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Editor-in-Chief

Victor P. Makmot

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CHIEF EDITOR'S NOTE

I am humbled to introduce to you this year's edition of the Makerere Law Journal. This year's edition is special because it coincides with the 50th anniversary of the Makerere School of Law; the oldest law school in our nation. It is at times like this that we are made firmly aware that the tides of change are coming and indeed not even the legal profession can be left behind. Such winds of change bring a sense of apprehension, especially in the more senior echelons of our profession, as to which direction this noble profession will take and whether those being trained by the system of today have what it takes to maintain the integrity and dignity of this noble profession.

This year's edition seeks to answer those questions and calm those fears. The major role of the journal is to provide a platform for an exchange of new and unconventional ideas and act as the threshold where those in practice and indeed those still learning can interface directly with these ideas as a compass to help plot their next coordinates.

As you pick up a copy of this journal, may you be reminded that the legal profession is indeed in safe hands in the next generation and that we are taking positive strides into the future together. I am humbled to say that at 50 years the school of law has kept in step with its aim of honing the brightest legal minds to serve this country. This year's edition of the journal is testament to that promise.

At this point I would like to thank all the editors who have done an amazing job in ensuring that this publication sees the light of day. The tireless efforts of this brilliant team made the compilation of this great journal an experience that we can all be proud of. I would also like to thank the entire School of Law and Principal Professor Christopher Mbazira for his dedication towards the journal and his continued support towards legal research and writing at the school.

Lastly, but by no means least, I thank Hon. Justice Kiryabwire for his kind advice, wise counsel and mentorship throughout this project.

Finally my deepest gratitude goes to the MLS cabinet for the wonderful co-operation with the editorial team. May we all continue to BUILD FOR THE FUTURE.

Victor P. Makmot

Editor-in-Chief

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NEW TIDE IN AFRICAN AFFAIRS? AN ANALYSIS OF INTERNET ACTIVISM IN AFRICA

Solomon Rukundo*

ABSTRACT

The growth of the Internet and its use as a tool for activism has altered the terrain of socio-political crusading, creating new possibilities and shifting power balances world-over and especially in Africa. But while new possibilities emerge *and unpopular regimes become fearful for their survival, existential hurdles limit the capability for creating real change on the ground and continue to emphasise the virtual hollowness of internet, armchair activism. But not all is lost, and the liberator that is technology may yet become the single most powerful and effective gizmo for change in human history.*

I. INTRODUCTION

At the onset of the bloodless coup that removed Robert Mugabe from the Presidency of Zimbabwe, shutting down social media was considered the first step in an attempt to deflect the overthrow.[1] Elsewhere in a speech before the United Nations, the Ethiopian Prime Minister had described the Internet as a tool to "spread…hate and bigotry without any inhibition." In Cameroon, the Speaker of Parliament has described social media as "a new

* LL.B (University of Dar es Salaam) Dip. Legal Practice (LDC).

1 MacDonald Dzirutwe, Joe Brock and Ed Cropley, 'Special Report: 'Treacherous shenanigans'-The inside story of Mugabe's downfall, Reuters', November 26, 2017, https://www.reuters.com/article/us-zimbabwe-politics-mugabe-specialrepor/special-report-treacherous-shenanigans-the-inside-story-of-mugabes-downfallidUSKBN1DQ0AG (31 December 2017)

form of terrorism" bent on creating a "social pandemic."[2] It is also now the norm for many African governments to shut down the Internet during election time.[3]

The Internet is a potent political force in Africa, and the best evidence for this is the Arab Spring of 2011.[4] Currently, 10% of the population on the African continent is estimated to have access to the Internet[5] with more gaining access through the proliferation of affordable Internet-enabled smartphones.

The Internet in Africa is considerably more politicised than other parts of the world. According to the US Company Portland Communications, 10% of the most popular African hashtags in 2015 related to political issues whereas in the US and the UK only 2 per cent of hashtags were political.[6] The potential for the Internet as a political tool against authoritarian regimes was acknowledged by then U.S Secretary of State Hillary Clinton in a now famous 2010 speech in which she argued that the Internet '…has

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2 Abdi Latif Dahir, 'More African governments blocked the internet to silence dissent in 2016', *QZ*, December 31, 2016, https://qz.com/875729/how-african-governments-blocked-the-internet-to-silence-dissent-in-2016/ (31 October 2017)

