left logged on. It was held that he had violated the UK equivalent of section 12.*
43 Ibid.
44 Ibid.
45 Ibid p 28.
46 Ibid.
*47 **Uganda vs Guster Nsubuga & Others** HCT-00-AC-SC-0084-2012.*
48 [1992] 3 WLR 432; [1992] 3 All ER 897.

of sales transactions were entered into a computer till. He was familiar with the system and, taking advantage of a moment when the terminal was left unattended, entered a code into the system instructing the computer to give a 70% discount on the sale. The invoice, which was subsequently generated, charged the sum of £ 204.76 instead of the normal price of £710.96. At first instance the judge rejected the applicability of the section stating that the access contemplated therein was the use of one computer to access another i.e. hacking and not the simple direct access to one stand-alone computer. This in effect was limiting the provision to apply only to computers that were part of a network. Upon a reference by the Attorney General to the Court of Appeal, it was held that the trial court had erred. The acts committed by the defendant indeed fell within the section and the trial court's interpretation would have left the field of law dealing with computer crime with 'unlikely lacunae' if allowed to stand.[49] Access, however, does not include the mere sending of an e-mail message or file to a system.[50]

D. Interception

'Intercept' is defined in section 2 as including 'listening to or recording a function of a computer or acquiring the substance, meaning or purport of such a function'.[51] Interception of communication by Internet Service Providers (ISPs) is also prohibited by section 79 of the Uganda Communications Act No 1 of 2013. Section 2 of the Regulation of Interception of Communications Act (RICA)[52] provides that no person shall intercept any communication in the course of its transmission by means of a telecommunication system unless he or she is party to the communication or has consent of one of the parties or is authorised by warrant. The offence as

49 The limitations of the trial judge's decision today can be seen when one considers that it is possible for one stand alone computer to have multiple users each with their own user account. In a scenario where one user gains unauthorised access to another user's account on the same computer this amounts to unauthorised access.

50 Cybercrime Convention, Explanatory Report; Para 46.

51 Section 2 of the CMA.

52 Act No 18 of 2010.

provided for under the CMA applies to 'non-public' transmissions of computer data i.e. private transmissions.[53] This provision aims to protect the right of privacy of data communication. The offence represents the same violation of the privacy of communications as traditional tapping and recording of oral telephone conversations between persons.[54] The right to privacy in Uganda is enshrined in article 27 of the 1995 Constitution. The rationale for the right to privacy in communication is to secure the individual against interference in his private and family life. This right has been held to be concomitant to the right to life and to personal liberty.[55] In *Malone vs The United Kingdom*[56] the European Court found that the interception of the applicant's phone calls by security services amounted to an interference with his private life. The spectre of state surveillance looms large over Uganda as seen by the July 2015 reports that the Uganda Police Force and the Office of the Presidency were in advanced stages of acquiring hi-tech surveillance software from Israel and Italy to begin large-scale spying in Uganda.[57] Today the state authorities are usually the culprits in this regard[58] although with the widespread use and availability of computers and the Internet, private individuals with the necessary skills can be just as adept at interception of private communication.[59] In *Hesse Brian vs Senyonga Patrick*[60] the email of a one Sofia Ibrahim was hacked by the

*53 United Nations Office on Drugs and Crime (2013), **Comprehensive Study on Cybercrime**, United Nations, New York, February, p 86; The term 'non-public' qualifies the nature of the transmission process and not the nature of the data transmitted. The interception of publicly available data when communicated confidentially will still be captured by the provision: Cybercrime Convention, Explanatory Report; Para 54.*
54 Cybercrime Convention, Explanatory Report; Para 51.
*55 **People's Union for Civil Liberties vs Union of India** [1999] 2 LRC 1 (India).*
56 Judgment of 2 August 1984, Series A no. 82.
*57 CIPESA, **Privacy in Uganda: An Overview of How ICT Policies Infringe on Online Privacy and Data Protection**, CIPESA ICT Policy Briefing Series No. 06/15, December 2015.*
*58 Kakungulu M. R., **Phone-tapping & the Right to Privacy: A Comparison of the Right to Privacy in Communication** in Uganda & Canada,http://www.bileta.ac.uk/Document%20Library/1/Phone-tapping%20and%20the%20Right%20to%20Privacy%20[Ronald%20Kakungulu].pdf (Accessed on 23/01/2016).*
*59 In **Copland vs the United Kingdom**, no. 62617/00, § 30, ECHR 2007-IV the culprits were a college where the applicant worked; In **Hesse Brian vs Senyonga Patrick** HCCS No 612 of 2014 the culprits were ordinary fraudsters who hacked into an email.*
60 HCCS No 612 of 2014.

defendants who subsequently proceeded to defraud the plaintiff with whom she had been corresponding for 10 years by purporting to be her and rerouting funds that he was sending.

E. Lack of authorisation

The act committed must be done without authority or permission.[61] Under the Act, access is authorised if the person accessing is entitled to control access to the program or data or if the person has consent to access that program or data from any person who is charged with giving that consent.[62] In referring to 'control access', it is plain that the Act is not using the word 'control' in a physical sense of the ability to operate or manipulate the computer. A person with control access in this context means one who can authorise and forbid access.[63] If the relevant person is so entitled, then it would be unrealistic to treat his access as being unauthorised. There are therefore two ways in which authority may be acquired under the Act—by being oneself the person entitled to authorise and by being a person who has been authorised by a person entitled to authorise.[64] Authorisation can however also be given by law for example Part VII of the Anti Terrorism Act[65] provides for the legal interception of communication including data communication in investigation of terrorism activities and section 2(2) of the RICA[66] allows bona fide interception of a communication in connection with the provision, installation, maintenance or repair of a telecommunication service. ISPs are required to provide assistance in intercepting communication by ensuring that their telecommunication systems are technically capable of supporting lawful interception at all

61 Section 12(1) of the CMA.
62 Section 5 of the CMA.
*63 **R vs Bow Street Metropolitan Stipendiary Magistrate and Allison, ex parte Government of the United States of America** [2000] 2 AC 216 (HL); [1999] 4 All ER 1 at page 7*
64 Ibid.
65 Anti-Terrorism Act 2002.
66 Act No 18 of 2010.

times.[67] In the Indian case of *People's Union for Civil Liberties vs Union of India*[68] it was held that where interception of communication by state authorities was established under procedure by law, this would not violate the right to privacy.

It should be noted that the question of authorisation relates to access to the relevant data or program. The focus is on the program or data that is accessed and whether that access is authorised. Therefore the unauthorised access to data is not limited to initial access to the computer and may be committed subsequent to an authorised access.[69] The provision therefore includes not only a scenario where the accused is external to the victim's organisation with no colour of right of access but also the scenario where the accused is an employee of the organisation whose system has been wrongfully accessed.[70] For example a computer data operator may accesses his or her computer for legitimate purposes. However, he or she subsequently forms the intention to access unauthorised data and is aware that such access is unauthorised. Once the operator causes the computer to function in order to affect that access the offence is committed notwithstanding the initial authorised access.[71] The reality of such an internal threat was acknowledged by the Uganda Law Reform Commission, which stated in its report[72] that in the surveys carried out in different jurisdictions most computer related disgruntled employees carried out abuses.[73] For example in ***R vs Bow*** *Street Metropolitan Stipendiary*

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67 Section 8 of Regulation of Interception of Communications Act No 18 of 2010.
68 [1999] 2 LRC 1 (India).
69 Jonathan C. Op Cit., p 72.
70 Ibid.
71 Ibid.
*72 ULRC, **A Study Report**, para 5.1.*
*73 UK Law Commission, **Computer Misuse**, Working Paper No. 110 Para 2.12 [Hereinafter Law Commission Working Paper No. 110]; For example in **Uganda vs Kalumba Charles & Others** HCCr No 0008 of 2014 and **Uganda vs Adakun Grace** HCT-00-AC-SC -00 11-2014) [2015] UGHCACD 5 staff of banks were involved in fraudulent transactions through use of the bank's systems. In **Uganda vs Serunkuma Edrisa & Others** HCT-00-CR.SC 15/2013 Irene, one of the accused who gained unauthorised access to MTN's Mobile Money was a former Records Assistant at MTN who had been dismissed for misconduct. In **Uganda vs Guster***

Magistrate[74] Joan Ojomo, an employee of a credit card company, was able to access all customers' accounts but was authorised to access only those accounts that were assigned to her. It was alleged that she had accessed various other accounts without any authorisation, and had proceeded to defraud the company of a large sum of money. The issue was whether the provision against unauthorised access was directed at external hackers, and did not apply to misuse of information by a person entitled to control the computer and access data of the relevant kind. It was held that authorisation had to relate not merely to the data or program, but also to the kind of access secured. Authority to access one piece of data should not be treated as authority to access other pieces of data of the same kind. Joan Ojomo had therefore committed unauthorised access to data. In the Australian case of *Gilmour vs DPP (Cth)*[75] the appellant was an employee of the Australian Taxation Office with limited authority to input data in relation to individuals' tax returns. In particular, he was not authorised to grant tax relief and could not enter what was known as relief code '43' unless relief had in fact been granted. The appellant entered the relief code despite the fact that relief had not been granted, and knowing that he was not authorised to do so. The question of law was whether the appellant had authority to insert the data in a Commonwealth computer. It was held that the charges did not relate to gaining access to the computer, which was authorised, but with entering the relief codes on the specified occasions. It was the entry of that data which had to be authorised. On the facts it was clear that the applicant had a limited authority to make such entries and by going outside those limitations he was acting without authority. Where, however, an employee, for the accusation to stand, allegedly commits the

Nsubuga & Others *HCT-00-AC-SC-0084-2012 the 4th accused, Byamukama Robinhood, who was convicted of unauthorised interception of URA's system was a former staff of URA.*

74 [2000] 2 AC 216 (HL); [1999] 4 All ER 1.

75 (1995) 43 NSWLR 243.

offence the employer should have clearly defined the limits of authorisation applicable to each employee, and if he is able to prove that the employee has knowingly and intentionally exceeded that level of authority.[76] In most cases where the accused is external to the victim organisation for example the remote hacker, there will be no room for him or her to argue that access was authorised: it will be a simple matter for the person responsible for running the computer system to refute that claim.[77] However, where the accused is an employee of the organisation, the burden should lie upon the prosecution to show that the accused knew that the access was unauthorised and not just a misuse of express or implied rights of access.[78] The *mens rea* of the section 12(1) offence comprises two elements. First, there must be 'intent to secure access to any program or data held in any computer'. Second, the person must know at the time that he commits the *actus reus* that the access he intends to secure is unauthorised.[79] The intent does not have to be directed at any particular program, data or computer.[80]

A key contentious issue has been whether or not employers' monitoring of employee data communication in the workplace would amount to unauthorised access. This has previously been held to be a violation of the right to privacy[81], which as we have seen underpins the prohibition against interception of data. However, the European Court of Human Rights recently held that an employer may monitor the employee's email

*76Law Commission, **Criminal Law: Computer Misuse**, Para 3.37.*
*77 Law Commission, **Criminal Law: Computer Misuse**, Para 3.37.*
78 Ibid.
*79 Section 12(1) states 'A person who intentionally accesses…'; However authorised access being used for unauthorised purpose may not always amount to unauthorised access depending on the degree of unauthorised use. There should not be criminal sanctions against employees, or other authorised users, who out of idle curiosity, or failure to seek authorisation that would if asked for be forthcoming, obtain access to part of their employer's data or computer system without permission: Law Commission, **Criminal Law: Computer Misuse,** Para 3.5. For example a word-processor operator who has authority to use the office computer system in order to type the employer's letters ought, not to be guilty of a hacking offence if he or she uses the computer system to produce private correspondence: Law Commission Working Paper No. 110, Para 6.24.*
80 Section 12(6) of the CMA.
*81 Cybercrime Convention, Explanatory Report; Para 54; **Halford vs UK** ECtHR case, 25 June 1997, 20605/92; **Copland vs the United Kingdom** (no. 62617/00, ECtHR 2007 – I).*

communication where this is limited and proportionate as it is not unreasonable for an employer to want to verify that their employees were completing their professional tasks during working hours.[82]

F. Interfering with Data

Section 12(2) prohibits the interfering with data in a manner that causes the program or data to be modified, damaged, destroyed or rendered ineffective.[83] The purpose of this provision is to provide computer data and computer programs with protection similar to that enjoyed by corporeal objects against intentional infliction of damage. The protected legal interest here is the integrity and the proper functioning or use of stored computer data or computer programs.[84] Traditional English criminal law from which Uganda derives its laws is hostile to the treatment of information per se as 'property'.[85] In Uganda the offences related to property were woefully inadequate in dealing with interference with electronic data.[86] The section prohibits unauthorised modification of data which is also prohibited and elaborated on in section 14. Causing data to be 'damaged' relates in particular to a negative alteration of the integrity or of information content of data and programs.[87] Damage is defined in section 2 to include any impairment to a computer or the integrity or availability of data, program, system or information that 'causes any loss'. The phrase 'causes any loss' is justified on the grounds that it may be difficult to measure the financial loss resulting from a computer crime and the full extent of the damage may not be clear straight away due to the lack of forensic capacity.[88] Causing data to

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*82 **Barbulescu vs Romania** [2016] ECHR 61: This case distinguished the earlier case of **Halford vs UK** ECtHR case, 25 June 1997, 20605/92 which had held that communications of employees, whether or not for business purposes are protected against interception.*

83 This provision reflects article 4 of the Cybercrime Convention.

84 Cybercrime Convention, Explanatory Report; Para 60.

*85 In **Oxford vs Moss** [1979] 68 Cr App. R 183, a student took a forthcoming examination paper from a lecturer's desk drawer, photocopied it, and returned the original. The court held that the offence of theft had not been committed because the information did not constitute 'property' under the Theft Act.*

*86 ULRC, **A Study Report**, Paras 5.3 and 5.5.*

87 Cybercrime Convention, Explanatory Report; Para 61.

88 Parliament Hansard, Tuesday, 29 June 2010.

be 'destroyed' relates to deletion of the said data, which in traditional property offences would be destruction of a corporeal thing.[89] The input of malicious codes, such as viruses and Trojan horses can also be covered under this section.[90]

G. Production, possession, sale of malware

Section 12(3) criminalises the production, possession, sale, design adapting, procurement and distribution of any device, including a computer program or a component which is designed primarily to overcome security measures for the protection of data and section 12(4) provides that a person who utilises such a device or program commits an offence. This criminalisation of the misuse of devices is in conformity with Draft East African Framework for Cyber Laws 2008[91] and the Convention on Cybercrime.[92] The provision is designed to criminalise the market for 'hacker tools', which has become an inevitable feature of cybercrime[93]. In *Uganda vs Serunkuma Edrisa & Others*[94] one of the accused used a flash, which he inserted in a colleagues computer thereby stealing her logon credentials, and financial administrator rights which were subsequently used in committing unauthorised access and electronic fraud. It was held that what he did was what section 12(3) of the CMA was meant to combat and he was found guilty of the offence. The inclusion of a 'computer program' is intended to encompass malware such as viruses, or programs designed or adapted to gain access to computer systems.[95] In *Uganda vs Guster Nsubuga & Others*[96] there was evidence that one of the accused used a credit card to order for a remote spy contraption and a key logger from Florida. Investigators also found legion spyware on

89 Ibid .
90 Ibid.
91 Draft East African Framework for Cyber Laws 2008, Para 2.3.1.
92 Council of Europe Convention of Cyber Crime 2001 Article 6.
93 Cybercrime Convention, Explanatory Report; Para 71.
94 HCT-00-CR.SC 15/2013.
95 Cybercrime Convention, Explanatory Report; Para 72; Jonathan C. Op Cit., p 122.
96 HCT-00-AC-SC-0084-2012.

the accused's laptop as well as tutorials on how to use them. There was also evidence of chats between the accused relating to installation of spyware in the URA computer system. Devices such as Tim viewer and remote desktop were recovered from the accused's computers. The accused were found guilty of procurement and possession of programs and devices designed to overcome security.

There is a clear tension between restricting the illegitimate use and distribution of such material while allowing for legitimate uses. Many items of this nature are 'dual use', and widely used by security professionals and system administrators for example penetration-testing devices are used to detect security weakness,[97] but may also be used by hackers as a way of gaining unauthorised access. Limiting the offence to those devices designed exclusively for committing offences, while excluding dual-use devices would hinder prosecution and insurmountable difficulties of proof would arise. Conversely, applying the offence to all devices, whether legally produced and distributed or not, would be too broad[98]. The section therefore, in accordance with the Convention on Cybercrime,[99] only criminalises the creation, dealing in and use of the devices and programs when done unlawfully thereby allowing legitimate users such as IT systems security professionals to use the same in testing and ensuring security.

H. Denial of Service Attacks

Section 12(5) criminalises denial of service attacks. A denial of service attack (DoS attack) exploits the way in which networked computers communicate in order to overwhelm a network and thereby 'deny service'. When a website is unable to cope with the number of requests it is receiving or a system is overwhelmed by the number of simultaneous requests it is unable to function optimally. The server may be overwhelmed with

97 Jonathan C. Op Cit., p 122.
98 Cybercrime Convention, Explanatory Report; Para 76.
99 Ibid.

requests. As the server can only handle a certain number of requests, they are put into a queue. Eventually, there is no room in the queue and no further requests will be received.[100] A DoS attack replicates this effect intentionally, and can target a single computer, server, website or network.[101] Often aimed at businesses engaging in e-commerce, the aim is to generate such a volume of spurious messages that the system becomes clogged up and is unable to accept messages from genuine users wishing to place orders for goods or services.[102] The technique has been compared to repeatedly dialling someone's telephone number with the intent of occupying the line so that other callers cannot get through[103] and to overwhelming the staff of a store with bogus inquires until they cannot respond to legitimate customers who form a queue and block the entrance to the store further denying access to legitimate customers.[104] The prohibition includes a 'partial denial of service' meaning that even if the denial of service is only for a brief period or only affects a portion of the system, the offence will still have been committed. Usually, no damage will be caused to data or equipment but in some cases the financial losses caused to system operators can be quite costly in terms of lost business and customer goodwill.[105] Commercial websites such as eBay and Amazon are frequent targets. As the country seeks to develop a healthy e-commerce atmosphere,[106] the criminalisation of such attacks is necessary. The protected legal interest is the interest of operators and users of computer or telecommunication systems being able to have them function properly.[107]

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100 Jonathan C. Op Cit., p 38.
101 Ibid p 37.
*102 Ian J. L., Op Cit., p 216; Ethan Zuckerman, Hal Roberts, Ryan McGrady, Jillian York, and John Palfrey, **2010 Report on Distributed Denial of Service (DDoS) Attacks**, (Berkman Center for Internet and Society Research Publication No. 2010–16) (Cambridge, MA: Berkman Center for Internet and Society, 2010).*
103 Ibid.
104 Jonathan C. Op Cit., p 38.
105 Ian J. Lloyd, Op Cit.
*106 ULRC, **A Study Report**, Para 1.*
107 Cybercrime Convention, Explanatory Report; Para 65.

A far more insidious version of this cyber assault is the 'distributed denial of service attack' (DDoS attack) whereby the attacker enlists other computers to attack the target computer or network.[108] To mobilise the multiple computers required, the perpetrator will generally surreptitiously seize control of what are known as 'zombie' computers, or 'botnets', computers acting under the control of the perpetrator without the owner's knowledge.[109] For example in *US vs Arabo*[110] the defendant ran web-based companies dealing in sportswear. He enlisted the help of a teenager named Jasmine Singh, to conduct a DDoS attack on his competitors' websites. Singh had infected some 2,000 personal computers and, using his home computer, instructed these 'bots' to access the targeted websites all at once. The attack not only overloaded the server hosting the websites, it also caused harm to other sites hosted by the server, having impacts as far away as Europe. In another striking example, a teenager launched global DDoS attacks against UK Home Office and FBI websites crippling them.[111] With a DDoS a section 12(1) offence is likely to have occurred against the 'zombie' computers as well. DoS and DDoS attacks are extremely common on today' s Internet with some studies showing that over 4000 such attacks occur in a week.[112]

I. Intent need not be directed at any particular computer

Section 12(6) provides that the intent of a person to commit any of the offences under section 12 need not be directed at: any particular program or data, a program or data of any particular kind, or a program or data held in any particular computer. In effect any deliberate unauthorised intrusion

108 Jonathan C. Op Cit., p 38.
*109 Aaron Schwabach, **Internet and the Law: Technology, Society, and Compromises**, 2nd Ed, ABC CLIO, USA, 2014, p 71.*
*110 (D NJ 2006) United States Department of Justice, **Press Release**, 25 August 2006, www.cybercrime.gov/araboSent.htm (Accessed on 21/01/2016).*
*111 **FBI website hacker Charlton Floate, 19, facing jail for cyber attacks**, 19 Aug 2015, http://www.birminghammail.co.uk/news/midlands-news/fbi-website-hacker-charlton-floate-9887386 (Accessed 12/02/16).*
*112 APIG, **Report on Computer Misuse**, Para 58.*

into any system, whether or not that specific system is the target the intruder has in mind, will be caught by the section as for example where the offender sends malware to a specific computer or system but it is designed such that it will attack other systems as well. An example is in *US vs Smith*[113] that involved the notorious 'Melissa' virus. The virus was first posted on an Internet newsgroup 'Alt.Sex.' in 1999. Visitors to the newsgroup were tempted to download the document, which promised passwords to pornography websites. Once the file was executed, the victim's computer was infected. The virus targeted Windows operating systems and altered Microsoft word processing programs so that any document created using Word would also be infected. The virus was then able to replicate itself via Microsoft Outlook by causing computers to send emails to the first fifty addresses in the victim's address book. Opening the document of course infected the computer, which in turn caused more emails to be sent. In effect each infected computer could infect fifty additional computers, which in turn could infect another fifty computers thereby ensuring that the virus proliferated rapidly and exponentially, resulting in substantial impairment of computer networks. Section 12(6) ensures that such an offender cannot claim a lack of *mens rea* regarding the latter computers infected.

J. Penalty

Section 12(7) of the Act lays out the penalty of a fine not exceeding 4.8 million shillings (USD 1450) or imprisonment not exceeding ten years or both for breach of any of the above provisions in section 12. It should be noted that the original Bill had a maximum penalty of 240,000 shillings (USD 73) and six months imprisonment however this was increased to make the sentence more deterrent.[114]

113 (D NJ 2002) US Department of Justice, Press Release, 2 May 2002, www.cybercrime.gov/melissaSent.htm. (Accessed on 25/01/2016).
114 Parliament Hansard Tuesday, 29 June 2010.

4.3 Access to Commit or Facilitate the Commission of a Further Offence

A. Hacking as a preliminary offence

Section 13(1) creates the ulterior intent offence where the offender gains unauthorised access for the purpose of committing or facilitating the commission of another offence. The further offence need not involve the use of a computer[115] and need not even be committed.[116] The section 13(1) offence is a preliminary offence, in the sense that it falls short of the commission of the further offence but it is also an aggravated form of the basic hacking offence as it may facilitate the commission of a more serious offence.[117] The need for such an offence arises from the fact that the use of a computer in preparation for committing the further offence may not fall within the requisite overt act[118] so as to be captured by the law of attempts in regards to the further offence. For example the hacker who gains access to a banking computer system without authorisation will have to overcome security checks which may consist of secret passwords. The hacker may have to try a large number of alternatives in order to find one that works. If he manages to transfer and remove the funds, he will have committed theft.[119] However, trying the passwords in such a case probably does not amount to an overt act with regards to the offence of theft as this is merely preparatory.[120] The speed with which such a theft may be carried out using a computer and the consequent difficulty of detecting the perpetrator

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*115Law Commission, **Criminal Law: Computer Misuse**, Para 3.49.*
116Stefan F. Op Cit., p 40: In analysing the similar offence in the UK it was argued that as this offence is defined in terms of preparatory conduct it is not necessary to prove that the intended further offence has been committed for one to be convicted of the ulterior intent offence.
*117Law Commission, **Criminal Law: Computer Misuse**, Para 3.55: The UK Law Commission gives the hypothetical example of the person who hacks into a hospital computer containing details of blood groups and rearranges that data with the intention that a patient should be seriously injured by being given the wrong blood.*
118 Sections 386 and 387 of the Penal Code Act Cap 120.
*119 Section 254 of the Penal Code Act Cap 120; **Uganda vs Serunkuma Edrisa & Others** HCT-00-CR.SC 15/2013.*
*120 **R vs Gullefer** [1990] 3 All ER 882; Robert J. Sciglimpaglia, Jr., **Computer Hacking: A Global Offense**, 3 Pace Y.B. Int'l L. 199 (1991)Available at: http://digitalcommons.pace.edu/pilr/vol3/iss1/8 (Accessed on 19/09/2016).*

required a special extension of the criminal law in order to discourage such conduct, by exposing the hacker to prosecution at an early stage.[121] Under section 13 such a person, if he were detected trying to find the password, would at that stage have committed the offence of obtaining unauthorised access to a computer with intent to steal.[122] In *R vs Governor of Brixton Prison and another, ex parte Levin*[123] the accused was convicted of hacking with intent to commit both forgery and false accounting. In the case of *Raphael Grey*[124] the defendant exploited a weakness in e-commerce sites using to access customer databases and thereby obtain the credit card and other personal details of thousands of customers, which were then published on the Internet and used for purchasing various goods and services including Viagra which he sent to Bill Gates. In one case in Ukraine the police database was hacked with the aim of deleting records on stolen cars, allowing criminals to sell stolen cars without any problems.[125]

B. Subsequent offence committed by another

Section 13(2) extends the provision to cover a scenario where the subsequent offence is committed by someone other than the one who commits the initial unauthorised access for example a person who claims that he was not hacking in order himself to steal by transferring funds into his bank account, but in order to enable a friend to commit such a theft would still be captured by the provision.[126] For example in *R vs Delamare*[127] the defendant was a Barclays bank official who was approached by an old school friend to use the bank's computer system to obtain account details on two accounts and to reveal them to him. The details were subsequently

*121 Law Commission, **Criminal Law: Computer Misuse**, Report No. 186, Para 3.52.*
122 Ibid.
123 [1996] 4 All ER 350.
124 (Swansea Crown Court, 6 July 2001) cited in Stefan F. Op Cit., p 40.
*125 Peter Warren and Michael Streeter, **Cyber Alert: How the World is Under Attack from a New Form of Crime**, Vision Paperbacks, UK, 2005, p 38.*
*126 Law Commission, **Criminal Law: Computer Misuse**, Report No. 186, Para 3.57.*
127 [2003] EWCA Crim. 424.

used to carry out fraud. The bank official was convicted on his own guilty plea.

C. Penalty

Upon conviction for an offence under this section, the offender is liable to a sentence of a fine not exceeding 4.8 million shillings (USD 1450) or imprisonment not exceeding ten years or both.[128]

4.4 Unauthorised Modification Of Computer Material

Section 14(1) prohibits any action done with requisite intent and knowledge which causes unauthorised modification of the contents of any computer. The concept of damage in the Penal Code is inappropriate to cater for such an offence and as such 'modification of the contents of the computer' cannot be regarded as damage to constitute an offence under the Penal Code as it does not impair the physical condition of the computer.[129] The offence of unauthorised modification comprises three elements:[130]

(i) Unauthorised modification of contents
(ii) Requisite intent
(iii) Requisite knowledge

A. Unauthorised modification of contents

A 'modification' takes place if any program or data held in the computer concerned is added to, altered or erased.[131] An unauthorised modification is one where the person causing it is not entitled to determine whether it should be made and does not have the consent of a person who is entitled to determine whether or not the modification should be made.[132] The unauthorised modification may be permanent or temporary.[133] The section

128 Section 13(3).
*129 ULRC, **A Study Report**, Para 5.8(e).*
130 Ibid.
131 Section 7 of the CMA.
132 Section 8 of the CMA.
133 Section 14(5) of the CMA.