3 Eva Nolle, 'Social Media and its Influence on Democratization in Africa', International Policy Digest, 11 Aug 2016, https://intpolicydigest.org/2016/08/11/social-media-influence-democratization-africa/ (16 December 2017)

4 Reza Jamali, Online Arab Spring: Social Media and Fundamental Change, (Chandos Publishing-Elsevier Ltd, USA, 2015)

5 *Internet World Stats* 'Internet Users in the World by Regions', June 30 2017, http://www.internetworldstats.com/stats.html (1 January 2018)

6 *Portland Communications*, 'How Africa Tweets 2015', https://portland-communications.com/publications/how-africa-tweets-2015/ (31 October 2017)

been a critical tool for advancing democracy....'[7] Larry Diamond, the Stanford political sociologist, has in similar optimistic terms described the Internet as 'liberation technology' lauding its ability to expand political, social, and economic freedom.[8] The United Nations Human Rights Council in recognition of the Internet's value as a tool for democracy passed a non-binding resolution in June 2016 that emphasised '…the importance of applying a comprehensive human rights-based approach when providing and expanding access to the Internet and for the Internet to be open, accessible and nurtured by multi-stakeholder participation…'[9]

II. INTERNET ACTIVISM AT A GLANCE

Internet activism is the continuation of traditional grassroots political mobilisation using modern digital tools as aids. Sandor Vegh[10] classifies Internet activism into three main categories. The first is awareness or advocacy whereby public awareness is achieved by availing information relevant to the cause being advocated online. The second category is organization or mobilization where the Internet is used to call for action either online or offline with the relevant schedule for a demonstration or protest agreed upon online, and the third is action or reaction which

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7 Hillary Rodham Clinton, 'Remarks on Internet Freedom', *US Department of State*, 21 January 2010, https://20092017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm (26 October 2017)

8 Larry Diamond, 'Liberation Technology', *Journal of Democracy*, 21, 3 (July 2010), pp. 69-83.

9 United Nations Human Rights Council, Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/32/L.20, https://www.article19.org/data/files/Internet_Statement_Adopted.pdf (6 November 2017)

10 Sandor Vegh, 'Classifying Forms of Online Activism: The Case of Cyber Protests Against the World Bank', in Martha McCaughey and Michael D. Ayers (eds.), *Cyberactivism: Online Activism in Theory and Practice,* (Routledge, USA, 2003 p. 71)

basically involves taking action for or against a cause online such as 'hacktivism'.

One of the most widely used Internet tools in Internet activism today is social media. Social networking sites such as Facebook, micro-blogs like Twitter and Tumblr, video sharing sites like YouTube and many others are all used in Internet activism. Social media eases mobilisation as it easily brings together like-minded people. When a post is 'liked' or shared by others, the author may get the idea that there are people out there who share his or her views and whom he or she can lead. This imparts a sense that they can be more effective than before and followers develop the sense that they are not alone in the ideas they hold.[11] Social media causes the traditional top-down style of government to slowly shift towards government by the bottom by giving the masses a bigger voice to question and challenge their leaders.[12] Ordinary people are able to communicate their approval or disapproval of different policies and actions to otherwise unreachable people in high offices by commenting on their social media accounts.

A more controversial form of Internet activism is hacktivism. This is the use of computer hacking to protest for or against social and political policies. In 2013 the hacker collective, Anonymous Africa hacked into the sites of Zimbabwe's defence ministry and the state-run Herald newspaper. Shortly thereafter the group hacked into South Africa's ANC party website

11 Jamali, *Online Arab Spring*
12 *Ibid.*

flooding it with DoS attacks.[13] In Kenya throughout 2013 and 2014 hundreds of government websites were reportedly hacked into and defaced with political messages pasted on the websites.[14] Again in Zimbabwe in 2016 the official government website and that of the state broadcaster, Zimbabwe Broadcasting Corporation were hacked into and shutdown.[15]

III. WHY INTERNET ACTIVISM HAS GROWN IN AFRICA

The use of technology to mobilise people for action goes back as far as the invention of the printing press. More recently in 2001, networking technology was used to oust President Joseph Estrada in the Philippines when text messages were used to mobilise protesters to congregate and demand Estrada's resignation.[16] The Internet however provides unique advantages to activists unmatched by any previous technology.

3.1 *Internet platforms are easy to use*

Internet activism is successful because online platforms such as social media accounts and blogs are easy to create and maintain – even for non-

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13 *BBC News*, 'Zimbabwe hackers hit ANC website', 14 June 2013, http://www.bbc.com/news/world-africa 22902168 (31 October 2017)

14 Harry Misiko, 'How Anonymous and other hacktivists are waging war on Kenya', *Washington Post*, 30 July 2014, https:// www.washingtonpost.com/news/worldviews/wp/2014/07/30/how-anonymous-and-other-hacktivists-are-waging-war-onkenya/?utm_term=.307e67b6d27f (31 October 2017)

15 Abdur Rahman Alfa Shaban, 'Hackers shut down Zimbabwe government websites', *Africa News*, 7 July 2016, http:// www.africanews.com/2016/07/07/hackers-shut-down-zimbabwe-government-websites// (31 October 2017)

16 Alex Comninos, 'Twitter revolutions and cyber crackdowns: User-generated content and social networking in the Arab spring and beyond', *APC* June-2011, https://www.apc.org/sites/default/files/AlexComninos_MobileInternet.pdf (29 October 2017)

technical web users.[17] Setting up a blog or social media account hardly requires any skills. The Internet requires considerably less resources for mobilisation than earlier forms of activism such as the telephone, postal mail, or door-to-door canvassing reduces.[18] It has introduced speed and interactivity unknown to traditional mobilisation techniques. Activism can take the form of relatively easy to carry out activities such as commenting on a popular activist's post, changing a profile picture or making a statement using a hashtag.[19] It is much easier to establish a social media campaign than it is to establish a newspaper, run a television station, or open a civil society organization. Therefore more people can produce information seen by others.[20]

The ease with which online platforms can be used belies the far reaching impact of Internet activism. A single nondescript individual in the right circumstances can use the Internet to impact a nation. In Zimbabwe in 2016, a little known church Pastor, Evan Mawarire, while pondering how to pay his children's school fees spontaneously filmed himself venting his frustrations with the Zimbabwean flag around his neck and posted the video on Facebook and YouTube using the hashtag '#ThisFlag'. The video

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17 Richard Kahn and Douglas Kellner, 'New media and internet activism: from the 'Battle of Seattle' to blogging', New *Media & Society,* 6, 1, (2004) 87–95

18 Brian S. Krueger, 'A Comparison of Conventional and Internet Political Mobilization', *American Politics Research,* 34, 6 (November 2006) 759-776

19 For example in September 2010 Ethiopian Facebook users changed their profiles to that of Birtukan Mideksa, a prominent Ethiopian dissident and Amnesty International prisoner of conscience imprisoned since 2005: Mark Tran, 'Ethiopian activists in Facebook protest for Birtukan Mideksa', *The Guardian*, 8 September 2010, https://www.theguardian.com/ world/2010/sep/08/ethiopian-facebook-protest-birtukan-mideksa (27 October 2017)

20 Zachary C Steinert-Threlkeldl, Delia Mocanu, Alessandro Vespignani and James Fowler, 'Online social networks and offline protest', *EPJ Data Science* 4 19 (2015)

gained tens of thousands of hits and this quickly snowballed into a movement. Fellow social media users started posting pictures wrapped in the flag on his Facebook page. He declared five days of digital activism using '#ThisFlag' which was extended to 25 days by popular demand.[21] The movement soon gained offline traction when two opposition MPs were kicked out of parliament for wearing the Zimbabwean flag.[22] The government reaction to this unusual blend of patriotism and protest was threatening anyone who sells or displays the national flag with up to a year in prison under the Flag of Zimbabwe Act for allegedly "bringing it into disrepute".[23]

3.2 *Internet activism is international*

Internet activism rides on the cross-boundary nature of the Internet to easily attract the attention of the international community. Videos and pictures posted online can be seen by millions across the globe and attract support or condemnation from the world at large. In this increasingly globalised era, this can have a powerful impact on the actions taken by governments. When the Ugandan parliament passed a law with the death penalty for homosexuality activists took to the Internet attracting international condemnation of the law eventually resulting in its being

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21 The Guardian, The man behind #ThisFlag, Zimbabwe's accidental movement for change, 26 May 2016, https://www.theguardian.com/world/2016/may/26/this-flag-zimbabwe-evan-mawarire-accidental-movement-for-change (29 October 2017)

22 *Ibid*

23 Adam Withnall, 'Zimbabwe cracks down on protest '#ThisFlag' movement–by banning sale of flags', The Independent, 21 September 2016, http://www.independent.co.uk/news/world/africa/thisflag-zimbabwe-flags-robert-mugabe-protest-evan-mawarire-latest-a7320556.html (29 October 2017)

declared unconstitutional.[24] The Internet also enables citizens living in diaspora to easily be part of an online protest. For example social media campaigns have been used by Eritreans living in diaspora to voice opposition to their authoritarian government.[25]