14 offence is designed to encompass simple unauthorised modification where a person erases or wipes clean programs or data contained in a computer[134] as well as more sophisticated forms involving computer viruses,[135] 'Trojan horses' and worms, interference with websites such as defacing them[136] and the unauthorised addition of a password to a data file, thereby rendering that data inaccessible to anyone who does not know the password.[137] For example in *R vs Vallor*[138]the defendant released three viruses that he had written onto the Internet, infecting computers in 48 countries and was convicted under the equivalent of this section under the UK Act.

This section deals with a mischief different from that tackled by sections 12 and 13. Here, the offence is concerned with forms of electronic sabotage, which may be carried out even without the unauthorised access required in the other offences.[139] For example in *R vs Goulden*,[140] Goulden installed an IT security package for a printing company, Ampersand. The package included a facility to prevent access without use of a password. Goulden made use of this facility as part of his claim for fees totalling £2,275 preventing access till receiving payment. Ampersand was unable to function for a period of a few days and claimed £36,000 lost business as a result of Goulden's actions, including £1,000 for a specialist to override the access protection. He was convicted and fined for his actions. His access was authorised however the

*134Law Commission, **Criminal Law: Computer Misuse**, Para 3.65; In **Uganda vs Guster Nsubuga & Others** HCT-00-AC-SC-0084-2012 the accused had gained unauthorised access to the URA system ASYCUDA and created other users with unlimited access. This amounted to unauthorised modification within the meaning of the Act. One of the evidences of modification was the clearing of an activity entry log by one of the accused.*

*135 ULRC, **A Study Report**, Para 5.8(e).*

*136 Stefan F. Op Cit., p 41; **R vs Lindesay** [2002] 1 Cr App R (S) 370 (CA); the hacking and defacing of websites has arisen in Uganda primarily as a form of political protest. As seen above, a number of websites have been defaced such as the president's website, the prime minister's website, the ministry of defence website and the Uganda Investment Authority website.*

*137 Law Commission, **Criminal Law: Computer Misuse,** Para 3.65.*

138 [2003] EWCA Crim. 2288; [2004] 1 Cr App R (S) 54.

139 Ibid.

140 The Times, 10 June 1992, Southwark Crown Court.

modifications that he made were unauthorised.

B. Requisite intent

The requisite intent is intent to cause a modification of the contents of any computer to impair its operation, to prevent or hinder access to any program or data, or to impair the operation of any such program or the reliability of any such data.[141] The requirement of intent to impair ensures that the offence does not punish unauthorised modifications, which improve,[142] or are neutral in their effect on, the computer or its operations.[143] Modifications such as an employee accessing a file he has no authorisation to access are sufficiently dealt with by the basic unauthorised access offence in section 12. Authorised use of a computer for unauthorised purposes such as an employee using his work computer to access social media or play games could only constitute this offence if an intent thereby to impair the operation of the system could be shown, and that would be difficult where the employer's computer will very likely have a very large capacity and the employee's use is comparatively minor.[144] The intent need only be a general intent. That is, the accused must be shown to intend, for example, to impair a computer or to destroy some data, but his intention need not be directed at any particular program or data or at the operation of any particular computer.[145] This subsection captures a person who creates a computer virus and sends it out into the world with the intention that it will infect other computers without specifically targeting any one computer.

141 Section 14(2) of the CMA.
142 Modification of a computer to increase RAM for example would not fall in this category: Parliament Hansard Tuesday, 29 June 2010.
*143 Law Commission, **Criminal Law: Computer Misuse**, Para 3.72.*
144 Ibid, Para 3.77.
145 Section 14(3).

C. Requisite knowledge

The requisite knowledge is knowledge that any modification that the person intends to cause is unauthorised.[146] The knowledge referred to only relates to the issue of authorisation, not the act being committed. In *R vs Pile*[147] the defendant had written, two vicious and very dangerous viruses named 'Pathogen' and 'Queeg' and released them to the world. He was found guilty of the offence even though he had no knowledge of which computers were affected by his viruses and had not targeted any specific computer.

D. Penalty

Section 14(6) provides a penalty of a fine not exceeding 7.2 million shillings (USD 2200) or imprisonment not exceeding fifteen years or both.

4.5 Unauthorised Use or Interception of Computer Service.

Section 15 deals with the unauthorised use or interception of a computer service. While section 12 is primarily concerned with the hacker who merely obtains unauthorised access to a computer, section 15 is concerned with the case where the person having gained unauthorised access, proceeds to use the computer for his own purposes. These two scenarios obviously overlap however, the distinction has been expressed as being comparable to, on the one hand a person who gets into a motor car simply to see what the interior looks like and, on the other hand, a person who, without authority, actually drives the car for his own purposes.[148]

A. Unauthorised Use of Computer Service

Section 15(1) (a) states that a person who knowingly secures access to any computer without authority for the purpose of obtaining, directly or indirectly, any computer service commits an offence. Securing access is

146 Section 14(4) of the CMA.

*147 (Unreported) 15 November 1995, in Akdeniz, Y. [1996], '**Section 3 of the Computer Misuse Act 1990: an antidote for computer viruses!**' 3 Web Journal of Current Legal Issues http://webjcli.ncl.ac.uk/1996/issue3/akdeniz3.html (Accessed 27/01/ 2016).*

*148 Scottish Law Commission, **Computer Crime**, Consultative Memorandum No 68, March 1986, Para 3.62.*

defined in section 3 as viewing, altering, erasing, copying or destroying a program or data. A computer service is defined in section 2 as computer time, data processing and the storage retrieval of data. Therefore the offence is committed when one gains access (whether authorised or not) and then proceeds to use computer time or data processing without authorisation. For example unauthorised access to, and use of, commercial databases may allow the hacker to obtain valuable services for free. Hackers may gain access to more powerful computers in order to run programs that require high-levels of processing power. Hackers accessed Cray Inc. supercomputers in order to run password cracking programs.[149] A hacker may also use a computer as part of the practice of 'weaving', that is the hacker gains access to a succession of computers using them as 'stepping stones' in order to conceal his or her identity and/or location.[150] At a more mundane level 'wireless hacking' or the unauthorised use of wireless networks or Wi-Fi falls within the ambit of the section. This is a product of the recent proliferation of 'Wi-Fi' networks access in Uganda.[151] In addition to the roaming wireless access provided by telecommunications companies, individual homes or businesses may set up local networks allowing wireless access to their network within a limited radius. Access is usually straightforward such that any computer that is wireless enabled can be used to detect networks by simply viewing available networks.[152] When the offender proceeds to use the wireless service, the offence is committed. In ***Uganda vs Guster Nsubuga & Others***[153] the Uganda Revenue Authority

149 Computer Crime and Intellectual Property Section, The National Information Infrastructure Protection Act of 1996, Legislative Analysis (US Department of Justice, 1996), www.cybercrime.gov/1030analysis.html, (Accessed 28/01/2016); Law Commission Working Paper No. 110, Para 2.15.
150 Jonathan C., Op Cit., p 30.
*151 **Mobile Internet cost up as MTN ups tariffs**, New Vision, 10,10,2013, http://www.newvision.co.ug/new_vision/news/1333374/mobile-Internet-cost-mtn-ups-tariffs# (Accessed on 28/01/2016); **UTL Brings Wireless Internet Service**, New Vision, 4,07,2005, http://www.newvision.co.ug/new_vision/news/1121987/utl-brings-wireless-Internet-service (Accessed on 28/01/2016).*
152 Jonathan C., Op Cit., p 30.
153 HCT-00-AC-SC-0084-2012.

computer systems had been compromised by the accused, who, by means of a Trojan horse, used sophisticated software to access the systems and register motor vehicles without authorisation. The accused were convicted of use and interception of the computer service.

B. Unauthorised Interception of a Computer Service

Section 15(1) (b) criminalises the unauthorised interception of any function of a computer by means of an electro-magnetic, acoustic, mechanical or other device. The mischief targeted by this section seems to be hardware hacking attacks by means of physical tools.[154] The provision relating to electro-magnetic devices stems from a fear that once loomed in the early days of personal computers about the use of surveillance devices which could detect the electromagnetic radiation emitted by the Video Display Unit (VDU) of the computer and convert these back to readable data.[155] Such emissions would seem to fall within the definition of 'data' under the Act.[156] This particular threat is less of a problem now with changes in VDU technology, which generally no longer rely on cathode-ray emissions.[157] However, electro-magnetic devices can still be used today to interfere with the functioning of computers for instance as all electronic devices generate electro-magnetic interference in one form or another and these can be used for hacking.[158] The reference to an acoustic device is recognition of the possibility of an unauthorised interception of a computer function being done by means of a sound device, which has apparently recently become a reality.[159] The phrase 'mechanical or other device' is a catchall meant to

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*154 Hardware hacking has been defined as modifying hardware appliances or electronic products to perform functions for which they were not originally intended: David R, Mirza Ahmada et al, **Hack Proofing Your Network**, 2nd Ed, Syngress, USA, p 610.*
155 Law Commission Working Paper No. 110, Para 2.13; Jonathan C. Op Cit., p 137.
156 Section 2 of the CMA 2011.
157 Jonathan C., Op Cit., p 137.
*158 David R, Mirza Ahmada et al, **Hack Proofing Your Network**, 2nd Ed, Syngress, USA, p 623.*
*159 Michael Hanspach and Michael Goetz, **On Covert Acoustical Mesh Networks in Air**, Journal of Communications, vol. 8, no. 11, pp. 758-767, 2013. doi: 10.12720/jcm.8.11.758-767, Available at http://www.jocm.us/index.php?m=content&c=index&a=show&catid=124&id=600 (Accessed on 31/01/16).*

ensure any other device that might be used still falls within the provision. Section 15(1) (c) criminalises the direct or indirect use of a computer or other device to commit the offences in sections 15(1) (a) and 15(1) (b). Although the section reads 'Unauthorised use *or* interception of computer service' it has been held that where a charge is drafted as 'unauthorised use *and* interception of computer services' and the interception and use alleged are part of the same transaction there is no duplicity of charges.[160]

C. Penalty

Section 15(1) provides that any person who commits an offence contrary to section 15 is liable on conviction to a fine not exceeding 4.8 million shillings (USD 1450) or to imprisonment not exceeding ten years or both and in the case of a subsequent conviction, to a fine not exceeding 7.2 million shillings (USD 2200) or imprisonment not exceeding fifteen years or both.

4.6 Unauthorised Obstruction of Use of Computer

Section 16 prohibits the unauthorised obstruction of use of computer. In particular section 16(a) prohibits the unauthorised or unlawful interfering or interrupting or obstructing of the lawful use of a computer. Section 16(b) states that any person who impedes or prevents access to or impairs the usefulness or effectiveness of any program or data stored in a computer, commits an offence. Section 16(a) therefore deals with a scenario where access to the computer is impeded or obstructed while section 16(b) envisages a scenario where though the computer is accessed, access to a particular program or data has been obstructed. The *mens rea* of the offence is clear in the phrase 'knowingly and without authority'.[161] 'Knowingly' means the offender knows something is true or is virtually certain that it is true[162] or is willfully blind to the truth.[163] Therefore the offender must know

*160 **Uganda vs Guster Nsubuga & Others** HCT-00-AC-SC-0084-2012.*
161 Section 16 of the CMA.
*162 Mike Molan, **Modern Criminal Law**, 5th Ed, Cavendish Publishing Limited, UK, 2003, p79/*

that he is obstructing the use of the computer through his actions in order to fall foul of the section. An unwitting obstructer therefore does not fall within the section. If the denial of access is achieved by purely physical means such as by cutting a wire, such an offence could be prosecuted under the Penal Code.[164] The provision under the CMA covers scenarios such as where an unauthorised user obstructs an authorised user by occupying a port,[165] an unauthorised user, deliberately or otherwise, activates defensive mechanisms in the computer which cause it to shut down a whole or part of its system[166] and so on. Sabotaging a computer program before leaving the company by secretly setting password protection within the program that prevents the company from being able to check, modify or upgrade the system could amount to an unauthorised modification[167] or obstruction of computer services.[168] For example in Uganda in 2002, 600 staff of the Electoral Commission (EC) working on the Photographic Voter Registration project who were dismissed went away with the computer passwords thereby impeding the access to EC computers and severely hampering the voter registration process.[169] In Singapore, a systems engineer formerly employed by SMC Marine Services was accused of secretly setting passwords within a program that he developed before leaving the company, allegedly leaving his former employer unable to check, modify or upgrade the system.[170] In *Hesse Brian vs Senyonga Patrick*[171] it was alleged that the

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*163 **Westminster CC vs Croyalgrange Ltd** [1986] 2 All ER 353.*

164 Section 335(1) of the Penal Code Act Cap 120 provides that any person who wilfully and unlawfully destroys or damages any property commits an offence and is liable, if no other punishment is provided, to imprisonment for five years.

165 It may be that a computer can only handle a finite number of users at any one time. When all its "ports" are in use, attempts to log on will be rejected: Law Commission Working Paper No. 110, Para 2.18

166 Law Commission Working Paper No. 110, Para 2.18.

167 Section 14 of the CMA.

*168 Gregor U., (2008) **An Overview of Cybercrime Legislation and Cases in Singapore**, Asian Law Institute Working Paper Series No. 001, December, www.law.nus.sg/asli/pub/wps.htm. (Accessed 28/01/2016).*

*169 Felix Osike, **Kasujja's Voter Registration Computers Can't Open**, New Vision, 25 July 2002, http://allafrica.com/stories/200207250059.html. (Accessed on 05/02/16).*

*170 Gregor Urbas, **An Overview of Cybercrime Legislation and Cases in Singapore**, Asian Law Institute Working Paper Series No. 001, December 2008, www.law.nus.sg/asli/pub/wps.htm. (Accessed 28/01/2016).*

defendants blocked one of the victims from accessing her e-mail account in perpetration of their fraud. Such actions would presumably now fall under the sanction of this provision. Section 16 provides that any person who commits an offence under this section is liable on conviction to a fine not exceeding 4.8 million shillings (USD 1450) or to imprisonment not exceeding ten years or both and in the case of a subsequent conviction, to a fine not exceeding 7.2 million shillings (USD 2200) or imprisonment not exceeding fifteen years or both.

4.7 Enhanced Punishment for Protected Computers

Section 20 provides for enhanced punishment where access is obtained for offences under section 12, 14, 15 or 16 involving protected computers. The section provides for life imprisonment in such an instance. A computer is treated as a "protected computer" if the offender knew or ought reasonably to have known, that the computer is used directly in connection with: the security, defence or international relations of Uganda, the existence or identity of a confidential source of information relating to the enforcement of a criminal law, the provision of services directly related to communications infrastructure, banking and financial services, public utilities or public key infrastructure and the protection of public safety including systems related to essential emergency services such as police, civil defence and medical services.[172] In such circumstances, the accused is presumed to have known that the computer was protected unless he can prove otherwise.[173] As noted earlier, one of the key purposes of the Act is to facilitate the growth of e-commerce and e-government in Uganda. The rationale for this enhanced and severe punishment is therefore to deter[174]

171 HCCS No 612 of 2014.
172 Section 20(2) of the CMA.
173 Section 20(3) of the CMA.
174 The initial penalty in the Bill was a ten year prison sentence but this was enhanced to life imprisonment: Parliament Hansard Tuesday, 29 June 2010.

hackers and similar offenders from interfering with the institutions and organs relevant to their development. In *Uganda vs Serunkuma Edrisa & Others*[175] although Justice Paul K. Mugamba sentenced the accused to 9 years for hacking into the MTN Mobile Money system, he commented on the fact that life imprisonment was the maximum sentence imposed to show how serious the offence was.

4.8 Conclusion

As computers and the Internet increasingly become a standard part of daily business and personal life, they also facilitate crime and other wrongs through their misuse. The criminalisation of hacking by the CMA is a laudable effort in combating this rising new crime. These provisions criminalise virtually every form of hacking. The penalties given also appear to equally deal with the different scenarios. The offences carry maximum prison sentence of either ten years[176] or fifteen years[177] which is adequately deterrent. The fines cater for a scenario where the hacking occurs but the damage done is minimal not warranting an extended jail sentence[178] yet a penalty for deterrence is required. A challenge likely to be faced in the enforcement of these anti-hacking provisions of the CMA is lack the specialist knowledge regarding computer systems amongst judicial officers, which may result in inappropriate interpretations. This problem arose in the UK as seen in *Attorney-General's Reference (No.1 of 1991)*[179] where the trial judge acquitted the defendant as he felt that the hacking offence was only committed if one computer is used to obtain material stored on another

175 HCT-00-CR.SC 15/2013.
176 Section 13(4); Section 12(7).
177 Section 14(6); Section 16; Section 15(1); Section 17(2).
178 'The decision to issue an order of a fine instead of a term of imprisonment is an express act of lenience': ***Otim vs Uganda*** *(Crim. Appeal 0025 of 2015) [2015] UGHCCRD 48; Justice Law and Order Sector,* ***A Study on Sentencing and Offences Legislation in Uganda****,* *www.commonlii.org/ug/other/UGJLOS/report/R5/5.pdf (Accessed on 18/09/2016).*
179 [1992] 3 WLR 432; [1992] 3 All ER 897.

computer. This, however, is easily dealt with through proper training of the judicial officers.It should be acknowledged that victims of hacking are unlikely to be willing to report the crime.[180] Organisations such as banks may not be so eager to report breaches of their security whether internal or external as any doubts about the security of their systems could lead to a loss of clientele.[181]They may therefore choose to pursue employee offenders through internal disciplinary measures[182] and provide compensation to victims without reporting the incident.[183] In some cases, the victim may not even understand that they have been harmed at all as a consequence of the invisible nature of hacking[184] or they may not believe that anything can be done to repair what is done.[185] Therefore regardless of the merits of the offences created under the CMA, their enforcement might be hindered by the unwillingness of the victims of hacking, especially those in the corporate sector, to come forward or by their ignorance.

180 Stefan F. Op Cit., p 51.
181 Ibid.
182Ibid., p 49.
*183 The Uganda Police, **Annual Crime Report 2014**, http://www.anppcanug.org/wp-content/uploads/Resource_Center/Annual_Reports/Police/R_P_annual_report_2014.pdf (Accessed on 16/09/2016).*
184 Ibid p 102.
*185 Florence Tushabe, and Venansius Baryamureeba, **Cyber Crime in Uganda: Myth or Reality?**, World Academy of Science, Engineering and Technology, International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering Vol:1, No:8, 2007.*

5. UNCONSTITUTIONAL CONSTITUTIONS.

Makmot Victor Phillip*

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterized by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED 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;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY.[1]

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* *LLB III, School of Law, Makerere University.*

1 *The preamble to the 1995 constitution of the republic of Uganda.*

Abstract.

Few words ably describe the history of our great nation and our arduous journey through the murky waters of democracy and constitutionalism than the preamble to our first home grown constitution. Many would agree that one of the most fundamental aspects of modern democracy is the idea of the constitution. However as many a nation have agreed, something that would purport to be an instrument of promoting democracy can just as easily be turned into an instrument of oppression. How is this so? When the constitution is likened to a cosmetic which can be changed and applied as and when somebody or certain individuals charged with this responsibility choose or are influenced to do so by a power higher than that of the people.

Uganda as a nation is no exception, our constitution having undergone three different amendments in 2000 and 2005 which resulted into the removal of term limits among other things. Today, with a bill in the offing to amend the age limit for a person intending to stand for the highest office in the land, and with many believing that the motive behind this is to allow the incumbent to stand for yet another term of office, a great question lingers in many minds.

The process for amendment is provided for under the constitution and as a result there seems to be no way to stop this as it is by way of legal process. However there could be light at the end of this tunnel and hence the gist of

this article stems from a single query buried deep in our study of constitutionalism: can constitutional amendments be unconstitutional? And if so how? It is apparent that the nature and scope of constitutional amendment could actually have limits and as was seen in the case of Kesevananda, these limits would only fall into place if the amendment was in contradiction of the basic structure of the constitution.

This paper will explore the Ugandan situation and see whether there can be a legal solution and whether or not an amendment to a provision of the constitution can actually be found to be unconstitutional.

5.1 Introduction

Many have agreed that one of the fundamental aspects of a democratic nation is the constitution. 'Constitution', here is used to denote the narrow sense of the term, i.e. the cluster of supreme principles and rules, typically set in a written legal document (or a set of such documents), which establish and regulate the state's basic institutional arrangements and practices and express the nation's most enduring values.[2]

Uganda, having been declared independent in 1962, is no exception however throughout our numerous constitutions from 1962 to the most recent one of 1995 and its subsequent amendments, we notice a distinct pattern; one of constitutional abuse and misuse. From a point during the regime of Apollo Milton Obote where the Constitution was abruptly amended to abolish kingdoms and provide for a Republic State, to Idi Amin Dada who decided to abolish the Constitution in its entirety, to the present day regime that has

2 For wide and narrow senses of constitutions, see Perry (2001, 103); Tully (2002, 204-5); Elkins, Ginsberg and Melton (2009, 38-51).

used all the power at its disposal to influence the nature of the Constitution and its provisions to create a situation that would be expedient to their own political ambitions.

What is clear from the above recap is that not every state that has a constitution (in that sense) is a constitutional state. Some constitutions are façade/sham constitutions, in that they exist for 'cosmetic' purposes only and have no effect in reality. Others are in line with the political reality but do not impose binding rules upon it; on the contrary, they reinforce governmental power.

John Locke, who in 1669 wrote 'The Fundamental Constitution' of the colony of Carolina, provided that it 'shall be and remain the sacred and unalterable form and rule of government of Carolina forever'.

Treating the entire constitution as unamendable derives either from ascribing it to a super-human source much like was done by the Israelites when they received the ten commandments from God on stone tablets hence the use of the term cast in stone to mean unchangeable, or from the constitution-maker being afflicted with exceptional arrogance and belief that he has achieved the apex of perfection. Nowadays, such 'delusions of unamendable grandeur' no longer exist and as such most framers of constitutions always envisage that the constitution at some point or another will have to be changed and have consequently embedded provisions within the constitution that provide for this.

Constitutions change with time. Such change can take place in various ways. It can occur outside of constitutional law, in the social sphere, for instance 'by gradually shifting the rank and importance of constitutional factors and norms.

Constitutions may also be modified according to a procedure stipulated within them. This is the constitutional amendment procedure, by which textual changes to a constitution may occur. The latter has been commonly used in Uganda with no less than three amendments being made to the 1995 constitution of the republic of Uganda. By the term constitutional amendment, I refer to formal constitutional amendments enacted through the amendment procedure and not to any constitutional changes. Of course, important constitutional changes may also take place outside of the formal amendment process, for instance, through judicial interpretations or practice as was seen in the case of ***Victor Juliet Mukasa v. AG3*** where the court was of the view that the rights of individuals provided for in chapter four of the constitution must be read in conformity with the internationally accepted standards as stipulated in international treaties and the likes.

But few are quick to support such changes as the idea of judges making law as opposed to merely interpreting it, seems to raise a certain amount of judicial activism which is akin to over stepping their constitutional mandate and being in direct disregard of the doctrine of separation of powers, which is one of the fundamental tenets of a constitutional democracy.

However in certain jurisdictions, others have claimed, for example, that certain judicial interpretations of the U.S. Constitution are better viewed as amendments. Indeed, a modification of a constitutional text's meaning may often carry a greater effect than its formal modifications.[4] Nonetheless, formal constitutional amendments remain an essential means of constitutional change.[5]

However the fact that constitutions are ever changing as per the living tree

3 High Court Misc. Cause No. 247 of 2006
4 Grimm (2011, 27).
5Vermeaule (2006, 229).

doctrine that was espoused in the case of Unity Dow v the AG of Botswana[6], and coupled with the fact that the nature of most post-colonial African leaders is to cloak their "illegitimate" stay in power by use of a cloak of legitimacy, the ever changing nature of the constitution becomes a double edged sword that has the ability both to defend the principles of constitutionality or be the very weapon that tears them apart.

A familiar case in point would be in Uganda where there is a bill being floated to remove the age cap for a person intending to stand for the position of presidency as is stated in article 102 of the constitution[7]. The president when being questioned as to whether or not this was a deliberate effort to consolidate his firm grip on power as was done by the removal of term limits went ahead to respond by saying that "we do not need term limits, if you are tired of the person you vote them out". This was said in the backdrop of the 2016 election in which the incumbent won by 60% of the vote and which critics believe to have been marred by rigging and other electoral malpractices[8].

And this is not an isolated event as very many leaders on the African block have taken this similar, seemingly legal and constitutional approach to amend the constitution and do away with term limits such as in Rwanda, Burundi, and most recently in the Democratic republic of Congo. In the face of this a question lingers; if the constitution has been infiltrated and is now being manipulated by the people meant to safe guard and protect it, is it possible that the framers of these constitutions did not envisage such abuses? And if they did what measures did they put in place within the constitution to ensure that these abuses were checked?

6 Dow v. Attorney-General in [1991] B.L.R. 233.
7 Article 102 of the 1995 constitution of the republic of Uganda.
8 http://www.reuters.com/article/us-uganda-election-idUSKCN0VY1FH (accessed on May 23, 2017).

5.2 Checks and Balances

It was argued by Roznai in his thesis that the amendment process is a method for reconciling the tension between stability and flexibility. 'A state without the means of some change', Edmund Burke wrote, 'is without the means of its conservation'. One way in which constitution-makers balance stability and flexibility is by designing different amendment processes for different provisions. They separate the constitutional subjects so that the majority of ordinary provisions require a simple amendment procedure, whilst a minority necessitate a different, more difficult procedure or are considered 'unamendable'. In other words, their amendment would be prohibited.[9]

Articles 259-263 of the Constitution succinctly provide for the process of amendment of the provisions of the Constitution and also clearly stipulate those particular sections which will be incapable of amendment without the majority of at least two thirds of the members of the house of parliament or being subjected to a referendum by the people of the Republic of Uganda.

Article 260 states expressly that a bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless;

(a) It is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) It has been referred to a decision of the people and approved by them in a referendum.

9 Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, Yaniv Roznai, A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, February 2014.

(2) The provisions referred to in clause (1) of this article are—

(a) This article;

(b) Chapter One—articles l and 2 ;(**the constitution and the republic**)

(c) Chapter Four—article 44 ;(**the bill of rights)**

(d) Chapter Five—articles 69, 74 and 75; (**the representation of the people**)

(e) Chapter Six—article 79(2) ;(**the legislature**)

(f) Chapter Seven—article 105(1) ;(**the executive**)

(g) Chapter Eight—article 128(1) (**the judiciary)**

(h) Chapter Sixteen. (**Institution of traditional or cultural leaders**)

What does the above article seek to emphasize? It shows that constitutionalism is nowadays commonly identified by certain conditions, such as: the recognition of the people as the source of all governmental authority; the constitution is supreme law (in the sense that it carries the highest normative status within the legal hierarchy); the constitution regulates and limits the power of government; demanding adherence for the rule of law and respect for fundamental rights.

The particular articles mentioned within article 260 seek to explicitly show those aspects of our Constitution that are to a larger extent very fundamental to our practices of democracy as a country for example the statement that "all power belongs to the people"[10] and the fact that "the constitution shall be the supreme law of the land"[11] and as a result to be able

10 Article 1 of the Constitution supra.
11 Article 2 of the Constitution supra.

to change them arbitrarily would in essence defeat our desire to achieve and practice democracy. One can even be tempted to say that these are "cast in stone".

What is clear is that in as much as the amendment process was meant to be the healing balm in case a provision of the Constitution became over strained by the constant changes within the status quo, and the times required certain amounts of adjustment in order to allow it evolve and meet the needs of the new and present times, the amendment formula was what would allow the Constitution to stand the test of time and such a mechanism was required to be relatively simple and straight forward and not burdened with undue technicalities so as to facilitate the change.

A case in point that would highlight the difficulty experienced when unnecessary technicalities are created would be the Articles of Confederation's almost impossible amendment process in America which required among other things the states' unanimity. The chosen mechanism for amendments in Article V of the Constitution[12], as James Madison described in the Federalist No. 43, 'guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults'[13]

However despite all this we see that certain requirements were put forth such as those in article 260 to ensure that the only way certain parts of the

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12 U.S. Constitution, Art. V: 'The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'. For the history of the drafting of art. V, historical views on it, and of some of the prevailing theories surrounding it, see Denning (1997-1998, 155); Vile (1991B), 44.
13 Madison (1817, 239).

Constitution which are so vital to our survival as a democratic state would only be changed after a certain amount of difficulty is undergone by the people wielding the amendment power.

For instance, in an ideal parliament, it would be necessary to achieve a majority which would involve the ruling party having to appeal intellectually to the opposition so as to enable them join and make up for the vast majority. Also the expense that would be involved in holding regular referendums so as to let the people decide on whether such amendments would be acceptable to them or not is an essential safeguard.

However we ruefully note that with the ruling party having 293 out of 426of the seats in parliament, the need for a two thirds majority is more or less done away with as some national decisions may be taken at a party caucus and these same views reflected on the floor of parliament.

This is prima facie evidence that the experiment on the use of explicit controls of the amendment process has failed therefore the need to explore other less prominent but equally important features within the Constitution.

5.3 Implicit Controls

A more complicated issue concerns the question of whether any implicit limitations on the amendment power exist, regardless of the existence or absence thereof of any unamendable provisions. This issue is more contentious than explicit limitations since the major adjudicators in the matters concerning them are the courts of law and this immediately creates the presumption of a breach into the law making function which would be a direct contravention of the separation of powers doctrine

In the latter case, the existence of clear constitutional provisions may ease and simplify the courts exercise in enforcing any such limitations by

substantially reviewing constitutional amendments. When faced with a situation where these have to be inferred indirectly from less clear means, we find the judiciary faced with an uphill task.

According to Rozni[14], it would appear that the genesis of the modern idea of implicit limitations on the amending power originated in the U.S. As noted in Chapter 2, Article V of the U.S. Constitution originally contained two explicit limitations on the amending power: a prohibition on abolishing the African slave trade prior to 1808, and, without time limits, prohibiting the deprivation of a state of its equal representation in the Senate without its consent.

The more intense controversy regarding the scope of the amending power did not concern these explicit limitations, but rather the existence of any implicit limitations on the amendment power. In the first American Congress, Roger Sherman argued that there is a difference between the authority upon which the constitution rests and that upon which amendments rest.

The Constitution is the act of the people, and ought to remain so entirely. But the amendments will be the act of the State Governments. Again, all the authority we possess is derived from that instrument; if we mean to destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build.

This point of view was further supported by the U.S. Supreme Court case, *Dodge v. Woolsey*[15] where court adopted Edward Everett vibrant arguments in favor of implicit limitations on the amendment power in a speech delivered in the House of Representatives in 1826:

14 Unconstitutional Constitutional Amendments supra.
15 59 U.S. 331(1885)

> *"The distinction still recurs, that to amend is one thing, essentially to change another. To amend is to make changes consistent with the leading provisions of the Constitution, and by means of which those leading provisions will go into happier operation. Can this be the same thing as to change … those essential provisions themselves?"*

It can be imagined from this general view that the idea he envisioned had more to do with the fact that the entire constitution had within it a certain fundamental character and personality out of which the rest of its provisions arise. As a result of this presumption it would be said that an amendment must have had the capacity to create the sort of change required such that the original spirit and character of the constitution would be fully manifested therein. On the same hand it seems to indirectly suggest that contravening this spirit would render such an amendment invalid.

A country that has ably demonstrated the applicability and also to an extent the danger of pursuing this line of thinking has been India. The Indian Constitution excludes any unamendable provisions. Likewise, Indian jurisprudence, rooted in British tradition, initially rejected the notion of implicit limitations on the amendment power. That position, however, was revised in the 1960s and 1970s following Prime Minister Indira Gandhi's far-reaching attempts to amend the constitution, which eventually led to the judicial development of '*the basic structure doctrine*', according to which the amendment power is not unlimited; rather, it does not 'include the power to abrogate or change the identity of the Constitution or its basic features'.[16] This buttresses the initial presumption that indeed there is a character and personality unique to any constitution and that the constitution of Uganda isn't any different.

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16 See Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

This doctrine was used by the Indian Supreme Court to review and even annul constitutional amendments several times. And much has been written on this doctrine and its development both within India and abroad.

In *Singh v. Rajasthan of 1965*,[17] facing a challenge to the 17th Amendment, the majority of the Supreme Court rejected the argument that amendments cannot violate fundamental rights. With two judges dissenting from this view, another challenge was brought before a large bench of eleven judges in 1967 in *Golaknath v. State of Punjab*[18].

Overruling its previous decisions, the majority of a divided court (six to five) held that Parliament's power to amend the constitution could not be used to abridge the fundamental rights since an amendment was deemed to be a 'law' under Art. 13, which prohibited Parliament from making any law abridging fundamental rights.

This can be likened to our very own constitution which mentions that all power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution. This particular article signifies that the people who hold the amendment power are subject to the constitution and to give them unlimited and unchecked power to amend provisions of the constitution by a mere two thirds majority in the house of parliament would now be making the constitution subject to them and their subsequent whims and desires.

Notwithstanding the fact that the Court delivered a prospective judgment and did not invalidate the amendments in question, this judgment triggered a powerful political reaction in India. It signified the opening shot of a 'great

17 AIR 1965 SC 845.
18 AIR 1967 SC 1643.

war over parliamentary versus judicial supremacy and as a result put the question of the doctrine of the separation of powers thesis to the test.

However, in *Kesavananda Bharati v. State of Kerala of 1973*.[19] The Supreme Court overruled GolakNath, holding that the term 'law' does not refer to constitutional amendments; hence, Parliament can amend any part of the Constitution. More importantly, seven of the judges held that the amendment power does not include the power to alter the basic structure, or framework of the constitution so as to change its identity, creating what has come to be known the 'basic structure doctrine'.

In *Indira Nehru Gandhi v. Raj Narain in 1975*[20], five judges unanimously confirmed the basic structure doctrine. Whereas the Court validated Gandhi's election in the 1971 election, it held that by excluding judicial review the 39th Amendment violated three essential features of the constitutional system: fair democratic elections, equality, and separation of powers, and was therefore invalid.

What can such a ruling mean for a country like Uganda? The preamble to the Constitution seems to present in itself what we could allude to as a set of experiences informing the basic structure of our Constitution. A fundamental aspect of which is the supremacy of the Constitution and the will of the people with power belonging to the people and their sovereignty being exercised in accordance with this Constitution.

Furthermore it highlights that we as a people are committed 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,

19 (1973)4 SCC 225
20 AIR 1975 SC 2299.

peace, equality, democracy, freedom, social justice and progress.[21] This may very well be the spirit and character of the Constitution that its framers intended it to have, recalling our history which has been characterized by political and constitutional instability and recognizing our struggles against the forces of tyranny, oppression and exploitation[22]that we had previously faced.

In light of the impending bill to remove the age cap for a presidential candidate that many of his critics feel is a ploy for the incumbent to guarantee himself yet another elected term in office, the unlikely ally of the people in their defense of the constitution may be the constitution in itself and the courts of law who would be able to put a definitive rest to this issue once and for all and perhaps create a precedent that will ensure that the posterity is protected from such attacks on its constitution and the practice of constitutionalism in this country.

To search for the spirit that has been often mentioned by many a legal officer may prove rewarding but I feel the spirit is already expressly stated and such is more in need of recognition much like the grund norm that was espoused by Hans Kelsen, only more well defined and properly articulated and less mystical.

The task may seem difficult but it has been done before, In the case of *Premier of KwaZulu-Natal v. President of the Republic of South Africa*,[23] Mahomed DP, in a judgment to which all of the members of the Court concurred, declared:

> *"There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly*

21 Preamble to the constitution.
22 Supra.
23 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC).

> *done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the constitution, might not qualify as an 'amendment' at all."*[24]

Court seemed to allude to the fact that there were certain aspects of the constitution that are so fundamental that to deviate from them would not only be void but would create an absurdity. In *Executive Council of the Western Cape Legislature v. President of the Republic,*[25] Justice Sachs noted:

> *There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life – the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.*

In contemplating that an extreme amendment could not be deemed an 'amendment' at all, the Court not only followed the line of reasoning of the Indian basic structure doctrine, but also 'left open the possibility that it may

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24Id., para. 47.
251995 10 BCLR 1289 (CC).

subsequently incorporate a basic-structure doctrine into South African law'.

Basing on the fact that a constitution is valid only with regard to those sections within the integrative and positivist legal order that do not exceed the predetermined borders of 'higher law', an amendment that violates 'higher law', as recognized by Article 79(3) of the German Basic Law, would contradict both 'natural law' and the constitution, and it should be in the power of the courts to declare such an amendment as unconstitutional and thus void.

This was the accepted approach in German courts at that time. In 1950, the Bavarian Constitutional Court famously declared that there are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself and subsequently the person with the power to amend it is bound by them. Other constitutional norms and amendments can be void because they conflict with them.

In conclusion, when faced with this debacle, the courts of law in Uganda would be in effect left to answer two fundamental questions which may prove to be more of a question of soul searching than actual questions of law, the first one being, basing on their reading of the constitution of the republic of Uganda in its entirety, what is the basic structure of our constitution?

Secondly, in passing the amendment to remove the cap on the age of a person intending to stand for the highest office in the land, what would be the implication of such an amendment on this basic structure?

Whatever answer they reach, what is clear is that it will effectively put the matter to rest, if not for posterity then at least for the foreseeable future,

when we are faced with another opportunity to exercise our constitutional right to vote new leaders as is the norm in our nation.

6. REVOLUTIONALIZING UGANDA'S COMMERCIAL SECTOR: THE IMPACT OF THE FINANCIAL INSTITUTIONS (AMENDMENT) ACT 2016

Mugumya Edwin*

Abstract

The 21st century has written and left a long history in the country's commercial sector in general but the Banking sector in particular. Whilst many structural and legislative measures have been taken by the government to revive the sector, the recent past has been characterized with crises in the banking and commercial sectors, takeovers and winding up of renowned companies by the government[1]. In equal measure there has been remarkable growth in money markets as well as robust expansion of the informal financial services.

This article therefore makes an exploration into the said recent trends in the sector in light of inter alia; the passing of more regulatory laws and policies by the government and revised efforts to supervise public companies.

6.1 Evolution of the Uganda's Banking Sector

Uganda's banking sector is categorized into the Central Bank, commercial banks, credit institutions, Microfinance Deposit Taking Institutions (MDI's) and development banks. Credit institutions and MDIs are known as non-bank financial institutions.[2]

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1 The East African 30th Jan 2017.

2 www.bou.or.ug.

Typically, banks are part of the financial system and play a major role towards the economic development of the country because they bridge the gap between deficit and surplus spending units to ensure economic welfare of the people.

Uganda's banking sector started in 1906 with the establishment of the National Bank of India which later turned into Grindlays Bank and consequently the Stanbic Bank.[3]

This sector has evolved through bank closures, mergers and acquisitions such as the National Bank of India, which merged with Standard Bank in 1912, the Bank of Netherlands that merged with Grindlays Bank, Uganda Credit and Savings Bank, which revolved into the first local commercial bank (Uganda Commercial Bank - UCB) in 1969, and Bank of Baroda which was regularized as a commercial bank in 1969[4]. The sector has since expanded and as of 2015 there were about 25 licensed banks operating in the country[5].

Most financial institutions in rural areas are informal in nature taking the form of village savings, money lenders, co-operative societies and loan associations and formal institutions are less prevalent in rural than urban areas.

6.2 Reforms

Over a period of time, the country's laws have been amended several times to regulate the banking system. The laws regulating the sector include the 1995 Constitution of the Republic of Uganda, The Financial Institutions Act

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3 G.P. Mukubwa: Essays in African Banking Law and Practice: Prof.
4 www.bou.or.ug.
5 Ibid.

(2004), The Financial Institutions Amendment Act 2016 and The Bank of Uganda Act (2000) (Cap 51).

The World Bank and International Monetary Fund (IMF) have also had a significant contribution to Uganda's financial-sector reforms mainly through Policy Framework Papers to ensure that Uganda remains on a very strong course of economic reforms. Examples of these reforms and performance benchmarks among others include the establishment of new legal and regulatory framework for banking sector, liberalization of the interest rate market, closure of failing banks, establishment of Non-Performing Asset and Recovery Trust, liberalization of the foreign exchange market and adoption of the internally accepted standards in banking particularly the Basel standards.

6.3 The Financial Institutions Amendment Act

At the height of revolutionalizing the sector, Parliament on January 6 2016 passed into law the Financial Institutions (Amendment) Act 2016[6]. The Act is a modification to the Financial Institutions Act 2004, which governs Uganda's financial sector especially the commercial banking and other commercial transactions sectors.

The Financial Institutions Act 2004 had become out of touch with the developments in the sector and therefore the 2016 Amendment came in handy to remedy most of these legislative deficiencies and the symptoms of the inevitable developments in the banking and commercial sectors. The changes introduced therein include inter alia; Agency banking, Bancassurance and Islamic banking[7].

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6 Ibid.

7 The Financial Institutions (Amendment Act) 2016.

1) **Agency banking.** The Amendment Act introduced, under S.42(b), a form of banking that will allow commercial banks to use Agents in the form of established business entities such as petrol stations, post office branches, hardware stores and the alike to conduct minor banking services (deposits, loan applications etc.) on behalf of the commercial banks. This is expected to reduce the cost of operation for the commercial banks, which will no longer need to set up brick and mortar branches to extend commercial services to their clients.

   This introduction will offer a viable solution to increasing and expanding the outreach of financial services in Uganda particularly in rural areas.

2) **Insurance Banking (Bancassurance)**

   The amendment Act repealed section 37 of the Financial Institutions Act of 2004, which prohibited financial institutions from among other things, engaging in providing insurance services. This amendment prescribes, under S.11, Bancassurance, a service that will mandate commercial banks to operate as agents on behalf of insurance companies.[8]

This Amendment however raises supervisory concerns as between the two authorities; Bank of Uganda and Insurance Regulatory Authority.

Under Section 115D of the Act[9], a financial institution shall not engage in bancassurance or Islamic insurance business in Uganda as a principal or agent without prior written authorization by the Central Bank. Subsection 2 thereof provides that a financial institution wishing to engage in the business of bancassurance or Islamic insurance shall do so in a format and manner prescribed by the Insurance Regulatory Authority of Uganda after consultations with the Central Bank.

8 https://pwc.com/financial-services.
9 The Financil Institutions(Amendment Act) 2016.

The two provisions in effect say that the duty to authorize the carrying on of insurance business by banks is a preserve of the Bank of Uganda and that the Insurance Regulatory Authority only prescribes the manner of carrying out of such business after consulting with the Bank of Uganda. However, under Section 14 of The Insurance Act Cap 213, The Insurance Regulatory Authority is also given the mandate of authorizing and licensing anyone doing insurance business in Uganda[10].

There is therefore need to harmonize what roles each institution plays in banc assurance. There needs to be a clear cut identification of activities between banking and insurance at the institution's level and also at the level of regulators.

3) Islamic Banking

The most contentious invention of the Amendment Act was Islamic banking introduced under S.3[11]. The Islamic Banking model follows the principles of Sharia, where the institution does not charge interest on money taken out by a borrower. According to Sharia Banking, the lender and the recipient become partners in the business venture receiving the loan, and there is full transparency in the execution of business, with the lender and borrower sharing in the profits and losses of the business, and therefore no interest is charged on the loan[12].

The amended law provides for at least three models that adhere to the Sharia; **Equity financing**, where the bank holds a stake in the business venture, **Lease based financing**, which includes the bank purchasing an asset that can be leased to a client until the lease period is over and thirdly

10The Insurance Act, Cap 213.
11 The Financial Institutions (Amendment Act) 2016.
12 www.global-islamic-finance.com .

sale based financing[13].

6.4 How Islamic Banking Works

The mode is less profit oriented yet more sharia inspired. According to the International Monetary Fund (IMF), Islamic banking is based upon the principle of profit and loss sharing (PLS) and the avoidance of interest rate-based commitments and contracts that entail excessive risks and finance activities prohibited under Islamic principles[14].

The system therefore prohibits levying of interest or fees for loans pursuant to the teachings of the Koran and the Hadith[15]. For instance, if a businessperson sought a facility from an Islamic Bank to pursue a particular business venture, any such bank would have to look into such venture and satisfy itself that the same is not contrary to the Quran and/or Hadith. If such businessperson sought to finance a venture that leads to establishing and running a bar/drinking joint, then the bank would have to satisfy the Central bank that such a venture is in accordance with the sharia, if not, such a facility would have to be declined.

This introduction however raises many questions of legality, practicability and profitability. Ideally, accommodating Islamic Banking within the existing legal framework may attract certain challenges as well as necessitate a total over haul of the financial structures in the economy.

A. Will an Islamic Bank in Uganda make profit?

One of the fundamental tenets of Islamic banking is Trust. Banks in Uganda have a plethora of court cases against their clients who default in loan repayments. In practice, the idea of advancing interest and collateral free

13 Ibid.
14 www.imf.org.
15 Albaraka.co.za/Islamic-banking.

loans to Ugandans on the trust that they will declare their profit and share the same with the Islamic bank will most likely not be feasible. There have always been cases of fraud against banks in Uganda under the conventional banking system. If for example a profit-based bank lends out Ushs10 million to a client to grow maize and it fails due to a bad whether, the next thing will be loss-sharing which definitely affects that bank. The Islamic model would need not just the element of trust and sharia compliance if the Islamic banks are to make profitable business in the country. This explains why most banks in the country are still reluctant to embrace and practice Islamic banking.[16]

However, it is equally important to note that Islamic banking has thrived in other economies. For instance Ernst and Young in its report "World Islamic Banking Competiveness Report – Participation Banking 2.0 (2015)" states that "For the first time in history, the combined profit of participation banks crossed the US $ 10 Billion." They further state that "the global profit pool of Islamic banks is set to triple by 2019" and that "International Islamic banking assets with commercial banks had exceeded US $ 778 Billion in 2014." This is indicative of the fact that the model is in fact capable of making profits in an economy but this is dependent on the level of financial monitoring.

B. Competition with other banking systems

It is understandable for conventional banks to fear any institution lending interest-free loans to give them a run for their money. The long term effect of this would be a reduction in foreign direct investment in the banking sector which will have the effect of reducing cash in-flow in the economy because investors in conventional banks will envisage untold competition

16 Allafrica.com.

with the Islamic banks.

C. Islamic Banking and the existing tax laws

The operation of Islamic Banking in Uganda's economy will need good harmonization with the economy's tax regime. The government needs to provide a levelled playing field for both Islamic Banking and conventional banking by allowing incentives in terms of tax exemptions on Sharia-compliant contracts that would attract double or multiple taxation. This will allow Islamic banks incur a common tax stipulated under the Stamps Act, in the same manner conventional banks do[17].

D. Islamic banking in a secular and multi-religious state

A cross section of Christian religious leaders has already expressed concern about this new model of banking. In 2016, the Inter Religious Council wrote a letter to the President of Uganda calling up on him to protect the Christians from sharia law. The letter read in part,

"*We regret to note that the introduction of Sharia law in the country opens door to the ultimate operationalization of fully-fledged Sharia not only in the finance sector as contained in the bill but in all aspects of our national life,*[18]"

The pessimism expressed by the Christians towards this model of banking raises questions as to whether the system will thrive in an economy where the Christians form a considerable portion of the population.

E. Lessons from other jurisdictions; Malaysia

An important objective underlying the regulatory framework for Islamic banking should be to avoid undermining the stability of the financial system. In furtherance of the efforts to achieve this, the country needs to draw a few

17 KPMG: "Tax Law to be adjusted for Islamic Banks".
18 Daily Monitor: 24th May 2016.

lessons from economies where the Islamic system of banking has thrived alongside other banking models. One of such economies is Malaysia.

The Malaysian adjustment of its existing laws to accommodate Islamic Banking system would provide important lessons for benchmarking into Uganda to create a legal atmosphere conducive for Islamic Banking without any unnecessary burdens.

Malaysia adopted a dual banking system where Islamic Banking operates side by side with conventional banking under the Bank Negara Malaysia (BNM) regulation[19]. This dual banking environment in Malaysia allows the Islamic Banking system to operate alongside conventional banking. Malaysia has merged and rationalized its regulatory laws to realize a more cohesive legislative framework through a dual banking system under the Financial Services Act (2013) and the Islamic Financial Services Act (2013). These two separate Acts regulate conventional and Islamic Banking businesses, respectively. Malaysia has also developed this sound legal architecture through stages where several statutes were enacted to govern and regulate its financial sector, that is, the Islamic Banking Act (IBA) 1983 (now repealed) to govern Islamic banks offering exclusively Islamic Banking products, the Government Investment Act (GIA) 1983 to enable government receive money from Islamic banks for a fixed period and pay dividends or gift (hibah) thereon instead of interest and the *Takaful* Act (TA) 1984 to regulate Islamic insurance business[20].

In a bid to accommodate Islamic Banking, the Malaysian Government also introduced incentives in terms of tax exemption for Islamic financial

19 www.bnm.gov
20 Islamic-banking.com.

Institutions and institutions offering Islamic financial services.[21]

The government of Uganda would therefore need to adopt an approach akin to Malaysia's in order to accommodate Islamic banking in its economy.

6.5 The Unfinished Business in the Financial Institutions (Amendment) Act

Whereas the Financial Institutions (Amendment) Act 2016 had the effect of addressing some loopholes in the 2004 Act, the amendment did not go to the root of the problem as to effectively iron out the creases in the Financial Institutions Act 2004. The former had problems but these problems weren't lack of Islamic banking per se, or agency banking or absence of Banc assurances. Instead a number of questions remained unanswered under this Act;

(i). The Act did not satisfactorily answer the question of what amounts to a financial institution for purposes of being regulated by this law.

In 2015, Hon. Abdu Katuntu petitioned the commercial court in the case of ***Hon. Abdu Katuntu and Kimberly V MTN Uganda Ltd &5 Ors***[22] seeking a declaration to the effect that the defendants' mobile money services were financial services and/or financial institution business under the law and that the said mobile money services were outside the scope of the licenses granted to them by Bank of Uganda. The Plaintiffs also sought an order directing the Defendants to formulate policy and proper regulations for mobile money services.

In his ruling, the learned High Court Judge Christopher Madrama stated obiter dictum that since the petitioner was a member of parliament (MP), he

21 Ibid.
22 Hon. Abdu Katuntu & Anor v MTN & 5 Ors (HCCS 248 of 2012)

had the capacity to move parliament to expand the definition of banks or financial institutions to include telecommunications companies[23].

This case exposed the need to answer the question of whether mobile money service providers are financial institutions properly so called, and also the need to have mobile money activities regulated under the financial institutions Act. However, when the amendment to the FIA was passed in 2016, it was still silent on the above.

As of January 2017, the mobile money market had hit 17.6 million registered subscribers in the country. Mobile money transfer services serve more than 15 million Ugandans compared with banks' at less than five million people, while total transaction values have grown to more than Ush18.6 trillion ($5.3 billion) per year according to Bank of Uganda (BoU) data[24].

The new law therefore ought to have applied the brakes to the telecommunications firms unregulated nature of financial and mobile money business.

(ii). The Act provides no sufficient shelter against fraud and cyber insecurity in financial institutions.

With the modernization of the financial sector to for instance; use electronic means of money transfer such as Smart phones, and other banking applications, the financial sector will increasingly become target for hackers. Additionally, the new payments systems using smart phones will be hit with malware attacks on the devices and the apps they are running. The law, needed to have such evils in foresight and therefore provide for effective safeguards against the same in the Amendment Act.

23 Ibid

24 www.monitor.co.ug.

More so, there have been a growing number of actors in the financial sector who are not regulated by the central bank. Such include online marketing business such as Alliance Global, Neblink, Telex Free among others. You will most likely read many posts on social media saying, Make 100 dollars online per day. Questions remain unanswered as to who regulates such businesses. These have been used by fraudsters to defraud unsuspecting members of the society.

For instance, in early 2000s, an organization known as Caring for Widows and Elderly (COWE) claimed to be running a microfinance scheme that would pay good rates of interest to investors, despite not having a license from the central bank to take deposits from the public. Ugandans welcomed COWE and envisaged it as an opportunity to make quick earnings, and when the first savers got the supernormal interest, a buzz of excitement was created and many more deposited their monies with COWE hoping to get double the money after a period of thirty days. Justice Gidudu in the case of ***Balikowa v. Uganda***[25] sitting at the anti-corruption court ordered the disqualification of COWE from operating a deposit taking business under **Act 2 of 2004.** The Amendment Act also unfortunately did not provide any tough measures to avert such fraud and protect people from fraud stars that come as financial institutions.

(iii)The Amendments did not clear the mist between a mobile communication network and a mobile financial provider.

Fortunately or unfortunately there's now a blurry line between being a "Telecom" and being a "Bank" in the mobile space. For instance, is MTN a telecom or bank? The answer apparently is that, it is both. The High Court of Uganda in the case ***Ezee Money (U) Limited V MTN Uganda Limited***[26] found that MTN engaged in activities that unfairly prevented restricted or

25 Balikowa v Uganda (Criminal Appeal No.24 of 2013).
26 Newvision.co.ug.

distorted competition in the communications sector contrary to the Uganda Communications Act, Act No. 1 of 2013 and that it also engaged in providing financial services contrary to the law. The Financial Institutions Amendment Act should have pronounced itself on the margin between these two institutions so as to regulate the competition between the two.

In conclusion, it is my considered opinion that much as the Financial Institutions Amendment Act 2016 came in handy, the amendments therein neither went to the root of the problem in the financial sector nor satisfactorily answered the big questions in Uganda's commercial sector.

7. REALIZING THE RIGHT TO FOOD IN UGANDA: THE ROLE OF THE UN VOLUNTARY GUIDELINES, CHALLENGES AND OPPORTUNITIES

Simon Ssenyonga*

Abstract.

The right to food is crucial in espousing the principle of universality, inter-relatedness, inter-dependence and indivisibility of human rights. It is one that is crucial in the full legal manifestation of the right to life and health among others. Its place in Uganda, like most Economic, Social and Cultural rights, is still in progressive realization. Specific and targeted steps are being taken to fully realize it. An aid to this has been the UN Voluntary Guidelines to progressively realize the right to food. The focus of this article is structured in a chronological manner to include the introduction and definitive statements of the Voluntary guidelines, the policy, legal and institutional framework on the right to food at the international, national and even the district level. Mention will also be made of the governments' compliance or failure to comply with its obligations under the guidelines and also relate the findings to existing policies, laws setting out any inadequacies in the law, and policy which affect the right to food. In conclusion, we shall be able to set out the modifications to be made in the law and the policy that will be suggested.

7.1 An Overview of the U.N Voluntary Guidelines.

The Voluntary Guidelines represent the first attempt by governments to interpret an economic, social and cultural right and to recommend actions to

be undertaken for its realization.[1] The objective is to provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security, in order to achieve the goals of the World Food Summit Plan of Action. Relevant stakeholders could also benefit from such guidance. The Voluntary Guidelines cover the full range of actions to be considered by governments at the national level in order to build an enabling environment for people to feed themselves in dignity and to establish appropriate safety nets for those who are unable to do so. They can be used to strengthen and improve current development frameworks, particularly with regard to social and human dimensions, putting the entitlements of people more firmly at the center of development.[2]

The Voluntary Guidelines represent a step towards integrating human rights into the work of agencies dealing with food and agriculture, such as Food and Agriculture Organization, as called for by the United Nations Secretary-General within his UN reforms. They provide an additional instrument to combat hunger and poverty and to accelerate attainment of the An Intergovernmental Working Group was established in November 2002 and working relationships, in particular with the Office of the High Commissioner for Human Rights and the Special Rapporteur on the Right to Food, were strengthened.[3] These Voluntary Guidelines are a human rights-based practical tool addressed to all States. They do not establish legally binding obligations for States or international organizations, nor is any provision in them to be interpreted as amending, modifying or otherwise

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1 VOLUNTARY GUIDELINES ***to support the progressive realization of the right to adequate food in the context of national food security, Adopted by the 127th Session of the FAO Council November 2004, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS Rome, 2005.***

2 Report of the Special Rapporteur on the Right to Food to the General Assembly, ***A/RES/57/356****, 27 August 2002.*

Paras. 5 and 6, p.4.

3 The Right to Food, Report of the Special Rapporteur, E/CN.4/2003/54, 10 January 2003.

impairing rights and obligations under national and international law. These Voluntary Guidelines have taken into account relevant international instruments, in particular those instruments in which the progressive realization of the right of everyone to an adequate standard of living, including adequate food, is enshrined. These include; Universal Declaration of Human Rights Article 25: International Covenant on Civil and Political Rights, Article 11: International Covenant on Economic Social and Cultural Rights ,Article 2: United Nations Charter, Article 55 and 56; Other international instruments[4], including the Convention of the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, the four Geneva Conventions and their two Additional Protocols also contain provisions relevant to these Voluntary Guidelines.[5] The United Nations Special Rapporteur on the Right to Food describes this right as the right to have regular, permanent and free access either directly or by means of financial purchases to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear. The special rapporteur recognizes food security as a necessary corollary of the right to food. Food security has been defined in the first paragraph of the World food summit plan of action as food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.[6]Important notions linked to the idea of food security are also included in the definition of the right to food, including the notions of

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4 *CESCR General Comment No. 12: The Right to Adequate Food (Art. 11***), (Contained in Document E/C.12/1999/5).**

5 *Eide A., Right to Adequate Food as a Human Right, Human Rights Study Series No. 1, United Nations publication (Sales No. E.89.XIV.2), (New York, United Nations, 1989).*

6 *Article 1 (3) of the UN Charter 1945; Pooja Ahluwalia, THE IMPLEMENTATION OF THE RIGHT TO FOOD AT THE NATIONAL LEVEL: A CRITICAL EXAMINATION OF THE INDIAN CAMPAGN ON THE RIGHT TO FOOD AS AN EFFECTIVE OPERATIONALIZATION OF ARTICLE 11 OF THE ICESCR (2012).*

sustainability and adequacy (cultural and consumer acceptability) of the availability of and access to food. However, the right to food not only includes all the elements of food security- availability, accessibility and utilization-but also goes further than this, by making food security a human rights obligation not simply a preference or policy choice or just an inspirational goal.[7]

State parties to ICESCR are required to adopt, inter alia, the legislative measures necessary to realize the right to an adequate standard of living, including the right to adequate food. States have a tripartite obligation in the realization of human rights to respect, protect and fulfill the human rights. Other obligations include the obligation of conduct; result and finally, the obligation to spend the maximum available resources with a view to progressively realize the right to food fully. In assessing whether the government is using the maximum of its available resources (whether at the national or district level), on the right to food it is relevant to find out: the percentage of national or national district budget relevant to the right to food; the utilization of funds allocated to implement policies, programs related to right to food and the result/impact of these policies/programs.[8]

7.2 Reviewing the Ugandan Status Quo in Relation to the Right to Food.

The population of Uganda is currently estimated at approximately 25 million. About 86% of the population lives in the rural areas. Children aged 0-4 years constitute 18.8% and women in the reproductive age constitute 21.2%. The average per capita income is estimated at USD 300 (Poverty Status Report, 1999). In 2000, 35% of the population was estimated to live

7 Kent G., The Right to Adequate Food, (2013). www2.hawaii,edu/~kent/HRAF2003/00HRAF2003ENTRYWAY.doc.

*8 CRISTOPHE GOLAY,**The Right To Food And Access To Justice:Examples At The National,Regional And International Levels (2009).***

below the poverty line (UDHR, 2000), while the unemployment rate was calculated to be 7.4% in 1997.

The country has an equatorial type of climate. Almost 80% of the county lies at an average altitude of approximately 1,000m (range 800-1500m) above sea level. As a result of a combination of these favourable geographic factors, Uganda produces a wide range of crops, including cereals, useful for the alleviation of hunger, such as maize, millet and sorghum among others. Subsistence farmers produce most of the food. Wider use of modern technology could undoubtedly boost production.[9]

However, the country still faces problems of malnutrition and there exists pockets of famine and hunger. There are high levels of childhood under-nutrition and 40% of deaths among children are due to malnutrition. Over thirty-eight per cent of the children below 5 years are stunted, 4.0 per cent are wasted and 22.5 per cent are under weight (UDHS 2000/2001). Macro-nutrient deficiencies are common, especially vitamin A deficiencies which has a prevalence rate of 5.4% from deficiency anaemia is slightly more than 50% while 10% of the women population are undernourished. The total goiter rate ranges from 60-70%.

In Uganda, there has been concern about the high prevalence of hunger and malnutrition in a world that has the capacity to feed its people. Populations affected are mainly those from poor developing countries, which depend on subsistence agriculture and are predominantly rural.

Many international conferences have been convened to find solutions to persistent food insecurity, famine and under-nutrition in parts of the world. One of the first was the UN Conference on Nutrition (1992) and World Food

9 *W.Kisamba- Mugerwa;* ***Development Policies and Agricultural Reforms in Uganda in Transformations in Uganda****, Makerere Institute of Social Research Cuny Center.*

Summits (1996 and 2002) were follow-up meetings to address the primary problem of inequitable food distribution and resultant macro and micro-nutrient malnutrition especially among the children and women. The World Summit for Children (1990), specifically convened to discuss issues of child development, gave specific commitment to improve the nutrition of children.[10]

7.3 The Right to Food in Uganda.

Uganda ratified the ICESCR in 1987 and recognizes the importance of food and nutrition in the 1995 Constitution of the Republic of Uganda. The National Objectives and Directive Principles of State Policy provide that a state shall take appropriate steps to encourage people to grow and store adequate food; establish national food reserves and encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy state.

Since the ratification of the ICESCR, Uganda has been party to the commitments and resolutions at most of the international conferences on the right to food and has developed national goals and plans of action such as an Action Plan for Children (1993) that address the right to adequate food. In 2003, a national seminar on the implementation of the right to adequate food in Uganda discussed issues relating to the right to food including the draft Uganda Food and Nutrition Policy.

Optimal nutrition that contributes to the highest attainable standard of health is also a goal of the food and nutrition policy. Uganda's national obligation and commitment are to address issues of food security and

10 See Nowak, Manfred. 1993. UN Covenant on Civil and Political Rights: CCPR Commentary. 53-54; Schachter, O. 1981. The Obligation to Implement the Covenant in Domestic Law, in L. Henkin ed. The International Bill of Rights: The Covenant on Civil and Political Rights, 311, 313-14; Henkin, Louis. 1990. Constitutionalism, democracy, and foreign affairs. New York. Columbia University Press, at 395; Craven, Mathew C. R. 1995. The International Covenant on Economic, Social and Cultural Rights. 125.

nutrition and to promote development. Food security promotes good nutrition and good nutrition is key to good health and the socio-economic well-being of the population. Food security and nutrition are mutually reinforcing; social and economic factors have overriding influences on either one or both of them.[11] The economic productivity of a population depends on its nutrition and health status.

The Ministries of Health (MOH) and Agriculture, Animal Industries and Fisheries (MAAIF),which are the lead ministries in food security and nutrition issues, are mandated by the Constitution to set minimum standards, assure quality of health services and to ensure equity in accessing essential health services with the overall goal of reducing morbidity and mortality. Nutrition is one of the priority components of the National Minimum Health Care Package being implemented under the Health Sector Strategic Plan (HSSP). The mandate of MAAIF is to support, promote and guide the production of crops, livestock and fish so as to ensure the improved quality and quantity of agricultural produce and products for domestic consumption, nutrition, food security and exports. MAAIF and MOH are also promoting diet diversification as well as other food-based strategies for a healthy and productive population. The issues relating to food security and nutrition are multi-sectoral, involving both public and private stakeholders.[12]

The enjoyment of the right to food[13] in Uganda and any district in Uganda should be examined in the context of the national environment for the right

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*11 POOJA AHLUWALIA,**The Implementation Of The Right To Food At The National Level: A Critical Examination Of The Indian Campaign On The Right To Food As An Effective Operationalization Of Article 11 Of Icescr.; Nyu School Of Law · New York, Ny 10012.***

12(UN Doc. E/CN.4/1998/53), UN Doc. E/CN.4/1998/53/Add.2.

13 The "State of the Union" message, delivered on 26 January 1941, Roosevelt F.D. "War—And Aid to Democracies," in Rosenman S. I., The Public Papers and Addresses of Franklin Roosevelt, (New York, MacMillan.
Company, 1941), p.672.

to food. This is important because districts operate within the context of national laws and policies which they are bound to comply with and implement. The national environment does not only have a relationship with the districts but can have impacts on what happens therein. A critical assessment that can inform futuristic advice should therefore bear in mind the relevant national legal framework, policy framework, institutional framework and budget allocations.

The legal framework to examine and bear in mind includes the International Covenant on Economic, Social and Cultural Rights, 1966; The African Charter on Human and Peoples Rights; The Convention on Rights of a Child; The 1995 Constitution of Uganda[14] and the National Objectives and Directive Principles of State Policy; The Children's Act; The National Agricultural Advisory Services (NAADS) Act; The Land Act.

A couple of policies also impact the right to food. These include The Plan for the Eradication of Poverty (PEAP);The Food and Nutrition Policy,2004;The Plan for the Modernization of Agriculture; The NAADS Programme; The Land Use Policy; The National Health Policy, The National Environment Policy; The Decentralization Policy; The IDP Policy; The Livestock Policy.

The progress of a country should thus focus on if the program/policy contributes to the realization of the right of food and in the specific respect. The policy framework ought to adequately cater for the rights of the vulnerable persons, the gaps that may exist in the policy or national policy framework and exploration of the weaknesses and strengths. The said policies ought to be backed with adequate funding strategies for implementation and these ought to clearly identify duty bearers and their responsibilities and prescribe clear accountability mechanisms and the

14 Articles 8A,45, 34(7),35.

policy framework should address the immediate and underlying causes of food insecurity such as emergency food aid, safety net and fortification of food among others.

The responsibility for the right to food lies with different ministries, local governments and institutions. The key ministries and institutions and roles of local governments are in the following criteria: Institutions/ministries responsible for the availability, access and utilization of food for example MAAIF, Ministry of Health, Ministry in Charge of social protection (Gender, Labour and Social Services);Food Safety for example the National Bureau of Standards; Nutrition Quality; Safety net provision for example the Prime Minister's Office; the Interest of the Vulnerable; Nutritional education; Agricultural knowledge and extension services for example MAAIF and NAADS, Access to Natural Resources for example Ministry of Lands, Housing and Urban Development, Ministry of Water and Environment and Local governments.

With the criteria above, the focus is then placed on specific ministries and institutions such as ministries and institutions in charge of agriculture, health, nutrition, education, sanitation, land, water, trade and industry, consumer protection, wages, marketing and distribution; commissioners/committees (national and at District levels) that coordinate food security. The examples include the food and Nutrition Council, Department of Disaster Preparedness in the Prime Minister's office, District Disaster Committees, District Planning Committees and finally Institutions that deal with violations of human rights and examples include the judiciary, the Uganda Human Rights Commission and administrative recourse mechanisms.

There have been lessons learned from the implementation mechanisms in

realizing the right to food in Uganda. Through a favorable policy and institutional framework, the right to food in Uganda began its journey from a policy commitment to a legal entitlement with the Food and Nutrition Bill. Starting with the 1995 Constitution and the recognition of food as a right under the NODPSP has since advanced mainly through policy action. While a rights-based approach was already somewhat present in the 2003 Food and Nutrition Policy which went as far as calling “ensuring food and nutrition security” a constitutional obligation-it took nearly a decade for this to be reflected in law, with a Bill still awaiting approval.[15]

These developments stand somewhat in contrast with other experiences in the implementation of the right to food at the national level in different regions of the world. Legislation has been a major tool in Latin America secondly, whereas there has been extensive litigation on this right especially in South Asia, such judicial action seems still far from reach in Africa, with the exception of South Africa. The cases of India, Guantemela and Brazil tend to indicate that the right to food has advanced most successfully where strong political leadership and a vibrant civil movement were behind it.[16] All the above have been somewhat lacking in the Ugandan context.

While the three main implementation avenues of legal, policy and institutional and judicial protection are presented as one, no actual sequence has been prescribed. Therefore, the most appropriate, available and effective in a given context can have precedence. Ideally, action should be taken at all levels, starting where the environment is most conducive and the chances of success and impact higher but ultimately combining all.

15 See e.g. Poverty Eradication Plan (PEAP) (1997); Universal Primary Education Policy,1997; National Health Policy (1999); Plan for Modernization of Agriculture (2003); National Orphans and Other Vulnerable Children Policy (2004); National Policy for Internally Displaced Persons (2004) and Nutrition Action Plan (2011-2016)

16 Aruna Sharma & Margret Vidar, India Legal Campaigns for the Right to food 93-117, in MAKING IT HAPPEN.

The likelihood of impact in reducing hunger that can be attributed to each of the above avenues is related, for most, to the position each holds in the domestic order. While, for instance, legislative action is considered an avenue of particular importance, if a given country is not receptive to such means a lot more can be achieved through other mechanisms that are more effective in a given context. At the same time, no mechanisms in isolation can lead to success, for example, should a law be passed with no mechanism in place at policy and institutional level to execute its provisions then the law would remain meaningless.

In other words, the three mechanisms can prove effective in protecting the right to food whether this happens through a) the technical precision of a law translating programs into legal entitlements, b) the strategic direction of a policy giving the right to food the political leverage it requires or c) the leadership of a strong multi-sectoral coordination body, bringing actors together and measuring progress against time bound targets.[17]

7.4 Challenges.

With regard to legal protection, the main challenge in advancing the right to food relates to transforming the understanding of food as a benefit or question of charity to recognizing it as a "legal entitlement". Recognizing food as a legal entitlement has consequences in terms of accountability of duty bearers, the ability of a person to take action to obtain remedy to an alleged violation. This transformation introduces the justifiability of the right to food, which is still for some Governments a very politically sensitive subject.[18]

17 On the need for coordination mechanisms as key in the implementation of the right to food, see: U.N. Food & Ag.Org.[FAO], The Right To Food Guidelines-Information Papers And Case Studies (2006) And Bultrini.
18 Foreword, Nutrition Action Plan. For more information on the Uganda National Development Plan, see Uganda National Development Plan 2010/20111-2014/2015, April 2010. For more information on the Nutrition Action Plan. See Uganda Nutrition Action Plan 2011- 2016: Scaling up Multi-Sectoral Efforts to Establish a Strong Nutrition Foundation for Uganda's Development (Nov.2011).

While policy protection may seem an easier avenue to pursue in some cases, the difficulty with policy-based implementation is ensuring that government prioritises and budgets are aligned with policy objectives and support the protection of the right to food. Often Government priorities are determined by external factors (including donor's agenda, international agreements etc.) that may not comply with a human rights agenda.

Finally, in terms of institutional protection, the main challenge is whether a designated body has the capacity to undertake a particular task and the related capacity to take ownership and responsibility over implementation. One factor that has slowed down the process of advancement of the right to food in Uganda is the "Bill ownership debate" between the Ministry of Agriculture, Animal Husbandry and Fisheries and Ministry of Health.[19] Resource constraints can also play a role.

Looking at the obligations of the Ugandan state to "respect, protect and fulfill" the right to food, it is clear that challenges remain in meeting all three types of obligations. In terms of respect, more efforts need to be made to ensure compatibility of legal and policy frameworks with right to food standards and to guarantee that the instruments will not harm individuals existing access rights. With respect to the obligation to protect, Uganda's initiatives in agri-industry development, macro economy strategy and building multi-lateral partnerships may be posing challenges and measures must be taken to protect individuals and communities from actions that would have a negative impact on their access to natural resources and services and tighter regulation of external actors needed. In terms of the obligation to fulfill, greater emphasis should be placed on support programs for the most vulnerable (facilitate dimension),including social safety net schemes, and in strengthening the resilience of communities to shocks

19 Draft Bill for a Food and Nutrition Act, note 22,at art.13.

through programs aimed at preparedness and rehabilitation, including food reserves, and aid programs.[20]

7.5 Recommendations.

As a way forward, the following actions should be taken. Firstly, alleviation of hunger ought to be prioritized. It is important for Uganda to build a momentum and maintain eradication of hunger as a key Government objective. This should be strongly emphasized in policy documents, particularly those related to areas of agriculture, nutrition and economic and social development. Political leverage will enhance this objective and for this reason it would be advisable to locate the new Food and Nutrition Council at the highest political level of Government, possibly under the Office of the Prime Minister.[21]

Secondly, there ought to be inter-ministerial coordination, policy coherence and budgeting. To avoid conflict, policy coherence among different sectoral instruments should be promoted. Interministerial coordination could be strengthened in order to harness multisectoral strengths and ensure coherent action plans.[22] Efforts should be made to more effectively link policies and strategies to annual budgets, as adequate funding is a key determinant to implementation. Similar effort must also be directed to strengthening the connections between economic growth and poverty reduction and clear immediate long term goals should be set.[23]

Thirdly, education ought to be promoted. Capacity and capability building on the right to food should be strengthened at all levels, from government to grassroots. Training and advocacy materials should be translated into local

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20 Uganda National Development Plan 2010/11-2014/15, adopted in 2010.

21 Isabella Rae; Presenting the Right to Food in Uganda: Advances, Challenges and the Way Forward.

22 UN Food and Agriculture Organization [FAO] Right to Food Methodological Toolbox http://www.fao.org/righttofood/publi_02_en.htm (accessed on 13th May, 2017).

23 U.N. FOOD & AGRIC.ORG. [FAO],GUIDE ON HOW TO CONDUCT A RIGHT TO FOOD ASSESSMENT AT DISTRICT LEVEL (2011).

languages to facilitate local groups understanding and empower them for action. Introducing right to food modules in relevant university curricula as a way of mainstreaming a rights-based approach would also be important in order to strengthen advocacy on food and nutrition issues and to create a vibrant national movement, strengthening linkages with academia and research institutions to promote knowledge dissemination would be key.[24]

Finally, Uganda ought to enact the Food and Nutrition Act and monitor progress on nutrition indicators annually, seeking to decrease the percentage of children under five underweight in line with national targets. Government should also increase allocation to agriculture to at least 10% of the national budget in line with its Maputo Declaration commitment. A National Agricultural Bank ought to be established to improve access to affordable credit to small-scale farmers among other things.[25]

In conclusion, for the past two decades, progressive thinking in Uganda has informed policy and legal processes alike, with the latter encouraging more obstacles in gaining political leverage. Capacity building and adequate resources remain a constraint in strengthening local agents' ability to determine meaningful change.[26] Possibly the absence of a clear national political focus, at times donor driven, in the area of food and nutrition security as well as weak advocacy, have been such that political parties have not always maintained the eradication of hunger and malnutrition and the protection of the right to food at the top of their agendas.[27] More needs to be done to enhance Government ownership of these processes and to promote harmonized responses at different ministerial levels. The progressive

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24 Recommendation from the Regional Workshop on Legislating for The Right to Food was organized by FAO and MAAIF in Uganda in 2007.

25 The 2016 Uganda UPR Factsheet on the Right to Food recommendation ;www.iser.org.ug

26 Consultative Group to Assist the Poor (CGAP) 2016.National Survey and segmentation of Smallholder Households in Uganda.

27 Nadia C.S and Hadia Lambek, ***Rethinking Food Systems: Rethinking Food Systems, Structural Challenges, New Strategies and the Law, Springer Publications****, First Edition.*

realization of the right to food is still in the earlier stages but with concrete and targeted steps being enhanced and created then national food security will no longer be a myth. Starvation is the characteristic of some people not **having** enough to eat. It is not the characteristic of there **being** not enough to eat. While the latter can be cause of the former, it is but of many **possible** causes.[28]

28 ***Amartya Sen, Poverty and Famines, 1981; CHRGJ Working Paper No. 8, 2004.***

8. TRIAL BY MEDIA IN UGANDA AND OTHER STATES: A LEGAL PERSPECTIVE

An analysis of the effect of media trials on the constitutional right to a fair hearing.

Atim Kinyera Sharon[*]

Abstract

The right to a fair hearing is a fundamental right provided for by Article 28 of the 1995 Constitution of the Republic of Uganda, further entrenched as non-derogable by Article 44 of the same Constitution, which is the supreme law of the land. The right to freedom of expression, under which media rights fall is another fundamental right provided for by the same Constitution, to be derogated from only upon the dictates of what is considerably just and fair in a free and democratic society.

This article assesses how trials by the media, whether print, audio, visual or social, pit these two rights against each other, usually in total compromise of the non-derogable right, resulting into a miscarriage of justice that is difficult to rectify, and provides for preventive measures, most of which have been successfully tested in other jurisdictions.

8.1 Introduction

Black's Law Dictionary defines the word "trial" as a "*formal judicial examination of evidence and determination of legal claims in an adversary proceeding*."[1] Thus, simply put, a trial means a proceeding before a court of

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1 Black's Law Dictionary, 8th Ed.

justice. By this definition, there cannot be a trial by media but this term continues to denote an occurrence where critical media coverage decides the view on a defendant's guilt before a jury can.

There is a fine line between the media reporting on a trial and sensationalizing a trial. Highly sensationalized trials like Matthew Kanyamunyu's and Stella Nyanzi's trials have a history of fostering public opinion that can influence their legal outcome. Media has eliminated the boundaries of information to increase and improve its dissemination and receipt. With the dramatization of sensational criminal cases in the news, blogs and by shows like '*Making a Murderer*' and '*The People v O.J. Simpson*', individuals are more interested than ever in playing detective.

While it is true that media coverage has its place in trials, when the media conducts its own trial of sorts, it can lead to jury dismissals, may result in a jury being sequestered, may force juries to disregard important character evidence for fear that media bias turned it into prejudiced evidence and even pressure the jury to decide in favour of public opinion. It therefore goes without saying that while freedom of speech and therefore, freedom of the press is a recognized and protected fundamental right by every democratic state, the media must stay distinct in its informative function and not overstep its boundaries by dispensing justice. This fact has, however, been unsuccessful in divorcing today's culture from the so-called "cirque médiatico-judiciare" or "media circus" as identified by Daniel Soulez Larivière.[2] This has never been as internationally and locally evident as in sensationalized cases tried following technological advances that took media reach to new heights, most especially during today's age of social media.

2 Soulez-Larivière, Daniel. 1993. Du Cirque Médiatico-Judiciaire Et Des Moyens D'en Sortir. Paris: Éd. du Seuil.

8.2 The Importance of Freedom of Speech, Expression and the Press.

Freedom of speech is recognized and protected as a fundamental right by every democratic state. It is internationally recognized by the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR), the Arab Charter on Human Rights (Arab Charter), and the European Convention on Human Rights (ECHR).[3] Press freedom is thus a derivative of the fundamental right to free speech and expression as per Article 29(1)(a) of the Ugandan Constitution. This provision states that "Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media." This means that the media does not enjoy any rights above the general public they represent and is therefore subject to the same limitations as the ordinary man. Justice Ramkumar observes that the journalist is saddled with more responsibility because his sayings or writings are more likely to influence public opinion than those of the ordinary citizen.[4] Press freedom does not, therefore, amount to a licence without any restriction whatsoever. While reaching information to the general public, the media has a constitutional duty to do so without prejudicing the human rights and freedoms of others or of the public. The rights to speech and expression are therefore subject to limitation. Article 19 of the ICCPR allows for restrictions on freedom of expression that are necessary to protect the rights or reputations of others, national security, public order, public health, or public morals. Any such restriction must be provided for by law and be proportionate. In *Charles Onyango-Obbo &Another v Attorney General*[5], Justice Mulenga employed the test of proportionality in determining whether free speech had been unlawfully

3 Richards M.J., Freedom of Expression, 2014.
4 Ramkumar V., Trial by Media (Updated), 2014.
5 Constitutional Appeal 2 of 2002

limited, stating that

> *"Given the important role of the media in democratic governance, a law that places it into that kind of dilemma, and leaves such unfettered discretion in the state prosecutor to determine, from time to time, what constitutes a criminal offence, cannot be acceptable, and is not justifiable in a free and democratic society."*[6]

8.3 Trial by Media in Uganda

The Supreme Court of India has had occasion to note the consequence of "trial by media" in the following words:

> *"The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial*[7] *impossible but means that regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny".*[8]

In Uganda, the trend has gone as far as on-camera arrests. According to a 2014 article by Halea Uganda, the following marked incidences may be referenced.[9] In 2014, a senior police officer was murdered as he arrived at his home in Wakaliga. The police vowed to hunt down the perpetrator and later paraded, before cameras, suspected car thieves, terrorists, rapists and

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6 Obbo and Another v Attorney-General (2004) AHRLR 256 (UgSC 2004).
7 Article 28, The Constitution of the Republic of Uganda.
8 Vide para 293 of R.K. Anand v. Delhi High Court -(2009) 8 SCC 106.
9 Halea Uganda, Police Should Stop Trial by Media, 2014.
https://humanistuganda.wordpress.com/2014/06/17/police-should-stop-trial-by-media/

murderers. Among these was the man police said was the murderer in question, stating that they were sure of this because he had confessed to the crime and he fit the description of a short boda boda rider. The police then attempted to force him to confess to the crime on camera but the accused refused. Similar circumstances were discussed in the American case of *Rideau v. Louisiana* in which the American Supreme Court laid down the test of "*presumed prejudice*".[10] The case involved the robbery of a bank, the kidnapping of three of the bank employees, and murder of one of them. Rideau, the accused, was interviewed and this interview was broadcasted on television for three days. The footage showed Rideau with the Sheriff in the jail, confessing to his guilt. Rideau's counsel requested for the venue of the trial to be changed on the ground that the interview had adversely affected his right to a fair trial, which prayer the trial court denied. On appeal, the Supreme Court stated that

> "*Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a Judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a trial of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute.*"[11]

Here, the Court presumed that prejudice had been caused by the broadcasting of the interview.[12]

Again in 2014, another situation with the police and media took place in Makindye where a suspected illegal immigrant was found without any identification. He had stayed in a guesthouse in which a bomb had been

10 373 U.S. 723 (1963).
11 Chauhan R.S. Trial by Media: An International Perspective, 2011, PL October S-38.
12 Ibid.

planted years prior in 2010. A herd of hungry, journalists armed with cameras were organised to accompany the police to record the raid on the guesthouse. The accused was forced to explain his presence in Uganda to journalists. His Arab appearance coupled with his inability to speak English did not help matters. He was instantaneously labelled a suspected Al-Shabaab terrorist. What's more is that in this specific case, police revealed the identity of the person who had alerted them to the presence of the suspect. Given the gravity of the accusation, not only could this have compromised such a person's safety, but it could also have jeopardized their future chances of employment. Ideally, such an individual ought to have been placed under police protection for instance by moving them to a secure, unknown location. Instead, the informant's identity was broadcast by the media and nothing was done to protect them.[13]

Another fairly recent example of trial by media may be seen in the case against Matthew Kanyamunyu, the prime suspect in the fatal shooting of Akena Watmon, a social worker, at Lugogo Mall in Kampala. This case attracted extensive media coverage and continues to make waves online, on-air and in the papers. The whirlwind of media attention surrounding the case led to all sorts of theories being shared on various media platforms, with everything from Kanyamunyu playing the hero in an intricate politically motivated assassination attempt on his Burundian girlfriend, to stories of ethnic rivalry and male bravado.[14] "Red Pepper" published an article by Angelo Izama entitled "*Release Kanyamunyu, Here is why*" in which the journalist sought to break down the legal aspects of the case to the effect that no primary evidence exists against the accused. At some point, the author felt it necessary, for some reason or another, to make mention of the fact that Kanyamunyu himself apparently lost a brother prior to the shooting. All these opinions aired on background events, possible motives

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13 Supra.
14 Supra.

and facts in issue should have been the very province of the court empowered to consider only the evidence presented at trial. An objective judicial examination should, in no way, be founded upon sympathy or prejudice solely drawn out through partial presentation of an incomplete picture.

Rosemary Namubiru's is another such case. Namubiru, a nurse accused of intentionally exposing a child to HIV in the course of administering an injection, received high levels of scrutiny both nationally and internationally. An article examining her trial by media made highlighted articles like *"Killer nurse charged with attempted murder"* which accused Namubiru of "*maliciously infecting her patients, mainly the children with her HIV positive blood"* and other inflammatory statements like "*as police struggled to find an appropriate charge to punish such an evil act, it became clearer that our laws are inadequate to cover such emerging but deadly crimes."*[15] Namubiru was described as "inherently evil-minded, bitter or mentally unstable" and found guilty in the court of public opinion before her case could be heard.[16] She gained the support of several advocacy and human rights organisations as well as by individual HIV advocates in Uganda who opined that the invasive media coverage increased HIV-related stigma and violated her right to a fair trial. Namubiru's eventual appeal relied, in part, on these facts.[17]

8.4 The Dangers of Media Trials

Parties have a constitutional right to have a fair trial in the court of law, by an impartial tribunal, uninfluenced by popular opinion.[18] Careless pre-trial publicity can rob an accused of his right to a fair trial. Even before the accused can be arrested and tried, media sensationalism can proclaim them

15 Bernard E.J. UGANDA: 'TRIAL BY MEDIA' OF NURSE ACCUSED OF EXPOSING A CHILD TO HIV VIA INJECTION SETS A 'DANGEROUS PRECEDENT', 2014 . http://www.hivjustice.net/news/uganda-trial-by-media-of-nurse-accused-of-exposing-a-child-to-hiv-via-injection-sets-a-dangerous-precedent/
16 Ibid.
17 Rosemary Namubiru v. Uganda [2014], HCT-00-CR-CN -- 0050-2014.
18 Article 28, Constitution of the Republic of Uganda, 1995.

guilty. There is a history of the media projecting irrelevant or inadmissible evidence as the honest truth, thereby convincing society that the accused person indeed committed the crime in question. Media trials therefore undermine the fundamental principle of presumption of innocence in common law. By portraying him as twisted and dishonest, the accused is robbed of his fundamental right to defend himself. Such biased reporting can also have the effect of convincing witnesses to tailor their testimonies to fit the public majority opinion. Most importantly, the opinion regarding the evidence by the public and the judiciary may differ. While the public may be convinced of the accused's guilt, the court, after close examination of the evidence, may acquit him. Such a disparity in the appreciation of evidence may cause the public's faith in the criminal justice system to weaken.[19] The case of O.J Simpson is a perfect example of this.[20]

In 1994, O.J. Simpson was charged with murdering his ex-wife, Nicole Simpson, and her friend, Ron Goldman. The original grand jury was dismissed because excessive media coverage compromised their neutrality. While the media whirlwind surrounding this case led to a long-overdue examination of jury bias, the time and resources used racked up expensive legal fees paid for by taxpayers and drew even more media attention to the case. The Los Angeles Times (L.A. Times) devoted their front page to running the story for over three hundred days, and the Big Three Networks carved out more time in their nightly news segments to the trial than to the on-going Bosnian War and Oklahoma City bombings put together.[21] Time Magazine came under fire for racist editorializing and racial profiling after publishing a cover photograph of Simpson that had been significantly darkened to make him look more threatening.[22] The trial quickly became

19 Supra.
20 The State of California v. Orenthal James Simpson, Case no. BA097211.
21 Thielking, M. Five Trials By Media. 2011. http://www.northbynorthwestern.com/story/trial-by-media/
22 www.theconversation.com, O.J. Simpson's return: what we've learned in the 20 years since the trial of the century, February 3rd 2016.

split along race lines and when Simpson was finally acquitted, the public uproar was deafening. Many believed the verdict to be a result of "white guilt" stemming from an overwhelming social pressure to prove that the criminal legal system was not unfairly biased against African-Americans.

The 1954 case of *Sheppard v Maxwell* is often referred to as the first case of trial by media.[23] In this case, Sam Sheppard was branded a murderer even before any official charges were made against him for the murder of his pregnant wife Marilyn. Despite his plea of innocence, he was convicted in the public eye due to the obvious bias exhibited against him, including the Cleveland Press headlines which read: "*Why Isn't Sam Sheppard in Jail?*" and "*Quit Stalling - Bring him in.*"[24] The jurors were readily exposed to the inflammatory and often baseless judgements produced by the media for purposes of increasing their ratings and viewership, which exposure inevitably affected the jurors' feelings on the case. After serving ten years, the U.S Supreme Court was asked to consider whether Sheppard was deprived of a fair trial because of the trial judge's failure to sufficiently protect him from the massive, pervasive and prejudicial publicity that surrounded his prosecution. Clark, J. concluded that Sheppard did not receive a fair trial consistent with the constitutional requirement of due process and reversed the judgment. The Court laid down the test of a "*reasonable likelihood of prejudicial news prior to the trial preventing a fair trial*" to the effect that if such reasonable likelihood exists, then the conviction should be overturned. Here, the Court shifted from the test of "*presumed prejudice*" in Rideau's case to the test of "*reasonable likelihood.*"[25] Sheppard's acquittal came altogether too late for him. Following his wrongful conviction, his mother and Marilyn's father committed suicide while he was imprisoned. It has been argued that the two were indirectly

23 384 U.S. 333 (1966).
24 Supra.
25 Supra.

executed by the media which fuelled the guilty verdict and mistaken ruling.[26] As one columnist writes, trials by media are "no less intrusive or damaging to people's lives, reputations or credibility than an official court conviction."[27] One of the most famous media trials is that of Amanda Knox.[28] This judicial drama is the true definition of a media circus. In November 2007, Meredith Kercher, a student from England, was found dead in her house in Perugia, Italy. Her housemate, Amanda Knox, her Italian boyfriend Raffaele Sollecito, and Rudy Guede were quickly named as suspects and arrested for her murder. In covering the trial over Meredith Kercher's horrific murder, the media focused its attention on gossip and scandal as opposed to significant facts. They painted Knox as a femme fatale dubbed "Foxy Knoxy" with an alleged obsession with sex, witchcraft[29] and drugs.[30] Her lawyer is remembered as stating that "The press have crucified and impaled her in the public square." Interestingly enough, this media criminalization was juxtaposed against her concurrent victimization by the same.[31] Knox's inverse media persona was that of an angelic, innocent college student who was being unfairly targeted by the Italian criminal justice system.

Knox became a media sensation: she wrote a book, appeared on "Good Morning America," and even received the support of Donald Trump, who famously tweeted, **"***Everyone should boycott Italy if Amanda Knox is not freed—she is totally innocent.*"[32] Amanda's supporters expertly built distrust

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26 Supra.
27 Giannini A, Amanda Knox and the Ultimate Trial By Media,2016.
28 "Case Files & Reports - Amanda Knox Case". The Amanda Knox & Raffaele Sollecito Case. N.p., 2015. Web. 20 July 2015.
29 "Monster of Florence: Amanda Knox Prosecutor's Satanic Theories Rejected by Judge". Crimesider, CBS News. April 23, 2010.
30Ferraresi, Mattia. 2015. "La Lezione Americana Di Amanda". Ilfoglio.It. http://www.ilfoglio.it/cronache/2015/04/12/amanda-knox-la-lezione-americana___1-v-127637-rubriche_c881.htm
31 Supra.
32 Supra.

in the Italian judicial system by making it out to be a "carnivalesque,"[33] "inquisitorial,"[34] and "sexist"[35] system tainted by anti-Americanism.[36] Knox returned to the U.S a martyr; beloved, adored, and pitied for her ordeal at the hands of the Italian inferno. She won public absolution through her countless public appearances, interviews, tell-all books, interviews and statements.[37]

The Italian Court of Cassation registered glaring errors, investigative amnesia, and guilty omissions throughout the different trials.[38] The media attention created an overwhelming pressure to find a culprit, which pressure only mounted with time. Eventually, the investigation crumbled under this burden and the charges against Knox were dropped, leaving behind doubt without any concrete answers. While Knox and Sollecito were acquitted, Rudy Guede was left guilty of complicity in a murder with no convicted accomplices: the impossible crime.[39]

Casey Anthony's case, labelled "the social media trial of the century" by Time Magazine, clearly showcases the tensions that occur when the constitutionally guaranteed freedom of press clashes forcefully with the constitutionally guaranteed right to a fair trial.[40] Anthony was accused of murdering her young daughter and subsequently subjected to an intense media attack before, during and following her trial in which her past was

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33 Khazan, Olga. 2014. "Amanda Knox And Italy's 'Carnivalesque' Justice System". The Atlantic. http://www.theatlantic.com/international/archive/2014/01/amanda-knox-and-italys-carnivalesque-justice-system/283487/

34 Stelter, Leischen. 2015. "Amanda Knox Case Is A Lesson In Understanding The Italian Justice System | In Public Safety". Inpublicsafety.Com http://inpublicsafety.com/2015/04/amanda-knox-case-is-a-lesson-in-understanding-the-italian-justice-system/

35 Edwards, Jim. 2015. "Amanda Knox's Legal Nightmare Exposed The Utter Insanity Of Italy's Justice System". Business Insider. http://uk.businessinsider.com/amanda-knoxs-epic-legal-nightmare-2015-3?r=US&IR=T

36 Cantwell.senate.gov. 2015. "Maria Cantwell - U.S. Senator From Washington State". http://www.cantwell.senate.gov/news/record.cfm?id=320475

37 Supra.

38 Supra.

39 Supra.

40Anthony v State, No. 5D11–2357.

picked apart to paint her as a dishonest, irresponsible party-girl. This played a big role in shaping public opinion and come time for deliberation, the jury was faced with the tough task of distinguishing between evidence and opinion. This public scrutiny could have called the relevance and validity of potentially damning evidence into question. At the time when Anthony's "not guilty" verdict was read, CNN LIVE's website saw thirty times more viewers than its daily average a month prior. Opinions on her acquittal blew up social media and news with journalists and laymen alike furiously sharing their disagreement with the ruling.[41]

Case law clearly shows that media trials often have the opposite desired effect of allowing a potentially guilty party to go free by making it impossible for a court to do their duty. Individuals who are eventually acquitted of the charges against them have continued to face attacks in the media and socially ostracism at the hands of a public acting as judge, jury and executioner to correct what they perceive to be a miscarriage of justice.

8.5 Safeguards against the Creation of Media Trials

India's courts have noted that the victims of media trials have few remedies in law. This is why the court should guard potential victims from the unforgiving jaws of the press before they have the chance to damage the lives or poison formal trials prior to the delivery of a judgement. The Delhi High Court remarked, regarding this, that

> "*We do appreciate that in respect of some cases largely criminal cases) the justice delivery system in our country progresses virtually at a snail's pace and often an innocent person has no real remedy available to him, if he in framed in a matter, or is*

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41 Supra.

> *subjected to a 'trial by media'. As a result, seldom does anyone approach a Court of law for relief either by way of an injunction or for damages in a case of 'trial by media'. Such being the reality, we are of the opinion that the Courts have a great responsibility and, therefore, need to be need to be far more vigilant and pro-active in protecting the rights and reputation of an individual from an unwarranted 'trial by media'. In a sense, the Courts have to energize the rule of law. While this may add to the burden of our criminal Courts, we are of the view that it is imperative for the Courts to protect a citizen from what may appear to be victimization. This is certainly the duty if not an obligation of Courts. This is all the more important in a pending matter. For example For example, if a person is arrested on the suspicion of having committed a crime, it is not the function of the media to 'declare' him (by implication) innocent or guilty. That is within the exclusive domain of the judiciary. But if the accused is subjected to a 'trial', either through the print or audio-visual medium, it may subconsciously affect the judgment of the Judge, and that may well be to the prejudice of the accused, who is, in our justice delivery system, presumed innocent until proven guilty. In such a situation, the Judge must be pro-active by restraining the media from carrying out a parallel trial. Otherwise our criminal justice delivery system will be completely subverted."*[42]

In *Bridges v California*, the American Supreme Court noted that, *"legal trials are not like elections, to be won through the use of the meeting-hall, the radio,*

42 *Suo Motu proceedings, 2009 (1) KLD 133.*

and the newspaper."[43] In *Sheppard v Maxwell*, the Court set out the following methods for controlling the pre-trial publicity i.e. by controlling press presence in judicial proceedings, through insulating witnesses by protecting and isolating them from media influence for the duration of the trial and by taking necessary steps to control the releasing of investigative leads, information and gossip to media outlets by police officers, witnesses as well as counsel for both sides. Additionally, courts ought to discourage and condemn extrajudicial statements made by any lawyer, witness, court official or other relevant party who share any prejudicial material. Reporters who go ahead to publish or publically broadcast such prejudicial stories should also be warned against publicizing information not set forth during trial proceedings. Where there is a reasonable likelihood that the media smear campaigns will compromise the accused's right to a fair trial, the judge ought to continue examination of the case until the threat subsides or transfer it to another jurisdiction which has yet to be poisoned by publicity. If, however, the media publicity during the proceedings actually threatens the fairness of the trial, a new trial should be ordered. This Court recognized the importance of pre-emptive measures, stating that, *"But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."*[44]

It should, however be noted that American courts have often treated freedom of speech as taking precedence over the right to a fair trial. They have therefore been reluctant to employ the above methods to control media sensationalism.[45] British courts, on the other hand, have been significantly stricter in their protection of the right to a fair trial. In *R v Lord Chancellor ex parte Witham*, Laws, J. observed that *"Indeed, the right to a fair*

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43 (1941) 314 U.S. 252.
44 Supra.
45 Supra.

*trial is as near to an absolute right as any which I can envisag*e."[46] English courts have therefore recognised the inherently prejudicial nature of unrestrained publicizing of confessions made by accused persons and unrelated details of their private lives prior to convictions. Where such publicity interferes with criminal trials, the Courts' tendency is to halt prosecution.[47] Where the evidence rules preclude the production of certain particular facts during trial and members of the jury are exposed to those same facts, British courts will simply assume that justice has been compromised.[48] English courts have thus followed the test of "presumed prejudice" under such circumstances. Collins, J. observed that in assessing whether there has been a violation, courts are tasked with determining whether the risk of prejudice from the publication is both immediate and serious.[49] In doing so, the nature and presentation of the published material, the timing of the publication, the likelihood of its coming to the attention of jurors or potential jurors and the possible impact on the jury and their ability to abide by any judicial directions put I place to neutralise any prejudice should all be considered.[50]

English law has also legally restricted the flow of information during criminal trials under the Contempt of Court Act, 1981, for purposes of ensuring fair trial. This Act empowers courts to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice.[51]

8.6 Conclusion

While free expression is recognized as one of the four pillars of justice, it must be exercised in a manner that does not violate the right to a fair trial. Media today has allowed individuals and society to participate in criminal

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*46 **[1998] QB 575.***
47 Supra.
*48 R v Evening Standard Company Limited, **[1954] 1 QB 578.***
49 Attorney General v. Guardian Newspapers Ltd, 1999 EMLR 904.
50 Ibid.
51 Supra.

trials in both legitimate and illegitimate ways. The exploitation of anonymity and the human fascination with scandal has created an unhealthy competition to sensationalise individuals, matters and events. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*, it was observed that *"A trial by press, electronic media or public agitation is very antithesis of the rule of law. It can well lead to miscarriage of justice".*[52] In such cases, the social acceptance, truth and reputation of individuals are the usual casualties.[53] As Justice Ramkumar said, "*The choice of the target and the degree of aggressiveness (all under the guise of independence and fearlessness of the Press) has reached such alarming proportions that the forbidden frontiers are very often forgotten or conveniently ignored*."[54]
It is therefore my opinion that, in the interest of upholding the right to a fair trial, Ugandan courts ought to adopt similar standards to those in Britain.

52 (1997) 8 SCC 386.
53 Supra.
54 Supra.

9. MERE TOLERANCE v REASONABLE ACCOMMODATION: WHAT WENT WRONG WITH THE DECISION IN LEGAL ACTION FOR PEOPLE WITH DISABILITIES V THE ATTORNEY GENERAL, AND 2 OTHERS?1

Ssekyewa Sam*

"Do not curse a deaf man or put something in front of a blind man so as to make him stumble over it. Obey me; I am the LORD your God."

Leviticus 18:14

9.1 Introduction

The 1995 Constitution of the Republic of Uganda can aptly be described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. At its core is the belief all citizens enjoy equal rights before and under the law in all spheres of political, economic and social life and enjoy equal protection of the law[2]. As such it presupposes that persons with disabilities and all hitherto marginalized and excluded groups get a chance at the table.

Desirous of attaining social justice the constitution of Uganda contains specific provisions on how the inclusion and participation of all persons is to be achieved. This is believed to ably cater for the rights of persons with disabilities. The various provisions include:

National Objectives And Directive Principles Of State Policy XVI of state policy provides that the state shall recognize the rights of persons with disabilities to respect and human dignity.

National Objectives And Directive Principles Of State Policy XXIV(c) of the Constitution provides that the state shall promote the development of sign

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*LLB IV (2017) Makerere University.

1 (MISCELLANEOUS CAUSE NO. 146 OF 2011).

2 This is envisaged in Article 21(1) of the 1995 constitution promulgated on 8th October 1995 by the constituent assembly replacing the 1967 constitution.

language for the deaf [3]

• Article 21 provides for equality and prohibits discrimination against all persons and specifically includes persons with disabilities.

It is provided under Article 32 that the state shall take affirmative action in favour of marginalized groups including persons with disabilities and shall make laws including laws to establish an Equal Opportunities Commission for the full fulfillment of this clause.

• Article 35 provides for the rights of persons with disabilities to respect and human dignity. It also imposes a duty on the state to make laws appropriate for the protection of persons with disabilities. Article 75 provides for the composition of parliament to include such representatives including representatives of persons with disabilities.

Similarly, there is along catena of legislative instruments that seek to guarantee the rights of persons with disabilities. These include:

The Persons with Disabilities Act, 2006[4] which is the primary legislation for the protection of human rights for persons with disabilities. It makes provisions for the elimination of all forms of discrimination against persons with disabilities and calls for the equalization of opportunities.

The Mental Treatment Act[5] enacted in 1938 (revised in 1964) is still applicable in Uganda today. The Act itself is primarily related to persons with mental disabilities. and follows the old medical model approach to addressing issues. It provides for the declaration of unsound mind by the court and subsequent compulsory detention and treatment and/or rehabilitation.

The National Council for Disability Act, 2003 establishes the National Council for Disability; its key function is to act as a national body through

3 Under Article 8A (1) of the Constitution it is clearly stated that the National Objectives And Directive Principles Of State Policy shall form the basis of governance of Uganda.

4 Laws of Uganda, Persons with Disabilities Act, 2006 sec 3.

5 Laws of Uganda, Mental Treatment Act Cap 279 sec 4, 6 & 9.

which the needs, problems, concerns, potential and ability of persons with disabilities of persons with disabilities can be communicated to the government and its agencies. The Council is also responsible for monitoring and evaluating the extent to which the government, non-governmental organizations and private institutions include and meet the needs of persons with disabilities.

There is a plethora of other legislations that indirectly address disability rights such as:

The Employment Act, 2006 which provides for the protection and equality of all persons employed in the work place including persons with disabilities, The Equal Opportunities Commission Act aimed at promoting equal opportunities for marginalized groups, persons with disabilities inclusive. The Traffic and Road Safety Act, 1998, that prohibits the denial of a driving permit on the basis of disability. The Universities and Other Tertiary Institutions Act, as amended, provides for affirmative action during admission of persons with disabilities to public tertiary institutions.

Noteworthy is the fact that Uganda signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD and its optional protocol on 30 March 2007 and ratified both instruments on 25 September 2008 without reservations[6].

The above legislative and policy steps indicate the government commitment and desire to advancing the rights of persons with disabilities. It is equally because of these efforts that Uganda has been praised as one of the champions in sub-Saharan Africa for advocating for the rights of persons with disabilities[7].

The case *of* ***Legal Action for People with Disabilities v The Attorney***

6 UN Enable 'Convention and Optional Protocol signatures and ratifications': http://www.un.org/ disabilities/countries.asp?navid=12&pid=166 (accessed 21st April 2017).

7 Katsui, H. & Kumpuvuori, J., 2008, 'Human rights based approach to disability in development in Uganda: A way to fill the gap between political and social spaces?' Scandinavian Journal of Disability Research 10(4), 227–236. http://dx.doi.org/10.1080/15017410802410084

General and 2 others[8] is among the few cases that have so far "**tested**" the implementation of Uganda's acclaimed wonderful legal framework. It is against this background that it becomes apposite to critically examine background facts of the case, the key issues thereof, the decision of court and its impact on the realisation and full enjoyment of rights by PWD's.

9.2 The Facts of the Case.

Legal Action for Persons with Disabilities filed this case under Articles 50(1), (2) & 32(1) of the 1995 Constitution of the Republic of Uganda, Order 48 r1 and O 52 rr 1, 2, 3 of the Civil Procedure Rules and the provisions of the Persons with Disabilities Act 2006. The respondents were: The Attorney General of Uganda[9] Kampala Capital city Authority[10] and Makerere University[11]. The grievances of the applicant were set out in the affidavit of Laura Kanushu to wit:

(i) The Constitution of the Republic of Uganda guaranteed affirmative action in favour of marginalised groups including persons with disabilities (PWD's) as well as the right to respect human dignity and enjoins the government and society to take appropriate measures to ensure that persons with disabilities realise their mental and physical potential.

(ii) The parliament of the Republic of Uganda enacted a law; The Persons with Disabilities Act 2006 to provide for a comprehensive legal protection for persons with Disabilities and to make provisions for elimination of all forms of discrimination against persons with disabilities towards

8 Supra.

9 The Attorney General is the legal representative of government in all proceedings against or by government under Article 119 (4) (c) of the constitution.

10 KCCA is a body corporate established to administer the capital city of Uganda Kampala, on behalf of the government pursuant to the KCCA Act 2010.

11 Makerere University is the oldest and leading university in Uganda.

equalisation of opportunities and for related matters.

(iii) The said Act was intended *inter alia* to provide for easy access and exit by PWD's to and from the premises, public transport and public and private buildings and enjoined all public or private individuals and institutions to provide easy access to such buildings and to provide suitable facilities to PWD's.

(iv) Despite the requirements of the above stated law, several owners of private and public buildings including the respondents have not complied with the provisions of the Act and the 2nd respondent has continued to approve of buildings plans for new buildings within Kampala City that violate the disabled persons right to easy access to buildings of public use.

(v) Government bodies and departments such as the Ministry of Gender Labour and Social Development, the High Court of Uganda at Kampala are operating in premises that cannot be easily accessed by PWD's or that do not have suitable facilities for PWD's thus depriving them access to such premises and buildings within Kampala City that violate the disabled persons right to easy access to buildings of public use.

(vi) As a result, PWD's still do not enjoy their full rights as guaranteed under the constitution of Uganda and have not realised their full mental and physical potential due to inaccessibility to such public and private buildings, places, public transport and other services that require physical movement.

(vii) The Government of Uganda is responsible for the predicament of the persons with disabilities in as far as it has failed to enforce the Persons with Disabilities Act but also has left some of its departments such as the Ministry of Labour Gender and

Social Development to operate in a building which does not have suitable facilities for PWD's.

Evidence of the non-enjoyment of rights by PWD's was provided by Angell T. Baraba who deponed that she got a contractual job with the Faculty of Veterinary Medicine Makerere University as a project assistant but faced challenges in terms of physical accessibility to her office because of rooms and toilets which were inaccessible. That during her studies at Kyambogo University she faces a lot of difficulties to access lecture rooms. That most University buildings had steep steps. That as a PWD she has experienced a lot of difficulties in movement because most buildings have no ramps or lifts to ease movement.

Buwembo Mulshid another deponent averred that he has experienced a lot of difficulties in movement. During his University education he reallocated to Makerere University from Mbarara University of Science and Technology because of inaccessible buildings but found the situation not any better. That because of this he performed poorly because he used to arrive late for lectures. That the main building at Makerere has narrow steps with no bars to cling on thus making it difficult to access.

The central argument of the applicant was that the respondents were in breach of a duty to provide **a Barrier free Physical Environment under Articles 32(1), 35(1) and Section 19 and 20 of the Persons with Disabilities Act 2006.**

The prayers sought by the applicant were:

(a) A declaration be made that the failure by the respondents to make their premises and buildings easily accessible by Persons with Disabilities (PWD) violates the fundamental rights of persons with disability to have access to a barrier free physical

environment.

(b) An order that the respondents jointly and severally, promptly do enforce the provisions of the law on PWD's relating to access to a barrier free physical environment.

(c) An order that the respondents do pay the applicants the costs of this application.

Conspicuously the Attorney General neither filed an affidavit in reply nor written submissions in the matter. The absence of the first applicant's position in the matter is of crucial importance to which I will return later.

However, as naturally expected, the answer from the second respondents was a total denial of any violation of rights. The second respondent stated that because of the mismanagement of affairs at KCCA physical planning laws among others were not strictly complied with which led to the construction of certain buildings in flagrant breach of physical planning standards and building regulations. However, with the establishment of KCCA, physical planning laws and regulations are being enforced and in case of any breach of the laws and regulations the authority has taken action against persons in breach. The decisive answer for the case seemed to be that of the third respondent, which claimed that, the university had developed initiatives to accommodate PWD's. These included:

Setting up an adhoc committee of council to address issues relating to students and staff who are disabled and to design a policy on people with disabilities. Employing student guides and helpers to assist people with disabilities to have access to a barrier free physical environment at the University premises. That the 3rd respondent pays the student guides a monthly salary of 70,000= plus meals, accommodation and medical care. The disabled students are allowed to choose their preferred halls of residence, which may be nearest to their respective colleges where they

study. The 3rd respondent allocates disabled male students rooms situated on the ground floor of Mitchell Hall Block D for easy accessibility. These rooms are closer to the bathrooms and toilets. Disabled students have specially designed facilities for their welfare. They have special teaching material methods and materials in the Main Library such as special computers used by the blind persons. The Main Library also has ramps and special rooms designed for disabled students.

The above seemed to fascinate the presiding judge His Lordship Stephen Musota who dismissed the applicant's claim and opined:

> "*I am in agreement with learned counsel for the 3rd respondent that by taking the above steps the 2nd and 3rd respondents have promoted and upheld the rights of people with disabilities as provided under Article 35(1) as well as promoting affirmative action in favour of marginalized group as provided under Article 32 of the Constitution*".

The learned judge gave his reasons at page 9 of the judgement.

> ***"I will take particular note that both the 2nd and 3rd respondents have limited resources to immediately provide what is required by the applicants****. Therefore restructuring the existing buildings to accommodate the disabled people or students requires a lot of funds, which is not readily available.* ***For the 3rd respondent, utilizing its scarce resources on the existing structures may substantially increase the cost of education making it impossible for all citizens to attain the highest educational standards. Many poor students will be prejudiced"*** **(underlining mine for emphasis).**

Court was not prepared to grant any of the prayers sought by the applicant. at page 10,the learned judge held;

> "*...In the instant case the applicants seem to imply that their own right must be enjoyed irrespective of the negative effects that it may have on public interest, the costs to the respondents and the overall costs to other (students) or people. The applicants ought to know that the enjoyment of their rights is not absolute. It has to take in to account the rights of others as well as public interest.*"

The decision is of particular importance especially in the broader context of the requirement for reasonable accommodation of the PWD's enshrined in the various legal instruments ratified by Uganda as well as the national legislation. It raises *a question as to whether the evidence provided by the respondents amounted to mere tolerance of the PWD's or reasonable accommodation of their interests. If not, what went wrong? Could the court have done better than it did by being part of the global trend of judicial activism in the field of human rights enforcement? Or could the applicants have conducted the prosecution of this case better especially at the preparation stage of the case to the satisfaction of the trial judge.*

These are issues, which I seek to address in the next chapter.

9.3 The Notion of Reasonable Accommodation.

In their quest for an inclusive environment both at work places and institutions of learning, the PWD's in Uganda have always sought to sail through the environmental barriers that exist in society to fully realise and enjoy their rights. The **LAPD case** was not the first attempt to seek judicial intervention to these barriers. There was an early attempt in 2008 in the case of *Nyeko Okello & Santo Dwoka v Centenary Rural Development Bank*

Limited[12]**.**

The plaintiffs, both persons with disabilities and customers of Centenary Rural Development Bank (CERUDEB), sued CERUDEB on the grounds that the bank, including access to the main banking hall, was inaccessible for persons with disabilities. Prior to the suit the plaintiffs had notified CERUDEB about the lack of ramps to facilitate their access to the bank but to no fruition. The plaintiffs sued. The bank afraid of costs arising from loss of the suit, eventually constructed the ramps. Since the breach had been remedied the judge advised the plaintiffs to settle the matter out of court. A consent judgment was later entered into between the parties with costs being awarded to the plaintiffs however the court awarded no damages.

Disability surely is a novel[13] and important equality issue. There are two schools of thought with respect to the concept of disability, namely the medical and social approaches to disability.

The older medical approach treated disability as a health and welfare issue and called upon the State and society to care for people with disabilities. It dictated that people with disabilities were objects of pity and were to be cared for and thereby did not treat the group as independent human beings with human dignity. The model puts the persons with disabilities at the mercy of the abled members of the society. The latter receive alms and gifts from the able bodied persons for their sustenance under this model. In the words of **covey,** societies have believed that people with disabilities were closer to wild animals than humans". They have presented people with mental illness as *being wild men, savages, wild women, or animals*[14].

The social model is based on the notion that the adverse circumstances that

12 High Court of Uganda Civil Suit No 23/2008 (unreported).

13 Ngwena "Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability) " (2005) 16(2) Stellenbosch Law Review 210 at 211.

14 Covey Herbert, social perspectives of people with disabilities in history 10 (1998).

people with disabilities endure, and the unfair discrimination to which they are subjected do not flow from their impairment, but from the social environment[15]. This school of thought places emphasis on the failure of society to accommodate people with disabilities and the fact that disability (of an individual) does not mean "inability". The disability of the person, which was the individual's problem in terms of the medical model, becomes society's problem and the latter must change to fit the impaired person and not *vice versa*[16]. The social model of disability as described here, is in line with substantive equality[17]. The concept of reasonable accommodation has taken firm roots in South Africa where it lies at the core of the rights of PWD's[18].

Reasonable accommodation has been defined as *"any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment"*[19]. The designated groups include persons with disabilities.

Section 15(2)(c) of the EEA[20] also states that affirmative action measures taken by a designated employer must include providing reasonable accommodation for people from the designated groups (which include people with disabilities) to ensure that such persons enjoy equal opportunities and are equitably represented in the workplace of the designated employer.

Reasonable accommodation is a constitutional principle and a tool to achieve substantive equality[21]. It is also the origin of affirmative action

15 Chapter 1 of the White Paper on Integrated National Disability Strategy: The Social Model of Disability.
16 Chapter 1 of the White Paper on Integrated National Disability Strategy.
17 Olivier and Smit "Disability" in Joubert (ed) The Law of South Africa 13(2) Labour Law and Social Security Law 230.
18 By virtue of White Paper on Integrated National Disability Strategy, Office of the Deputy President November 1997.
19 Section 1 of the EEA.
20 the Employment Equity Act 55 of 1998 (Hereinafter "the EEA").
21 Ngwena (supra).

which is codified in our constitution[22] as well as non-discrimination[23].

The principle flows from the celebrated dictum of *Judge Jajbhay* in *McLean v Sasol Mine (Pty) Ltd Secunda Colliery; McLean v. Sasol Pension Fund*[24] *when he remarked:*

> *"Where a rule or a practice makes generalizations about people solely on the basis of disability without regard to the particular circumstances of the specific class of individuals affected, then this is, in my view, entirely unfair to the individuals. Moreover, in order for there to be true individualization, a close assessment should be made of the individual in question since even persons with the same disability vary markedly in how they personally function and cope with their affliction, or vary in the degree of impairment because of different stages of their infirmity. I concede that this method may make matters somewhat burdensome for the employers. However, this is a small price to pay for the high value society has placed on the rights of disabled persons"***.***

It is apparent from the reasoning given above that; there is always a price to pay to achieve this much adored accommodation and equally involves undue hardship to the party implementing it.

The employer and employee with a disability must consult with each other and, where it is needed, also with technical experts, to determine measures by which the person with a disability can be reasonably accommodated[25]. Where a technical expert is needed to assist in identifying and establishing suitable accommodation for the employee, the expert must make

22 Article 33.

23 Provided for under Article 20 of the Constitution.

24 (2003) 24 ILJ 2083 (W) at 2097.

25 Item 6.6 of the Disability Code.

recommendations on such accommodation in consultation with both the employer and employee, for the purpose of ensuring accommodation that will cater to the needs of both[26].

The measures of reasonable accommodation for people with disabilities include,

but are not limited to – adapting existing facilities to make them accessible for such persons; adapting existing equipment or acquiring new equipment including computer hardware and software; re–organizing workstations; changing training and assessment materials and systems; restructuring jobs so that non–essential functions are re–assigned; adjusting working time and leave; and providing specialized supervision, training and support in the workplace[27].

The South African courts have been champions in advocating for the promotion of this noble doctrine. For example, In *NEHAWU on behalf of Lucas and Department of Health (Western Cape)*[28] The applicant was as a result of her spinal injury unable to pick up heavy objects in the nursing department in which she performed cleaning duties. It was recommended that she be given "light duties but the Department of Health, who was the employer, held that there were no light duties available to her in the nursing department. Lucas was placed in the hospital's needlework department on a temporary basis, because there was no vacancy in such department. She was dismissed for incapacity due to ill health. In determining whether the Department of Health had reasonably accommodated Lucas as a person with a disability, the Arbitrator considered item 6 of the Disability Code and Technical Assistance Guidelines[29].

> She stated that the purpose of reasonable accommodation is to enable people with disabilities to be employed and

26 Item 6.6 of the Technical Assistance Guidelines.
27 Item 6.9 of the Disability Code.
28 (2004) 25 ILJ 2091 (BCA).
29 Ibid 2102.

> retained in employment. *"Reasonable" accommodation for a person with a disability depends on the circumstances of both the workplace (and employer) and the employee. It also requires the parties to an employment relationship to jointly adopt a problem–solving approach to alter employment practices, to afford an employee with a disability an opportunity to perform a job similarly or equal to a similarly situated "able bodied" employee*.

The Arbitrator stated that an employer should seek to permanently, and not temporarily, accommodates a person with a permanent disability.

Similarly, In *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration and Other*[30] Ms. Ferreira, the third respondent (hereinafter "the respondent" or "the employee") worked as a mobile home loan consultant for Standard Bank, the applicant. She sustained a back injury when she was involved in a motor vehicle accident in the course of employment. She returned to the position she held in the bank prior to the accident, but after her back injury exacerbated, the employer created an administrative position with lighter duties for the respondent. The respondent found that the administrative post, by which she assisted other employees, was not challenging enough given her work experience and length of employment with the bank, which was 15 years at the time of the accident. She later performed loan confirmation work, which she found motivating, but which caused her to experience pain, because she was required to speak on the telephone and write simultaneously.

The respondent was able to perform telephone duties if she was provided with a telephone headset. She requested a headset and communicated the costs thereof to her line manager, but the employer did not supply her with the telephone headset. The employer regarded her as a poor performer in

30 (2008] 4 BLLR 356 (LC).

the workplace and she was dismissed.

The Labour Court stated that an employer's duty to reasonably accommodate employees and job applicant with disabilities is inherent to its duty not to discriminate against such persons. There is also a heavier duty on an employer to reasonably accommodate disability, as opposed to religion and culture because; in the words of the court *"practicing religious and cultural beliefs is a freedom whereas "disability is an imposition"*

In light of the foregoing discussion, I submit that had the advocates in the case as well as the learned trial judge in the LAPD case focused on the question as to whether what the third respondent was providing was mere tolerance or reasonable accommodation, then in view of the above authorities court would have reached a different conclusion.

This is by no means to discredit the efforts undertaken by the respondents. It was submitted for the third respondent that as an admission policy, people with disabilities who score two Principles Passes are admitted on Government sponsorship. They are also offered an opportunity at a time of admission to change to any course suitable for them. If they are unable to attend lectures or go to exams, it was submitted (*and believed by the learned judge*) that transport facilities from the main gate to their respective destinations inside the 3rd respondent's premises are offered to the PWD's. Now, the grievance of the applicants (as I understand it) was this: That where they study from, the buildings had steep steps and in such a way they were inaccessible. Further that most buildings have no ramps or lifts to ease movement.

On record was evidence of Kwesiga Phyllis, an architect and CEO of KK consulting Architects who had made a report on how buildings in KCCA and other areas can be modified for ease of accessibility to PWD's. He opined that the alterations that can be made include:

"Introduction of exterior gently inclined access ramp along the building side

leading to the front entry/exit as at parliament, Provision of designated parking slots for the less able in close proximity to such an access, Provision of landings along that ramp at a maximum of 10 metres as specified in the standards set by (UNADP, Provision of appropriate hand rails along inclined ingress or egress points but suited to use by both adults and children among others".

The learned judge considered this report and gave his answer in four sentences.

> *"I will take particular note that both the 2nd and 3rd respondents have limited resources to immediately provide what is required by the applicants. Therefore restructuring the existing buildings to accommodate the disabled people or students requires a lot of funds which is not readily available"*

Clearly, to suppose that it required colossal amounts of money to establish ramps demanded by the applicant was the only error committed in the case. At this point things went wrong.

Of considerable importance is the conspicuous and unexplained absence of the first respondent in the court room. Whereas it can be understood that the third respondent had made some efforts, it would be imperative to know from government what steps it had undertaken to address the applicant's grievances. It was stated that Government bodies and departments such as the Ministry of Gender Labour and Social Development, the High Court of Uganda at Kampala (where the matter was incidentally heard) are operating in premises that cannot be easily accessed by PWD's or that do not have suitable facilities for PWD's thus depriving them access to such premises and buildings within Kampala City that violate the disabled persons right to

easy access to buildings of public use. Without a proper response to these concerns, the obligations placed on to government under the international treaties and national law on the subject remain empty promises and mere rhetoric.

9.4 Conclusion.

One pertinent question remains. What could have been done better? I partly concur with the learned judge to the extent that he suggests there should be a progressive realisation of the rights of PWD's. The learned judge summing up what should have been orders stated:

"...*The respondents will be encouraged to continue complying with the requirements of the Act and ensure continued modification of the old buildings and ensure that plans for new buildings take into account the right to easy access to them before they are approved".*

The question that remains though is how long shall we postpone the realisation of rights by PWD's? In my view, it would be more practical for the court to adopt a "timelines" approach, which seems to be a new and pragmatic step adopted by courts where violations of rights are alleged. One such example is the case of *Centre For Rights Education & Awareness (CREAW) v The Attorney General*[31]**.** In that case**,** the Kenyan court was addressing a social imbalance in the form of "*socialization of patriarchy"*

> *[that reflected power relations between men and women where]*

it encouraged inequitable participation and representation against women. The court gave the 27th of August 2015 as, so to speak, the "future", the dawn, by which date the requisite measures should have been taken to realize the constitutional threshold set for the representation of women in elective positions in the National Assembly and Senate. Certainly, it would

31 Petition No. 182 of 2015.

have been a better approach to require the respondents to have undertaken some steps towards addressing the injustice complained about. Otherwise, the decision is one that inflicted a big blow to the human rights discourse in this country.

10. THE PENDING CASE OF INGABIRE VICTOIRE UMUHOZA V REPUBLIC OF RWANDA: WHAT DID THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS ACTUALLY SAY ON RWANDA WITHDRAWAL OF ITS ARTICLE 34(6) OF THE ADDITIONAL DECLARATION?

An analysis of a landmark Ruling on Rwanda's withdrawal from the Special declaration on Article 34(6), Declaration allowing its citizens and N.G.O.'s direct access to the Court.

Gitinywa A. Louis[*]

Abstract

The African Court of Human and People's rights was set up to underscore the importance of human rights and the rule of law among members of the African Union. This was meant to bolster democracy on the continent. Due to the doctrine of State sovereignty, however, jurisdiction of this Court over a State and the entities allowed to bring a case before this court against a particular state are matters to be decided upon by the State in question.

This article provides an insightful analysis of the case of Ingabire Victoire Umuhoza V Republic of Rwanda in which the aforementioned issues were pivotal, given Rwanda's withdrawal from the special declaration on Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Right, during the course of the case. In this article, also, viable recommendations for the upholding of the efficacy of the African Court have been penned.

10.1 THE CONTEXTUAL BACKGROUND OF THE AFRICAN COURT

In the 1990s the transition to democracy in a number of countries across Africa marked a new emphasis on human rights and the rule of law. Partly building on the success (and responding to the failures) of the African commission, civil society lobbied for the creation of an African court[1] which would have the power to issue binding decisions and would therefore complement the protective role of the African Commission. Their efforts were successful, and the final text of the Protocol was adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, in June1998[2]. The African Court of Human and Peoples' Rights is a regional court for countries in the African union and formally started in 2006 to serve as a court of last resort for countries within the African Union. Only countries that have agreed to the court's protocol are officially under its purview[3].

The jurisdiction of the African Court includes the interpretation and application of the African Union Charter[4], as well as legal disputes between member states. Decisions of the African court will be legally binding and this may lead to improved implementation by states.[5] As of 2015, only twenty-seven of the fifty-four countries in the African union have signed and

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1 Nsongurua J.Ndombana, An African Human Rights court and An African Union Court: A Needful Duality or Needless Duplication? (2003), P.818, Vol.28, No.3 Brooklyn Journal of International Law,http://papers.ssrn.com/sol3/papers.cfm? abstract.

2 Ibid.

3 Marc Schulman, The African Court of Justice and Human Rights: A Beacon of Hope or a Dead-End Odyssey?, INKUNDLA: STUDENT L.J. U. WITWATERSRAND (2013),http://www.inkundlajournal.org/sites/default/files/2013_Inkundla_2_0.pdf.

4 Article 7 of the Charter establish the African Union and Article 3(1) of the African Court Protocol in http://www.au.int/fen/sites/default/files/achpr

5 List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, AFRICAN UNION (Apr. 16, 2014), http://www.au.int/en/sites/default/files/ achpr_1.pdf [hereinafter List of Countries].

acceded to the Court authority.[6]

10.2 Jurisdiction of the Court

At the African Court there is an additional step to admissibility before it can consider the merits of a case. This is the question of Jurisdiction, and it relates to whether the African Court has the right to hear and determine a case. Put differently, the question is whether the applicant has the right to access the African Court. Unlike the African Commission on Human and Peoples' Rights, the Court allows very limited access. Only the following entities can take cases before the Court; the African Commission on Human and Peoples' Rights, state parties that are complainants or respondents, African inter-governmental organizations and NGOs[7] with observer status at the African Union. As of December 2015[8], seven countries have signed the special declaration allowing their respective citizens direct access to the Court.

10.3 The Saga of Rwexit

The saga of Rwanda's withdrawal has been played out over almost a year at the level of the continental court, with analysts agreeing on the fact that this case is a 'big one'.

In brief, Rwanda signed up to the African Court by ratifying the African Court Protocol in May 2003. In January 2013 Rwanda also signed the Additional Declaration thus allowing Rwandans and NGOs direct access to the Court. One Rwandan citizen who took advantage of this was Victoire Ingabire Umuhoza, the leader of the opposition foreign-based political party *FDU Inkingi*. Ingabire is currently serving a 15 year prison sentence after having

6List of Countries, that have acceded to the Court's authority are Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Tanzania, Togo, Tunisia, and Uganda.

7 Article 5 of African Court Protocol, and Rules of court 33.

8 Burkina Faso, Mali, Malawi, Tanzania, Ivory Coast, Ghana, Rwanda are the States signatories of the Article section 6 of the Special Declaration allowing citizens and NGOs direct access to the Court.

been convicted of genocide-denial and terrorism related crimes in 2013 by the Supreme Court. After exhausting all domestic legal remedies, Victoire Ingabire petitioned the Court in October 2014, alleging that her trial contravened her right to a fair trial as protected under the African Charter on Human and Peoples' Rights.[9]

The African Court released its latest order in the case opposing Ingabire Victoire Umuhoza to the Government of Rwanda. The case has yet to have a public hearing, but it is already one of the most interesting cases the Court has dealt with so far. This is because news broke in March[10] this year (on the day the Court was due to hold the public hearing of the case) that Rwanda had withdrawn its Article 34(6)[11] Declaration which allowed its citizens and NGOs direct access to the Court. The withdrawal of this "Special Declaration" had the effect of halting Ingabire's case. Exactly how Rwanda withdrew and whether the Court was suspending or terminating matters was unclear. The court decision on how to proceed with Rwanda's withdrawal has become an important issue for everyone and not just for Ingabire. This is a critical subject for Rwanda in general and as well as the other countries on the continent. It especially concerns other states that have signed and adhere to the "Special Declaration" who will now be watching carefully to see and consider whether they too can withdraw their special declaration and at what cost, while countries that have not signed the special declaration will assess what they are potentially signing up for.

With all these perspectives in mind, many observers have been waiting for the Court's official decision as to whether Rwanda can withdraw its special

9 For those who are not aware of this matter, Mrs. Ingabire Victoire Umuhoza is Rwandan opposition political leader who after exhausting all the domestic legal remedies and sued the Rwandan Government before the African Court alleges violation of various articles of the Universal Declaration on Human Rights, the African Charter and the ICCPR, relating to her right to a fair Trial, under the legal regime of the Special Declaration on which Rwanda signed and ratified in January 2013, which through gives direct access to Rwandans citizens and NGO's to the African Court of Human and Peoples Rights.

10 Published on web www.theeastafrican.co.ke. on March 17-23,2016.

11 Article 34(6) of the Protocol provides that at the time of the ratification of the protocol or at anytime thereafter, the state party shall make a declaration accepting the competence of the Court.

declaration on article 34(6) and if so, when it will take effect and how it will affect cases currently pending before the court, including *Ingabire vs. Rwanda*[12]. Despite the circumstances the Court made an intermediate order on procedural matters, rather than a real decision to address the substantive issue of Rwanda's withdrawal. This is clearly stated in paragraph 31 of the Court Order that "*this order is with respect to the procedural matters raised by the Applicant as alluded to in paragraph 24 above".* It therefore does not address the substantive issue of Rwanda's Special Declaration withdrawal. It does address a number of important matters raised by Ingabire's legal team and contains some interesting findings that deserve to be examined. The Court particularly considered four requests from Ingabire and her legal team that is (1) for the court to reject an amicus brief, (2)for Ingabire to access her legal team, (3)for the Court to facilitate video conferencing technology to allow Ingabire to follow proceedings from Rwanda and (4)for the Court to comply with its previous decision to allow her legal team access to legal documents. For the purposes of analysing of the legal issues at stake, let us group the legal issues into two distinct categories, the first category including the second legal issue (Ingabire's request to access her legal team) and fourth issue (the Rwandan Government's alleged failure to provide legal documents to Ingabire and her legal team). These issues are requests for the Court to order Rwanda to do something under its jurisdiction.

The second category consisting of the first legal issue (concerning the Amicus brief) and the third issue (concerning the issue of video conferencing) are Ingabire's direct request to the Court to do something within its jurisdiction.

12 African Court, Ingabire Victoire Umuhoza v.Republic of Rwanda, Application 003/2014,March 2016 par.31

Concerning the first category, Ingabire's legal team complained that Rwandan authorities have been uncooperative, systematically harassed them and consistently tried to intimidate them by subjecting them to full searches including searching confidential legal documents on prison visits and delaying visas to Ingabire's co-counsel Caroline Buisman several times to prevent her from entering Rwanda to consult with her client. Ingabire Victoire and her legal team argue that these tactics resulted in their inability to prepare their case and undermined her right to an effective remedy (right to a fair trial).

The Court, relying on Rule 28 and Rule 32 of the Court's Rules[13], made it clear that Rwanda is required to assist Ingabire and her legal team in order to facilitate proceedings by the Court. The Court examined the issue of systematic searches on Ingabire's legal team and found that it did not constitute a violation, stating that lawyers like any other visitor entering a prison can and should be subject to a search by prison authorities. However, the Court made it clear that confidential legal papers should not be subject to search by prison authorities. I think this is a small but notable step in promoting and safeguarding the principle of confidentiality in Africa and of the attorney-client relationship in general, as well as concerning the aspect of confidentiality of legal papers.

On 7 October 2015 the Court ordered Rwanda to file all the relevant legal documents which, up until then, had been unavailable. These documents include national laws, Ingabire's indictment, and all related records of previous legal proceedings[14]; all of which the Court may want to examine as it considers the merits of the case. The Court noted that Rwanda has expressed compliance with the Court's order as the papers were either with

13 Id
14 Id.

Ingabire or the Rwandan Supreme Court, and that an application would have to be made to the Supreme Court explaining the reasons for the application. The Court was not convinced by this explanation reasoning that Rule 41 of the Court's Rules allows the Court to request any documents it deems necessary.[15]

The Court found that since the documents are in the hands of the Rwandan Supreme Court, this means that they are official state documents and are therefore also in the possession of the Attorney General of Rwanda, who is the figurative respondent on behalf of the Republic of Rwanda. In brief, the Court stated that Rwanda could not rely on an excuse that a different section of the state organ had the papers. The legal rationale of the Court is if they are public documents in the hands of a public institution, there is no reason why Rwanda could not file them with the Court. It's important to note that while this court ruling may appear small, it will be important for future cases when states attempt to hide behind bureaucratic excuses in order to explain their inability to provide court-required documents.

We can now tackle the second category of legal issues where Ingabire's legal team were requesting the Court to exercise its discretionary power. The first issue concerned an amicus brief filed by Rwanda National Commission for the Fight against Genocide (CNLG). Ingabire's legal team argue that the Court should reject this amicus brief based on the fact that this Commission is not independent and is an official State organ answerable to the Rwandan Government. The Court rejected this argument based on the provision of Rule 45 of the Court's Rule[16], finding that it was entitled to consider amicus curiae briefs and that it was for the Court and only the Court to determine the value or strength of any brief put before it. What is the rationale of the Court's decision? I suggest that it was based on the fact the Court would

15 Id. At par. 91

16 African Court on Human and People's Rights, Rules of Court, April 2010: Arusha, Tanzania.

make a determination on the status of any brief submitted to the Court at this stage of the proceedings and that by keeping the Amicus brief on the record, the Court is able to examine it if and when it considers the case on its merits. If it considers the brief to be of use the Court can provide relevant sections but if not, it can simply choose not to refer to it.

At some point this decision neatly sidesteps making any proclamation on the neutrality of CNLG and therefore the Court cements the principle that it is for the Court and not the parties to decide on the relevance or merits of an amicus brief.

The final and perhaps most interesting issue is Ingabire's request for video conferencing technology. Ingabire requested this technology be provided to allow her to follow proceedings from prison since she is unable to attend court in person. The Court found that personal presence in Court is materially distinct from protection of an applicant's participatory rights. In other words, an applicant has the right to participate in proceedings, most often through counsel, but this does not extend to a right to be present in court. The Court concluded and stated that while Ingabire is in prison, there is no automatic right for her presence, especially where she is represented by counsel in Court. Indeed, the Court based its decision on the Court's Rules which make no mention of video conferencing as a way of participating in court. This line of reasoning is fine by itself but the interesting point here is the very fact that the Court's Rules do not entertain the possibility applying such technology in court.

This excludes the use of video technology for participation or giving evidence, which can be said to constitute one of the biggest challenges faced by the Court as it grows and takes up more cases, considering the huge size of the African Continent and the impracticability of many applicants

traveling to the Court in Arusha to participate or give evidence in court proceedings.

Just imagine if applicants could participate in these cases by video-conferencing, or give evidence via video-link. We should bear in mind that this could be a great opportunity to open the Court up to many more people and help to raise the profile and prestige of the Court. Again, what is needed therefore is innovative thinking to make this kind of technology (video-conferencing) a possibility beyond limits of the Court's Rules, perhaps by changing the Rules.

Imagine if applicants in Kinshasa, Kigali, Kampala, Abidjan or elsewhere in Africa who could not face the expense, upheaval, and stress of traveling to Arusha, could instead follow proceedings from a secure video-conferencing line. Who knows how many cases are currently not pursued due to the perceived remoteness of the Court, both geographically and figuratively? By using existing video technology to bring the Court into the town or village where an applicant lives, the Court becomes real and relevant. The Court needs to get imaginative and proactive especially on this point because the potential benefits are just too important to be ignored.

10.4 Conclusion

The African Court of Human and Peoples' Rights' Ruling in Ingabire's case clearly shows that there is more to come in the form of the Court's actual decision on Rwanda's withdrawal of its Special Declaration. This interim decision is possibly a strong indicator that the Court is very much treating this case as ongoing. Otherwise, why would the Court issue orders if it is going to terminate the case soon? In any event, the order does provide some insight into the alleged difficulties that Ingabire's legal team have faced in preparing this case. Certainly the Court seems to have taken these complaints seriously and set out Rwanda's obligation to file documents,

allow lawyer-client relations and confidentiality in clear terms. The amicus decision is unsurprising but does cement the principle that it is for the Court, not parties, to decide on the usefulness of any briefs before it. The matter of video-conferencing, while sound in legal reasoning, presents a bigger issue.

The Court must grasp the importance of increasing accessibility to applicants throughout the process by bringing the Court to them through video conferencing and other forms of technology. This would raise the profile and maximum exposure of the Court and allow the persons for whom the Court's services are intended to be better helped.

11. KEEPING UP WITH THE KARDASHIANS SCIENCE

Ategeka Estella Felicity*

Abstract

Most people with access to the media; print, audio-visual or virtual, are privy to the famous Kardashian family[1] and their reality show that is full of surprises, twists and turns. It requires dedication to keep up with the drama. This article, however, is a call for dedication to an enigmatic, pragmatic and volatile field that is, too, filled with surprises, twists and turns, that have the capacity to shock the law even when not given as much media attention as its aforementioned contemporary; the field of science, especially medical science whose advances have left the legal community with a wide array of social, ethical and legal problems previously unimaginable[2].

11.1 Introduction

Law and science may seem worlds apart, with intellectual property rights, especially patents, as their only point of intersection. In the last century, science has evolved at an unprecedented speed. The development of technology has had a ripple effect on the other fields of science. With more ground breaking and norm shattering discoveries and research topics, however, there is a need for law and science to realize that they are in a symbiotic relationship in which they complement, support and provide parameters for each other. The law and its proponents should therefore interest themselves in the developments in the science world as these may

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1 This is the family of the late Mr. Kardashian, a businessman lawyer famous for his defence role on the "dream team" in the People of the State of Carlifornia v Orenthal James Simpson (O.J. Simpson) case.

2 Donaldson v Van de Kamp: Cryonics, Assisted Suicide, and the challenges of Medical Science, Abstract from Journal of Contemporary Health Law and Policy 1993 Spring; 9:589-603.
http://www.alcor.org/Library/html/Donaldson-VanDeKampAbstract.html (accessed 5th May, 2017).

cause a total disruption of the legal order, both in substance and practice[3]. Similarly, scientists cannot afford to ignore the law because the overarching character of the law could be an inhibition to breathing life into a particular area of research.

The concept of Mitochondrial Replacement Therapy (3-parent child) is a good illustration of this symbiotic relationship. Normally, a child is a result of the composition of the genetic material of two parents. The 3-parent child however has the genetic material of a third person (parent) placed within this composition. The purpose of this is to replace components of this composition that could cause the child to have a mitochondrial disease passed on genetically, for example, mitochondrial myopathy, Diabetes Mellitus and deafness, Leber's hereditary optic neuropathy (LHON), Leigh syndrome, etc. The biggest hurdle in the path to the actualization of this research was the absence of an enabling legal framework.

Following animal experiments and the recommendations of a government commissioned expert Committee[4], the Human Fertilization and Embryology (Research Purposes) Regulations were passed in 2001 to regulate and allow research into human embryos. On 3rd February, 2015, following the UK Government Recommendation in 2013 that mitochondrial donation be legalized, the House of Commons of the United Kingdom approved the procedure[5] and so did the House of Lords on 24th February, the same year. Pursuant to these approvals, the Human Fertilization and Embryology (Mitochondrial Donation) Regulations were passed and came into force on 29th October 2015 in the United Kingdom.

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3 For example, a robot has been invented that can do research relevant to a case more efficiently than a human lawyer.
4 Donaldson, Liam "Stem cell research: medical progress with responsibility" UK National Archives. UK Department of Health.
5 Gallagher, James "MPs say yes to three-person babies", 2015 accessed at www.bbc.com/news/health (accessed on 2nd May, 2017).

In contrast, the US Congress, in 2016, prohibited the Food and Drug Administration from considering applications for research in this area[6]. As a result, Dr. Zhang of the Hope Fertility Centre in New York had to perform the Mitochondria Replacement Therapy that resulted in the first 3-person baby, in Mexico which does not have prohibitive laws[7].

Mitochondrial Replacement theory, as shown above, is a classic example of the symbiotic relationship between law and science; the research required the law to create an enabling environment and the law needed to adjust itself in order to accommodate the 3-person child, to regulate and provide parameters so that, for example, this process is not abused to create "designer babies".

11.2 Cryonics and the Law

For purposes of this article, I will focus on the concept of cryonics to illustrate why the law and its proponents should interest themselves in the developments in the science world. This is because of its potential to cause an overhaul of various areas of the law. I will explore its possible effect on areas such as criminal law, contract law, the intellectual property regime, insurance law, family law, *inter alia.*

Cryonics is the science of using ultra-cold temperature to preserve human life with the intent of restoring good health when technology becomes available to do so[8].

This process may be initiated at the point of death, however, the available technology makes it possible to be done, not at the point of death but at an earlier appointed time, especially for persons who are suffering from

6Neimark, Jill, "A Baby with 3 Genetic Parents seems Healthy, But Questions Remain" www.npr.org/sections/health-shots/2017/04/08/523020895/a-baby-with-3-genetic-parents-seems-healthy-but-questions-remain (accessed on 2nd May,2017).
7 Marcus, Mary B. "It's a Boy! First Baby Born with DNA from 3 Parents" www.cbsnews.com/news/first-3-parent-dna-baby-born-rare-disease/ .
8 Alcor.org.

diseases that cause degeneration such that their organs would be too far damaged at the point of death resulting from the natural progression of the disease.

The rationale for undergoing this process is to give one a new lease on life; to give one an opportunity to continue living despite death, making death a mere interjection in one's life. It goes without saying therefore, that those who sign up for this process, do so in order to enjoy the same or a better quality of life and would thus prefer to undergo this process while their body systems are still intact. If one has a disease that causes degeneration, she/he would definitely prefer to undergo this procedure before it is too late; however courts have insisted that this process only take effect upon death[9].

As a result, the companies involved in carrying out this process, including Alcor, the market leader, currently require that a client must meet the legal definition of death before undergoing cryogenic preservation[10]. The legal definition of death for this purpose is still evasive yet it is of great importance to the debate on whether or not a cryogenic process can be carried out.

The laws of Uganda, for example, do not provide a legal definition for death, probably because our jurisprudence has not yet been directly confronted by a situation that requires a legal determination of the meaning of death. The United States of America (hereafter, USA) has, among its laws, the Uniform Determination of Death Act which defines death, its language, though, leaves much of the definition up to medical standards, which gives rise to

9 The Thomas Donaldson case, cited in Han, Ada, "Cryogenics: Legal Research" www.davidfriedman.com/Academic/Course_Pages/21st_century_issues/21st_century_law/life_life_extension_law_03.htm (accessed 9th April, 2017).
10 Ibid.

inconsistencies[11]. It must be noted that in medicine, there are two forms of death; clinical death which happens when there is cessation of blood circulation and breathing, the two necessary criteria to sustain human and many other organisms' lives[12]. The other is brain death in which the person's brain shuts down but the other vital organs like the heart remain active; "irreversible unconsciousness with complete loss of brain function, including the brain stem, although the heartbeat may continue"[13]. Brain dead persons can be kept alive on life support. For the process of cryonics to be well implemented, therefore, a clear definition or better guiding definition of death than what is available must be enacted.

Even when the definition of death has been established for purposes of determining whether or not cryonic preservation can be carried out, the persons who have undergone this procedure must be given a legal status hinged on whether they can be considered dead or not. The quagmire arising from this situation was well described in the words of Justice Brennan and Justice Marshall in their dissenting opinion in the case of *Cruzan v. Director, Missouri Department of Health*[14] (1990); "Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues…" This "twilight zone" gets bigger as life-sustaining technology gets better[15]. Cryonics is one such technology. It is actually referred to at times as a life extension mechanism.

Should the usual death certificate be issued for such a person or should a death certificate with a proviso for a petition for the setting aside of this certificate be issued instead? Upon "resurrection", should another birth

11 Han, supra.
12 Kastenbaum, Robert, "Definitions of Death" Encyclopedia of Death and Dying (2006) http://www.deathreference.com/BI-Ce/Brain-Death.html (accessed 7th May,2017).
13Kastenbaum (ibid).
14 497 U.S.261.
15 Ada Han, supra.

certificate be issued, the old one renewed or a renewed life certificate be issued instead? These questions are important because of the incapacity that comes with the legal status of death; one is struck off the voter's register, she/he cannot contract, her/his property is vested in an executrix/executor or administrator[16], her/his marriage is automatically terminated[17],to mention but a few.

The legal status of such persons in jurisdictions in which this process has already been carried out is still ambiguous. The fact that researchers predict that the persons frozen right now will most probably be able to live again in 100 to 200 years from now[18] places little or no pressure on legislatures to determine such issues and understandably so; there are more urgent issues, besides new findings may come up that may require a new approach to the situation. The danger in this, however, is that the situation may escalate much faster than expected like happened with the internet, causing States to panic and leaving no time for well-thought out laws which could be disastrous considering that there is human life involved.

Given this background to cryonics and its relationship with the law, I will now delve into the topical discussions on cryonics and specific areas of law.

A. Criminal Law

Under this head, I shall look at murder[19], manslaughter[20] and suicide. Under Ugandan law, these are crimes well defined with punishments attached in accordance with Article 28 of the 1995 Constitution of the Republic of Uganda (hereafter, the Constitution), in the Penal Code Act, Cap 120 under parts XVIII and XX of this Act.

16 Sections 25, 242 of the Succession Act, Cap 162.
17 Sections 26 and 29 of the Marriage Act, Cap 251.
18 Best, Ben, "Cryonics:The Issues" https://www.benbest.com/cryonics/cryiss.html (accessed 7th May, 2017).
19Sections 188, 189 Penal Code Act, Cap 120 of the Laws of Uganda.
20 Sections 187, 190 and 192, ibid.

Both murder and manslaughter entail causing the death of another, with malice aforethought in the former case and by unlawful act or omission in the latter case, with no malice aforethought. Both crimes attract heavy punishments because they deprive life. In the event that the victim has undergone the cryonics procedure, should the perpetrator be punished harshly or at all since the life shall be restored? Should this question be left to be determined and revised when the first person is brought back to life and should the time it will take to bring this person back to life be given consideration in determining the sentence?

On the other hand, should the death sentence, where handed down, be a bar to one undergoing cryonic suspension upon death resulting in consequence to such sentence or should a convict who dies before completing their prison term be required to serve the rest of it when restored to life after the cryonic suspension?

Article 22 of the 1995 Constitution provides that no person shall be deprived of life intentionally, except in execution of a properly handed down sentence. This means that not even the holder of the life should make a decision to take his own life, alone or with the aid of another person. As a result, suicide pacts (section 195), aiding suicide (section 209) and attempting suicide (section 210) are crimes under the Penal Code Act.

As mentioned earlier, some people would like to undergo the cryonics procedure before natural death sets in. This, however, would amount to suicide and the professionals involved would be guilty of aiding suicide, pursuant to the existing legal regime. This position was upheld in the case of *Thomas Donaldson*[21]. In this case the applicant had brain cancer and wanted to undergo cryonic suspension before the tumour destroyed too much of his memory and identity before ultimately killing him. He therefore petitioned

21 Supra.

the California Court to make a declaration to the effect that he had a constitutional right to cryonic suspension before his legal death. He also sought an injunction against the criminal prosecution of the people who would participate in his suspension. The Court held that there was no constitutional right to assisted suicide and the act of assisting or encouraging another's suicide was a felony.

This case placed cryonic suspension within the realm of existing laws pertaining to the right to life, which is probably the most important right since one cannot enjoy any other right unless she/he is alive. It, however, also pushes us to rethink our stance on life, death and suicide. This is because the person undergoes this procedure so that they are able to continue living in a better state of health at a later time.

The cryonic suspension process must be commenced as soon as possible, after death. This time period might not allow for an autopsy to be carried out. Also, once done, a coroner may not be able to carry out an inquest on the body in accordance with the Inquest Act, Cap 11 of the laws of Uganda. This poses a problem in terms of evidence required to prove the cause of death if the death occurred under suspicious circumstances.

Cryonic suspension and its outcomes could have more non-ignorable effects on the existing criminal law regime, however the examples picked out above are meant to stimulate discourse in the legal arena on cryonic suspension and ultimately, encourage lawyers and law makers to take keen interest in scientific developments.

B. Intellectual Property Law

I will, hereunder, use copyright law to further my proposition, since the dynamics of protection change upon death. Under the Copyrights and Neighbouring Rights Act, 2010 of Uganda, copyright subsists in an original

work reduced into material form for the lifetime of the author and up to 50 years after the author's death[22].

The question here, relating to copyright protection particularly, would be whether the "50 years after death protection" would take effect during the cryonic suspension and what would happen in the event the person was unfrozen successfully since copyright law is meant to ensure that the author derives benefit from her/his work throughout her/his life. Would she/he still be recognized as the author of this work; what would be her/his relationship to this work?

C. Family Law

Family law encompasses both domestic relations and succession law. I will therefore deal with all such matters in this segment.

The Marriage Act provides that a monogamous marriage[23] shall subsist until the death of one of the spouses upon which it will terminate[24]. Short of this, a marriage can only be dissolved through annulment of the marriage or divorce of the couple. What is the status of such a marriage during the cryonic suspension of one or both of the spouses? Would the amount of time between the suspension and the unfreezing make a difference? For example, the law could decide to borrow from the "Death in Absentia" rule in the Evidence Act[25] which allows for a person to be declared dead after seven years, such that a timeframe can be set within which the marriage may continue to subsist. This can only be set after the first set of persons is unfrozen and the procedure mastered in order to determine what a reasonable period is.

Cognizance must be taken of the fact that marriage is a union between two

22 Section 13(1) of the Copyright and Neighbouring Rights Act.
23 The marriages recognized as monogamous are the church marriage and the civil marriage.
24 Section 26 of the Marriage Act, Cap 251.
25 Section 108 of the Evidence Act, Cap 6.

consenting adults and it would therefore be unfair to force someone to be legally bound to someone who is "dead" or has died before yet death ordinarily terminates a marriage. In light of such a fact it may then make better sense to let the marriage terminate at the point of suspension but give the couple the option of either renewing their old vows or contracting a new marriage altogether.

In relation to succession, ordinarily, a deceased person's property is divided among either living persons or existing entities either by will or in accordance with statute in the absence of a will. This is done because the deceased person cannot make use of the property left behind in death and cements the finality of death.

Cryonics, however, are shaking the notions on the finality of death and make it probable that the deceased person may need the property she/he acquired before death. Since trusts in perpetuity are not permitted by law, how then can one secure his/her property for use during his/her extended life? The law may have to go out of its way to provide for a means of securing such property for use by the person under cryonic suspension and defining the relationship between such person and the property. It must be noted that for certain people, the property they have amassed is a motivation for them to undergo this process.

The law will also have to look into whether another person can bequeath property to someone under cryonic suspension.

In line with property, what would be the status of the academic qualifications of the person under cryonic suspension? Would they be able to make use of these qualifications as they are or would they need to undergo further training? Would this training be tailor-made to suit the needs of persons who have been away from the earth for very many years?

It should also be ensured that the persons who undergo this procedure are well counselled and informed in regard to the procedure they have chosen to undergo. The families of such persons must also be well counseled in order to deal with the long wait and the possible "return" of their relative so that they may be accommodative of her/him.

D. Insurance Law

Cryonics relate in an interesting manner to insurance. I find life insurance policies most relevant to this discussion. The first point of contention in this regard would be whether the individual is indeed dead in order to merit the paying out on the life insurance. The insurance company would most probably prefer the argument that the individual cannot be said to be dead while those who stand to benefit will argue that she/he is dead which is why she/he is frozen. The law may have to come out and settle this issue once and for all.

Another point of contention could be whether the insurance company that paid out on the policy could recoup the money paid out after the person who died is reanimated. In the present situation, they would most likely be barred by the relevant statute of limitations[26] but this is another area the law would have to make a pronunciation upon to avoid strife and balance out the inconveniences.

Life Insurance policies often cover deaths by suicide[27], but not those suicides which were contemplated when the policy was purchased.[28] Frequently the method chosen to contain liability within these conceptual bounds is a strict rule that deaths by suicide are covered if, and only if, they occur some fixed

26 Bishop, Katherine, "Legal Research on Life Extension and Cryogenic Suspension" www.davidfriedman.com/Academic/Course_Pages/21st_century_issues/21st_century_law/life_life_extension_law_03.htm (accessed 9th April, 2017).

27 Life Insurance policies in Uganda do not cover death by suicide since suicide is a crime in Uganda. In some other jurisdictions, though, death by suicide is covered by life insurance policies.

28 Han, Ada (supra).

period of time after the policy is issued.[29] An insurance company could therefore argue that the individual contemplated suicide by signing up for cryogenic suspension before purchasing the insurance plan.[30] Since there is a requirement that one should be legally dead before cryonic suspension is executed, it can be argued that the individual cannot be said to have committed suicide as she/he was dead anyway when the process commenced. It would then be incumbent upon the insurance company to show that the cryonic suspension was carried out before legal death and that undergoing this process before legal death was indeed contemplated before the purchase of the life plan.

A proper balance has to be struck in order to avoid a situation whereby insurance companies never pay out on life insurance plans purchased by persons who have decided to undergo cryonic suspension, but that also emphasizes that the cryonic suspension was carried out legally.

E. Insolvency; Of The Suspension Company

Trusts created by those who sign up for cryonic suspension are at times used to fund the process whereby the freezing companies are the beneficiaries.[31] Even then, there is a possibility of these companies going bust for one reason or another. One of the first Cryonics Organizations to be set up was the Cryonics Society of California by Robert Nelson in the 1960's. He unfortunately ran out of money and could no longer maintain his frozen clients so they were allowed to thaw and decompose. The families of his clients successfully sued for damages; however this may not be sufficient recompense.[32] To avoid such a situation, Alcor set aside funds to maintain

29 Weinberger V Salfi, 422 U.S. 749,776 (1975).

30 Han, Ada (supra).

31 David Pocklington and Frank Cranmer, "Cryonics and the law: Re JS (Disposal of the Body)" Law and Religion UK (2016) http://www.lawandreligionuk.com/2016/11/19/cryonics-and-the-law-re-js-disposal-of-body/. (Accessed 9th April, 2017).

32 Bishop, Katherine (supra).

their clients in case the company dissolves.

The law may step in to require a corporate rescue for such companies and winding up should be a matter of last resort after corporate rescue has been shown to be of no possible consequence.

F. The Contribution Of The Courts In Shaping The Law On Cryonics

In November 2016, the decision of Peterson J. in *Re JS (Disposal of Body)*[33] caused ripples of excitement as people thought that the court had finally pronounced itself on cryonics and actually condoned it. However, the gist of that ruling was who of the girl's parents should take charge of her body upon death. The facts of that case were that a teenage girl who was diagnosed with cancer asked that she is placed under cryonic suspension upon death. Her mother was okay with this but her father who had not earlier been present in her life was against it.

Peterson J. in his judgment made it clear that the case was not about cryonics but who would arrange for disposal of the body. He made use of the ruling in *Williams V Williams*[34] where it was held that,

> "*A dead body is not property and therefore cannot be disposed by will. However, the administrator or executor of the estate has the right to possession of (but no property in) the body and the duty to arrange for its 'proper disposal'- an undefined term. The wishes of the deceased may be highly relevant, but are not determinate and cannot bind third parties. The role of the court is not to give directions for the disposal of the body but to resolve disagreement about who may make the arrangements.*" (Emphasis mine).

He made a ruling in favour of the mother, probably why it was thought that

33 [2016] EWHC 2859 (Fam).
34 [1882] LR 20 ChD 659.

he had condoned the practice of cryonic suspension. He however called for proper regulation of cryonic preservation in the United Kingdom if it is to happen in future.

G. Relevance to Uganda.

Cryonic suspension may not take place within the boundaries of Uganda in the near future but that does not mean that a Ugandan may not want to undergo the process or that someone with property in Uganda may not undergo this procedure or that a Ugandan may not be responsible for the death of someone set to undergo the procedure and it would be unfortunate for us to be ill-equipped to handle the situation.

11.3 Conclusion

This article, however, is not about cryonics, particularly, although the concept was made use of to illustrate the need for lawyers and lawmakers to keep up with scientific developments. This is because the effect of these developments on the law may be of a great magnitude such that it would have been useful to have thought out the legal implications of this development at every step of the development.

Our national Parliament, for example, is grappling with the question of whether or not to pass the Bio-safety Bill on Genetically Modified Organisms (GMO's) into law. Hopefully a well-researched decision and not a political decision will be made. This process could have been made easier if research into GMO's had been facilitated and begun as soon as it became apparent that these GMO's would not remain within the confines of the boundaries within which they were created. It is important to emphasize the fact that thinking through these developments earlier on enables a country to come up with legislation and provide adjudication on such matters when they arise, without leaving behind, a long trail of injustices.

I, therefore, beseech the proponents of the law to keep up with science in order to facilitate the symbiotic relationship between law and science for the betterment of the world especially since the law has the ability to sieve through and determine which scientific developments are adopted in a particular jurisdiction.

12. HUMAN RIGHTS AND STATE SECURITY, SIAMESE TWINS AT CROSSROADS

*A critical study of state security agents on the principle national defense vis-a-vis respect for articles **24** & **44** of the Constitution of the Republic of Uganda.*

Njumba Ali Akiiki*

Abstract.

Human rights have been, across a very crucial aspect in the development of different democracies across the board ranging from social, political to economic spheres of life. Whereas there was the Universal Declaration of Human Rights and several other human rights instruments, controversy has and still continues to engulf the justification of torture by state security agents as well as the respect for human rights and the latter's format of limitation in a demonstrably justifiable free and fair democracy.

*For instance A**rticle 5** of the Universal Declaration of Human Rights affirms that no one shall be subjected to cruel, degrading and inhumane treatment or punishment. This same principle against torture is replicated in the **ICCPR[1].***

Uganda as a country is a signatory to quite several human rights instruments internationally and the same is replicated in the bundle of rights situate in chapter four; **Article 24** (hereafter A.24) of the **1995 Constitution of the Republic of Uganda (**the Constitution**)** which provides for freedom against torture cruel and degrading and inhumane treatment specifically lends credence to the importance of respect for human dignity against all formats of torture. **Article 44** (A.44) of the Constitution shows how strongly the

1 International Convention on Civil and Political Rights

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law protects rights against torture; to that effect it places torture among the four non–derogable rights.

S.2 of the Prevention and Prohibition of Torture Act, 2012 defines torture as any act or omission by which severe pain or suffering whether physical or mental is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity. It is quite clear from the definition of torture by the statute that it is a wide concept, and takes into account all forms which would fall within the realm of violation of the right against cruel, inhuman and degrading treatment. Whereas there can be said to be in existence the greater need by state security agents to keep the country safe from all forms of threats including but not limited to injury of state security and the desire to protect the general public from harm, this should not be reason to ignore, let alone, supersede keeping intact the integrity, respect and dignity of persons suspected of acts or omissions likely to be interpreted by the State as prejudicial to national security.

Torture is a prohibited action both under our Constitution and various international instruments. However in the intelligence community, torture is no new phenomenon in the aspect of getting information from suspects. Most suspects that happen to fall into state security operatives custody often have tales of extreme torture exerted upon them in a bid to extract confessions or certain information which in the contemplation of the security operatives would be useful in un-earthing a host of information in relation to national security or criminal activities that are of a great hazard to the general public and the nation at large.

The United Nations Convention Against Torture is a strong legal instrument in international law as far as prevention and combating torture is concerned but states have inherently violated it in a secret tone and disregarded it and

yet appear on the outside to be upholding it.

The **IRCT**[2] report 2015 states that there has been, over the years, increased state violation of the right against torture meted out brutally against different member state's citizens. The report goes further to highlight the fact that due to heinous pain inflicted on torture victims, some have been permanently disabled; some have become useless to themselves whereas others have died at the hands of state security agents. What makes it more worrying is the fact that reparations or compensation to victims of torture by perpetrators whether in official capacity or not remains a dream since the process of attaching criminal responsibility at evidence hearings in torture proceedings has been frustrated by perpetrators as they are under the direct shield of the state.

Whereas Section 6 of the Prevention and Prohibition of Torture Act, 2012 provides compensation to torture victims, most efforts to prove allegations of torture by victims have been hampered by threats to their lives which terrify them and place them in apprehension of infliction of further harm if they find the boldness to testify. Torture allegations against a state are very grave that the state will use all and sundry to prevent any allegations of the existence of torture perpetrated by its security agents from coming out to the public domain. This continues to frustrate efforts and campaigns against this degrading vice meted on the citizenry.

The IRCT Report is corroborated by the African Centre for Treatment and Rehabilitation of Torture Victims, Uganda chapter **(**ACTV) report which firmly acknowledges that in as much as something has been done to raise awareness and advocate for rights against torture, much a load still weighs heavy in the progress of the fight against violation of this right as is with other forms of human rights encapsulated under chapter four of the

2 International Rehabilitation Council For Torture Victims

Constitution. This acknowledgement is made in this report at its introduction by the Chief Executive Officer of the organization in Uganda in the names of Samuel Herbert Nsubuga.

Efforts have been made by anti- torture civil society organizations and other human rights groups but the vice continues to rear its ugly head amongst state security agents who are at the forefront of perpetrating and meting out torture under the guise of getting information from suspects, that could be useful to national defence and apparently 'loose' justification for maintenance of peace.

The question that puzzles many is, what happens to the victim of torture in the event that irreparable damage has been occasioned on suspects in state security operatives' custody yet the information obtained in a bid to get a confession out of torture victims has not been useful or that the victims submitted false information in order to save themselves of the heinous pain undergone during and or when exposed to torture?

There have been various arguments that have been advanced by different scholars in relation to this contentious clash of interests between state security and the respect for human rights, specifically the right against torture. One prominent scholar, Susan Marks[3] argues that whichever line of thought advanced for justification for torture lies lower than the threshold required for protecting humans from torture.

She goes ahead to note that those among the intelligence community and the security fraternity charged with national and or state security always advance necessity and the "ticking bomb argument to justify torture**".** This doctrine emphasizes violation of rights specifically against torture in such tense moments where the greater number of members of the public is in

3 Apologizing for Torture; 73 Nordic Journal of International Law (2004) 365-385

great danger if all means necessary are not employed on a suspect or any other person who could be having knowledge of or useful information.

The author goes ahead to note that since there are no parameters as to the test of what constitutes a threat to state national security, intelligence agencies and state security fraternity will always use the discretion within their mind and midst to employ torture even when the act/omission by no means poses such threat as to put in danger national security and or state defense.

A vivid example that lends weight to the author's assertion is when members of the political divide have been arrested and tortured several times but upon typically trumped up charges. Unfortunately the institution of the Director of Public Prosecutions under Article 120 of the Constitution has been seen to be used by the state directly and or indirectly to shield torture perpetrators in the name of state security agents decimally to frustrate torture victims and their urge to pursue justice.

The case of *Uganda –V – Kiiza Besigye*[4] gives a clear insight into the operation of this sad reality. In the silence, these blatant violations of human rights roar in the open while seem and appear to put on a human face in the public domain.

However worth commend are decisions by courts in Uganda regarding the reality of torture a vice common among security agents. In *Jasper Natukunda –V- A.G & Christopher Ruhunde*[5], court opined that it is very absurd that state security agents have turned to be poachers in a world where they are meant to be wardens as far as respect and protection of human rights is concerned, officers are meant to keep law and order, however it is materially disturbing and regrettably offending to find that they are indeed at the fore front of violating the laws for which they are meant to be custodians of?

4 High Court Criminal Case No. 955 of 2005
5 HCCS No. 2 of 2015

The above observation is a clear acknowledgement and expression of dismay by the judiciary as against state law enforcement agencies and security operatives.

Whereas the Constitution in Article 43 provides for limitations on the enjoyment of freedoms under chapter four, the exceptions allowed for derogation of these rights are spelt out in detail and by no means can one say that torture is an exception. It is rather a serious right that the Constitution expressly recognizes as non derogable and in a turn of events where violations or restriction are imposed must be demonstrably jusfiable in a free and democratic society.

In yet another landmark case *Behangana -V- A.G*[6], the constitutional court while finding for the petitioners held that there is an increasing trend among state security agencies to continue to violate this right and torture on citizens without any regard to respect for the rule of law but it is, time officers know that whoever is found to have committed acts of torture on a person will bear personal responsibility for their actions.

These state security agents have also used national defense erroneously and with intention to justify torture of persons whom they consider to be sympathizers of the dissenting voices against the incumbent government. Several citizens have disappeared without trace and those that are lucky to be found are discovered dumped in conspicuous places after being tortured to the maximum. Whereas the state has the monopoly of violence, this discretion once not looked into could be wrongly applied to scare dissenting voices. This form of action can only be ripped in the bud if accountability is brought into play and the perpetrators of torture are brought to book.

Whereas I am an ardent opponent of torture, I am not blind to the realities that engulf the security agents in trying to keep members of the public safe and that this kind of safety comes at a heavy cost to some individual citizens.

6 Constitutional Petition No. 53 of 2010

Some means will be used by the state in order to get to the crude and crux of the matter if information of threat to national security would be obtained through applying abnormal means on a person deemed to have overwhelming knowledge that could be of invaluable use to national defense. It would be taking a fantasy world in Disney world to attempt to write about torture as a beautifully crowned concept and script academically while ignoring the true realities of its justification, true existence and advancing mechanisms through which engagement of security agencies can be secured towards scaling down the use of this vice to obtain information which in their opinion would be an asset to national security.

This debate of justification of torture was greatly blown out of proportion since 9/11 attacks on the U.S and the propulsion of the justification was in respect of the war on or against terror and the suspects of terror itself as both doctrine and concept at the same time.

Alan Dershowitz [7] is an author who argues for torture in certain circumstances where he maintains that torture will be justifiable in the event a terror suspect is deemed to have information as regards terror activities that are likely to injure a greater mass of the members of the public. He further brings about the concept of torture with accountability. He deviates substantially on the preposition that torture should be administered at the mercy of those administering it without any form of accountability. It is then that he brings into play the principle of "torture warrant" which essentially is permission to allow physical application of pressure on a person for purposes known best by a torture administer.

The author goes ahead to opine that it is about how a democracy should be able to make a difficult choice of evil decisions but for the greater good and safety of the citizenry. Most torture allegations against the state and its security agents are always met with justifications of necessity in respect of

7Why terrorism works; understanding the threat, responding to the challenge, Yale university press 2002

national security. This is a defense not only used in Uganda but used worldwide to strike a balance between imagination in the shoes of the security agents as well as maintaining the rights of suspects in upholding the rule of law. The exercise of this mandate involves a lot of caution, care and attention to detail.

However in Israel for instance, their law of necessity states that:

> *"a person may be exempted from criminal responsibility for any act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person honor, or property or on the person or honor of others whom he was bound to protect all property placed in his charge provided he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided".*

This particular explanation on the law of necessity by Israel is of particular interest if not concern because it provides wide discretion for application of torture on suspects and given its peculiar position in the middle east, state security agencies like **GSS/ SHIN BET** apply torture at all costs which in the ordinary realm would be riddled with absence of accountability provided one pleads a threat to national peace and/or defense.

It is submitted that most governments in the absence of attention of the public eye do administer torture. Where controversies come in is when it is continuously used as a weapon for state defense and other uses and the determination of who could be a threat to national security is solely left to the security agencies with no standard measure established.

Unless torture executed either in private or official capacity is handled with a firm grip, the Ugandan citizenry will continue to witness such gruesome

brute. There needs to be established strengthened mechanisms of following up on torture and having heavy consequences for its perpetrators. Only then can a strong signal be sent that it is a risky venture to whoever engages in it.

Given the length and complexity of this delicate subject I would forthwith put up some viable proposals in form of recommendations that would narrow the gap of explosion between the conflict that is engaged in between national security and defense, on the one hand, and respect for human rights and specifically upholding article 24 even in the most turbulent of times, on the other hand.

12.1 Establishment of an Anti-torture Commission, is my first recommendation

Whereas different parent legislations have been promulgated in respect of torture, the establishment of an independent anti torture commission will do a great deal in fostering the fight against torture. This commission's mandate would be to independently investigate circumstances and allegations of torture by state agents. This committee's work would be further effectuated by establishing unit anti-torture committees in the different circles of state security machinery.

Just like the U.P.D.F[12] Act spells out unit disciplinary committees in relation to service offences and the like, the anti-torture committee would distinctly serve the purpose of investigating circumstances of torture and make recommendations to the torture commission from which prosecution of the perpetrators would ensue. This would cut costs and prove more effective than the ordinary process of courts which warrants institution of civil proceedings against perpetrators of torture.

Furtherance of the cause and fight against torture could be advanced through probono services under the Uganda Law Society Legal Aid Project or N.G.O's since one of the weaknesses of using the formal court system is that some torture victims may not be able to raise legal fees to sustain their action against torture perpetrators which would essentially shut down their

hopes of ever getting justice by torture victims.

Therefore a whole lot of tax payer's money would be saved if torture is specifically handled by the Anti-torture commission since it would have quasi-judicial powers not limited to power to summon witnesses, power to order for compensation as indeed many others.

This commission would indeed do great a job in furthering the fight against rampant torture unleashed by state security agents against the citizenry.

For as much as I applaud and acknowledge the works the police in operations of the Professional standards unit of the Uganda police force, a lot more work needs to be done to satisfy the objectives and spirit of establishing the PSU. This is a branch of the force that is charged with maintenance of professionalism in the force, however most often its operations are seen to have effect only after huge amounts of public outcry and in an effort of saving the forces image and the machinery of public relations, one only sees hurried trials before the unit which have only the effect of sending signals of police prevailing over errant officers and men in its fraternity.

This therefore makes the normal process of filing a complaint with the PSU so flouted and the complainants are sometimes embarrassed to pursue their torture claims hence a dark dawn on the hope of ever getting justice.

However, with the establishment of a separate anti- torture committee within the ranks of the police that is in charge of overlooking officers who could and or are suspected to be perpetrators of the vice would go a great way in championing the fight against torture since members of this committee would be charged with making monthly reports to the Anti-torture commission from which final proceedings of torture claims are commenced till their logical conclusions. I am very aware that members of the police force who sit on the PSU would likely be swept away by conflict of interest and fear of persecution since they are charged with the role of

maintaining professionalism among their own, a role that the anti- torture committee would best serve.

The other recommendation would be to look keenly through the prisons welfare department. Prisons are deemed to be lawful places for correctional services; however some reports from Foundation For Human Rights Initiative have come to point out that suspects remanded in the prisons become victims of torture while being held while on remand pending hearing of their cases. Therefore a critical review of the operations of the welfare department of prisons would be in relation to prevention of torture would be good a job towards furthering the fight against torture. Mere visits by Uganda Human Rights Commission are not enough to expose torture that could be happening in these correctional centres all over the country. On the day the Commission is set to visit, prisons authorities normally present a cosmetic representation of how human rights are being observed by them to solicit a nod by the Commission that all is well yet a whole lot of undiscovered torture acts and omission lay in the silence of the inmates for fear of reprimand after the commission members have left.

A free platform provided by the Commission in the absence of the prisons officers- in-charge or wardens would lay a fertile ground of exposing the ills of the vice of torture meted on the incarcerated convicts or suspects. Hencea call for a more open environment for disclosure by the incarcerated.

Establishment of a Compensation Fund is another format I would so gladly invite in the midst of the fight against torture. For instance the International Criminal Court has established a victim's compensation fund that caters for psycho-social support of victims of crimes under the statute. A replica of the same fund in Uganda would further a cause that would give hope for justice and support to victims and survivors of torture since it has effects both before during and after. Whereas the court has power to order for compensation of torture victims by the perpetrators, this only realizes

violation of a right because most times even after getting a judgment, it would be another process to execute it and if one is lucky to execute it, most often these perpetrators have nothing much in form of wealth and property that would be used in satisfying the judgment creditor hence a dwindle in the hope of ever getting compensation.

Commitment to a civil prison of the judgment debtor would not be enough since after a period of six months, they would be out. This leaves no option to the victim of torture save to live with the pain of violation of their rights for which compensation though adequate would not restitute them to their original position.

With the presence of this fund, mitigation of the ill effects of torture on victims would be one way of re-integrating them into society.

Intensified sensitization of the security forces regarding human rights would be another option at play that would enhance the positive direction the fight and campaign against torture. Whereas I am aware that such campaigns have been made in respect of the same, little progress has been realized in achieving the results that the said campaign targets. Information is power; therefore an informed security fraternity would be a step in the rights direction towards the fight against torture.

Increase of use of technology and harnessing of public trust in the security forces is one fundamental aspect that wouldn't miss in the debate against torture. It is *prima-facie* that most criminal activities are the direct cause that bring about torture by security forces in a bid to extract confessions from these crime suspects. Whereas there appear to be many other forms of torture in Uganda, torture among the security agencies lies high on the radar. Therefore use of camera technology fixed in different places would not completely eliminate crime *per se* but it surely would curb its increase. I

duly acknowledge how expensive cameras are but surely the benefits of its use will outweigh the costs of its procurement. In the absence of any witness, camera technology would serve best in resolving the inconsistencies in accounts of how events leading to commission of crimes duly unfolded. This would lead to an end speculation which most times invaluably invites the use of torture on suspects in a bid to make them confess their involvement in such criminal activities.

Resuscitation of the dwindling public trust in the security forces. I have known not the efficiency of military hardware than the keen vigilance, collaboration and input of the public towards ensuring a crime free society. For those that have advanced in intelligence gathering will agree with me the invaluable importance of public trust in maintaining a peaceful and secure society. Where both the members of the general public are at frictional crossroads with security agencies, no amount of good can come out of this impasse. This would mean that in situations of doubt and or threat to national security and defense, torture administered by the state through its state security agents will not only appear to be choice but rather the viable option of command to execute against suspects of criminal activities. Therefore enhancement of this corporation would tone down the likelihood of torture as a vice.

High levels of unemployment. In an economy where there is an exponential increase in un employment, there is a high likelihood of increased crime. Karl Marx[8] talks about how ownership and control of the means of production will affect societal relations. Indeed, to this I agree; wit the widening of the gap between the haves and the have-nots, this can only be breed to society chaos. This means that there will always arise occasions upon which disgruntled members of a community will express their dismay

8 Ideas of economy and state relations (puingwin publications) 1990

at the pressing economic hardships and realities. Whereas the Constitution under **article 29** guarantees freedom of peaceful assembly, most times than not many people will be arrested by state security in a bid to maintain calm and peace in society.

Whoever is to engage in peacefully exercising their rights of demonstration and assembly always face the wrath of security agents in administering torture as a form of deterrent measure. However , when the high rates of un employment are curbed through practical solutions like enrolling and encouraging vocational education as indeed many other forms that could be advanced to curb this sharp rise, the lens of looking at one as a job seeker rather than a creator would be no more and this would reduce un employment levels, which has a trigger effect of bringing into life economic independence which will reduce the levels of crimes committed and will in turn be an asset rather than a liability to national security and defense. The cycle above would reduce on the likelihood of employing torture mechanisms on demonstrators.

It is submitted that unemployment cannot be done away with completely. Even in the advanced democracies, it still does exist, however the difference is in the approach. Social welfare programmes are one great formula of decreasing the dependence syndrome on the government. One cannot talk about social progress in disregard of the economy. Therefore a stable economy increases the likelihood of respect for human rights and the rule of law, while the reverse is true for anon- stable economy.

This debate around state security agents as regards the delicate balance between national defense and the respect for rights against torture is one controversial phenomenon. However whichever line of thought one parts with, one thing will surely come out, the burden to preserve and protect this non- derogable right will always rank higher in present democracies and to be seen to use the excuse of national defense which most often has been

employed to silence dissenting voices will be to cut a branch on which one is sitting. This is not to say that I am blind to the threats, real or perceived to both national defense and the general public, but rather even in the strongest of hailstorms, torture should not be used as a tool of humiliation or getting information.

Whereas there are justifications like the ticking bomb argument, terrorism, as indeed many more, the right against torture remains inherent and should not be left at the mercy of the state security agencies since the citizenry would all become prospective candidates upon whom this grave vice could be administered.

13. WEAVING THROUGH THE JURISPRUDENCE IS MY GRATUITY TAXABLE?

Eyogyiire Irene*

Abstract

Taxation at the time of leaving formal employment, whether upon retirement or after termination of the employment relationship, has been a bone of much contention. On the one hand the employee hopes to walk away with his pay cheque unbothered by the cares of tax. On the other hand, the tax man seeks to fix the payments, however categorized, into the broad category of 'income arising out of employment' thereby making it taxable. This article attempts to tackle the often unspoken question "Will my terminal benefits be taxed?" by sifting through the jurisprudence to trace a clear line of authority on this matter.

13.1 Introduction

When asked about completion of his income tax form, Albert Einstein remarked, *"This is a question too difficult for a mathematician. It should be asked of a philosopher."* Einstein was so close to the truth in his jest. It would seem that as Taxing Acts seek to expand the scope of taxable payments (by providing for every foreseeable scenario), there is a tendency towards ambiguity. The inevitable result of any ambiguity in a Taxing Act is that liability to tax on one's income becomes a subject of perception thus drawing the parties into heated debate with arguments in favour of both sides.

Gratuity, terminal benefits, retrenchment package, severance allowance,

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* *Lawyer*

pension, annuity, retirement benefits; the use and meaning of these words has been the source of much examination and dispute between employees and the Uganda Revenue Authority (URA). Persons seeking to avoid tax liability have haggled time and again on the characterization of a payment; first seeking to hide under the cover of taxonomy (pun intended), then seeking to disguise the payment in such a way as would ensure it qualifies for exemption.

Strange as it may be, the Income Tax Act, Cap 340 ('*the Act*') does not define any of the terms normally related to terminal payments. Although there are specific provisions[1] making reference to these payments the Act does not attempt to define them thereby making these terms subject to interpretation. For instance Section 19 (1)(a) of the Act lumps gratuity with other payments that naturally arise from the employment relationship. This is in total disregard of the practice of many employers who refer to payments made to employees at the time of retiring after long periods of service as 'gratuity'.

Hence the looming question, like the sword of Damocles: shall my terminal benefits be taxable? This article intends to distil the major tax decisions on this matter and establish a clear line of authority for the scholar and the practitioner.

13.2 Judicial Decisions on Taxation of Post-Employment Benefits

Taking it from the top, the first case to consider this question under the provisions of the Income Tax Act, Cap 340 ('the Act) was *Siraje Hasssan Kajura v Diary Corporation Ltd & Uganda Revenue Authority*[2]. In this case former employees of Diary Corporation protested taxation of their terminal payments because in their opinion, levying of Pay as You Earn (PAYE) *was*

1 Section 19(1)(a) and (d) and Section 21(1)(n) and (o)
2 High Court Civil Suit No. 117 of 2009, delivered by Hon. Justice V.F Musoke Kibuuka

contrary to law because the payments constituted an allowance or gratuity. In support of this position, the Plaintiffs sought to rely on the expert opinion of the Attorney General given in regard to the terminal benefits of former employees of National Housing and Construction Company (NHCC). The opinion was to the effect that PAYE was not taxable on terminal benefits because the Pensions Act exempted the payments from tax. On the other hand, URA justified taxation of the terminal benefits under Sections 19(1)(a) and 19(1)(d) of the Act and argued that the Pensions Act did not apply to the Plaintiffs who were not employees in the Public Service.

Suffice it to note that throughout the judgment the words gratuity, allowance, terminal benefit and severance package were used interchangeably by the parties involved including the Honourable Justice.

The *Siraje case* set the ball rolling and has been and is still heavily relied on by many an employee in support of their objection to taxation of their gratuity. The Learned Judge, in reaching his conclusion that the payments to the employees were not taxable, made a couple of statements which guide the discussion as appears below. He reasoned that:

i) *'…the words 'gratuity' or 'other allowance' appearing in Section 19(1)(a) of the Act must be interpreted ejusdem generis. They must relate to payments earned or made while the person paying the tax is still in employment and not while he or she is out of employment'*

ii) '*…the intention of parliament could not have been to tax gratuitous payments, in form of terminal benefits under the provisions of Section 19(1)(d) of the Act. Terminal benefits cannot appropriately be referred to as compensation…*'

The judge's summation is somewhat flawed and leaves room for further analysis in light of the Act, tax decisions and practice.

Statement i)

A plain reading of section 19(6) (c) of the Act would, without a doubt, negate the learned Judge's reasoning under statement i) by which he seeks to exclude the payment made to the former employees of Diary Corporation from falling within the ambit of section 19(1)(a).

Section 19(6) (c) of the Act provides that:

For purposes of this Section, an amount or benefit is derived in respect of employment if it is provided in respect of past (emphasis mine), present and future employment.'[3]

Therefore the fact that a payment is made while the employee is no longer in employment does not in itself qualify the payment as exempt income. Such a simplistic view can only lead to an erroneous conclusion: what about the *golden handshake* or *parachute payment*? This payment though made at the time of exit is in recognition of the service already rendered and has consistently been regarded as income derived from employment. A case in point was *Weston v. Hean*[4] where the court considered a matter in which monies were given to Bank employees gratuitously at the time of retirement as a 'thank you' for 25 years continuous service. The court decided that although the sums were gratuitous, in as far as the employer was under no obligation to make these payments, the payments were chargeable to income tax because they arose from the employment relationship.

It must therefore be noted that the mere fact that a payment is made after the employment relationship has ended doesn't necessarily qualify such payment as a pension or retirement benefit that is exempt from tax.

3 Hochstrasser v. Mayes (1959) Ch 22, Upjohn J stated that a payment would be an emolument if it was made in reference to services rendered by the employee by virtue of his office and if it was something in the nature of a reward for services past, present and future

4 (1943) 25 TC 425

Statement ii)

In statement ii) the learned judge made a sweeping statement that '*terminal benefits cannot be appropriately referred to as compensation.'* His entire discussion centred around the argument that since Section 19(1)d) made reference to *any amount derived as compensation for the termination of any contract of employment*, then it could only be applied in cases of premature termination of employment not to terminal benefits in general. This approach sought to limit the application of the provision to cases of payments in lieu of notice and payments arising from wrongful termination.

A clear reading of Section 19(1)(a) covers a wider scope of payments and is intended to extend even to payments made to the employees in the event of collective termination or other restructuring. These are terminal benefits in as far as they are made when the employment relationship is being terminated yet they qualify as compensation for termination of a contract of employment. These terminal benefits whether called severance pay or a retrenchment package are within the ambit of Section 19(1)(d).

The court in the Siraje case (supra) decided that all the monies paid to the former employees were exempt from tax because they were terminal benefits and not compensation for loss of employment. This should not be so.

Terminal benefits can be comprised of a cocktail of payments some of which are exempt from tax and some of which are liable to tax. It would be foolhardy to lump all payments made by an employer at the time of termination and label them exempt but this same reasoning was adopted by Hon. Justice Kibuuka Musoke in a subsequent decision.

In *Patrick Nyabiryo & 1117 Others v Uganda Revenue Authority*[5], the court did not apply itself to a consideration of which part of the terminal benefits was tax exempt. The court acknowledged that the retrenchment package for former employees of Uganda Electricity Board included a gratuitous retrenchment benefit, repatriation allowance and pension from UEB's home grown non-contributory scheme. The first two payments would be categorized as a compensation for termination under section 19(1)(d) and any other allowance under section 19(1)(d) respectively. Both payments though made post-employment are clearly deriving from the employment relationship and do not qualify as pension/retirement benefits.

Attempting an over-simplified conclusion of the question as to whether any payment made to an employee at the point of his/her exit is taxable is dangerous. This is because as stated above the fact that the income has been paid post-employment does not mean that it is a retirement benefit/pension. There are even instances where the terminal payments have been prescribed by the terms of the employment contract? Wouldn't these terminal benefits then be properly described as income derived during subsistence of employment and thus falling within the ambit of gratuity or other allowance under Section 19(1)(a)?

When juxtaposed against the decision in *Weston v Hean* (supra) and some Ugandan cases, the learned judges' proposition that all post contract payments are gratuitous, amount to pensions (retirement benefits) and as such cannot be taxed, cannot be sustained.

In *Katureebe Eldadi & Anor v. URA*[6], URA argued, and in my view rightly so, that terminal benefits arising from a contract of employment though terminated are taxable because they are derived from employment even if

5 High Court Civil Suit No. 0067 of 2008, delivered by Hon. Justice Kibuka-Musoke
6 High Court (Civil Division) Civil Suit No.107 of 2010, delivered by Hon. Justice Eldad Mwangusya

they are received at the point of exit. The learned judge agreed with her submission and called for a distinction to be made between emoluments received on termination into two broad categories namely; pension benefits and terminal benefits.[7] He stated that, *'Section 21(1)(n) of the Act specifically exempts the taxation of pension. It is the only post contract payment that is exempt from tax*'.

13.3 Categorisation of Post-Employment Payments

There are two (2) categories of post contract payments that have time and again been collectively referred to as gratuity giving rise to confusion. The two categories of emoluments accruing at the time of termination of somebody's employment (in whichever way it occurs) are:

a) **Pension or a payment from retirement fund**: The Act expressly exempts pension and lump sum payments from resident retirement funds from taxation. Where the employee can bring the payment under this category, it is not taxable. However, although the Act defines a resident retirement fund[8] thereby making this payment clearly distinguishable, it does not supply a definition for pension.

Pension: Should use of the term pension be restricted to payments made to public servants? This conclusion cannot be supported because retirement funds refer to their benefits as pension.[9] Pension is defined in Black's Law Dictionary as a fixed sum paid regularly to a person or to a person's benefit by an employer as a retirement benefit. This definition of pension would cover an annuity paid by a retirement benefits scheme since it is without a doubt a pension payment/retirement benefit.

7 Referring to the case of Nkote Charles v. Uganda Revenue Authority HCCS No.107 of 2009
8 Retirement fund is defined under Section 2(lll) of the Income Tax Act to mean a pension or provident fund established a permanent fund maintained solely for either or both of the following purposes; a) the provision of benefits to members of the fund in the event of retirement or provision of benefits for dependants in the event of death of the member
9 Diverse provisions of the URBRA and the ITA

Annuity is defined under the Uganda Retirement Benefits Regulatory Authority Act, 2011 to mean regular payments made to a member of a retirements benefits scheme or to his/he beneficiary according to the terms of payment of the scheme. The exemption under the Act is specifically for lump sum payments from resident retirement funds. There is room for ingenuity in escaping tax on this front by paying allowances stated to be annuities because although an annuity is not a lump sum payment from a retirement fund, it would qualify under the general definition of a pension.

Contributions by a tax-exempt employer to a retirement fund are taxable as property income to the employee. Therefore where the tax was not remitted at the time of making the contribution, the tax man has a right to claim that tax be withheld by the employer/trustees of the retirement benefits scheme at the time of making the payments. This is still a grey area since it has not been the subject of deliberation in the courts of law.

b) Terminal Benefits: These may include a broad range of payments by the employer including payment in lieu of notice, accrued leave pay, contractual gratuity for long and meritorious service and many other benefits paid at the time of exit. These payments fall within the ambit of Section 19 and would therefore qualify as employment income.

In *Omondi Martin v Uganda Revenue Authority Industrial Court Case No.176/2009*, ex-staff of Stanbic Bank (U) Ltd protested taxation of their terminal benefits claiming they were a 'thank you' from Stanbic Bank and should not be subject to tax. The court ruled that unlike pension and retirement benefits which are expressly exempted from income tax under the Act, terminal benefits are taxable. Court agreed with the reasoning of counsel for URA

The employee's only relief where a payment of terminal benefits is made would be the exemption of 25% of the payment where the employee has been in employment with the employer for a period of more than 10 years.[10]

13.4 Last Thoughts on the Matter

The *Siraje case* raises another question which has the potential to give rise to future debate and one that is yet to be exhausted. The court took cognizance of the fact that the Pensions Act applies to 'certain bodies' even though they are public service.

The learned judge posited as follows:

> *'It is a matter of general knowledge that all those former statutory corporations had in their terms and conditions of service, provisions or clauses which provided that the retirement or terminal benefits of their employees would be the same as those accruing to public officers under the Pensions Act…the defendant after acting upon it (the AG's opinion) …. refunded the money it had deducted as PAYE from the former employees of NHCC, it would automatically act in a similar manner with regard to the instant case which is similar in all respects.'*

Section 8 of the Pensions Act, Cap 286 provides that *'Notwithstanding any provision in any written law to the contrary, no income tax shall be charged upon any pension, gratuity or other allowance granted under this Act.'*

The former employees of UEB were also able to benefit from this decision in the *Patrick Nyabiryo case* (supra). The application of this exemption must be restricted to persons employed in the public service and cannot applied

10 Section 19(4) of the Income Tax Act, Cap 340

generally. In the *Katureebe Eldadi v BAT*[11] where the plaintiffs sought to rely on the AG's famous opinion on taxation of terminal benefits, the judge disagreed clearly highlighting that

> '…*the long title to the Pensions Act which the Plaintiffs sought to rely on was limited to Public Service Officers and the Government of Uganda. The (Pensions) Act also provides that one has to hold a pensionable office in order to benefit from the exemption stipulated in the (Pensions) Act.*'

We are yet to see a decision by the courts on whether employees of public corporations are indeed entitled to benefit from the exemption under the Pensions Act. Would the judge interpret the statement above so as to extend its application beyond persons employed by the public service to all employees in public bodies? Such corporations would include National Water and Sewerage Corporation (NWSC), National Information Technology Authority (NITA), Uganda Communications Commissions (UCC), National Drug Authority (NDA) to state but a few.

When these arguments arise and they soon will, it is my considered opinion that the exemption in the *Siraje case* could easily be limited to former statutory corporations which had provisions to the effect that terminal benefits to their employees would be the same as pensions paid under the Pensions Act. This position should therefore not be uniformly applied by all public bodies because in it there is a requirement that the terms and conditions of service of the relevant body prescribe that their retirement or terminal benefits are to be treated as those accruing under the Pensions Act.

What then, you may ask, would be the position of the hybrid bodies like KCCA and UNRA? I refer to them as hybrid bodies because whereas they are

11 Supra Note 6

considered to be public organisations/bodies for all intents and purposes and as such are enjoined by various laws relating to public organisations to follow set procedures for instance when mobilizing financing and carrying out procurement for goods, these bodies do not offer employment on permanent and pensionable terms or carry out recruitment through the public service.

13.5 Conclusion

It is clear from the foregoing discussion that the lines have been drawn and there should be no more contention as to what part of your post-employment payments shall be taxable.

However with the development of the Retirement Benefits Sector, the tax man should be thinking of necessary amendments to the Act for situations where an employee gets more than one exempt post-employment payment. Now he cannot say that no one gave him a heads up!