3.3 *The Internet overcomes restrictions on mainstream media*

In countries with authoritarian governments, the mainstream media is usually nothing more than a government mouthpiece. Through various means such as restrictive laws and intimidation, governments are able to keep a firm grip on the mainstream media. The situation in two countries, Eritrea and Ethiopia, is informative. Eritrea was voted the world's most censored country in 2012[26] and again in 2015 by the Committee to Protect Journalists.[27] In Eritrea only state media is allowed to disseminate news. The last accredited international correspondent was expelled in 2007. Journalists live and work under constant threat of arrest. All private media houses were shut down in 2001[28] and many journalists were arrested then some of whom remain jailed. Eritrea has the dubious award of the country

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[24] Darnell L. Moore and Bryan M-C Epps, 'An Interview with Frank Mugisha, LGBT Freedom Fighter in Uganda', Huffington Post, 14 November 2011, http://www.huffingtonpost.com/darnell-l-moore/frank-mugisha-interview_b_1082943.html (11 December 2017)

[25] Maeve Shearlaw, 'From online trolling to death threats – the war to defend Eritrea's reputation', *The Guardian*, 18 August 2015, https://www.theguardian.com/world/2015/aug/18/eritrea-death-threats-tolls-united-nations-social-media (26 October 2017)

[26] Andrew Meldrum, 'World's most censored country? Eritrea', *Public Radio International*, 3 May 2012, https://www.pri.org/ stories/2012-05-03/worlds-most-censored-country-eritrea (26 October 2017)

[27] *Committee to Protect Journalists (CPJ)*, '10 Most Censored Countries', 2015, https://cpj.org/2015/04/10-most-censoredcountries.php (26 October 2017)

[28] *BBC News*, 'Eritrea profile–Media', 3 December 2014, http://www.bbc.com/news/world-africa-13349077 (27 October

with the most jailed journalists in Africa. Ethiopia is similarly noted for its harsh treatment of journalists with dissenting opinions.[29] The state-run Ethiopian Radio and Television Agency (ERTA) provides the country's only nationwide radio and TV services. There are no independent broadcasters in the country.[30] The Ethiopian government even blocked signals from ESAT and the Oromia Media Network which are both independent television stations run by Ethiopians in the United States.[31]

In such circumstances, the Internet becomes the main source of independent news reporting. As noted above, the Internet has been used by Eritreans in diaspora to oppose their government. This has taken the form of opposition websites and social media campaigns.[32] Eritrean activists in the United States use a Facebook group with 27000 members named Eritrean Youth Solidarity of Change (EYSC) to speak out against the excesses of their government.[33] The same activists also use an online platform called Paltalk chat room which enables users to combine video, audio and text and thereby overcome challenges of low literacy among

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29 *PJ*, '10 Most Censored Countries.'

30 *Ibid*

31 Adam Withnall, 'Ethiopians face five years in jail for posting on Facebook as 'state of emergency' rules set in', *The Independent*, 18 October 2016, http://www.independent.co.uk/news/world/africa/ethiopia-state-of-emergency-facebook-social-media-internet-blackout-rules-oromo-protests-latest-a7366956.html (27 October 2017)

32 Shearlaw, 'The war to defend Eritrea's reputation'

33 *Carnegie Council for Ethics in International Affairs (CCEIA)*, 'Eritrea: An Exiled Nation Suspended in Liminal Space through Social Media', 30 December 2016, , https://www.carnegiecouncil.org/publications/ethics_online/0125 (27 October 2017)

participants.[34] Similarly, Ethiopian activists both within the country and in diaspora use the Internet to protest against government actions.[35]

3.4 *The Internet provides anonymity to activists*

One of the most important benefits that the Internet provides to activists in Africa is anonymity. Standing up against a despotic government can often mean imprisonment or worse. It is therefore common for radical political activists to adopt a fake online identity.[36] In 2016 it was reported that an anonymous Facebook user was administrator of a page called 'SACTISM-Classified Documents of the Dwindling PFDJ' on which he was posting documents showing how the Eritrean authorities abuse their citizens. The page had 17000 followers.[37] The page is said to register between 250,000-350,000 weekly hits having once reached 700,000 hits in one week at its peak.[38] One of the key reasons for the popularity of Paltalk among the Eritrean diaspora is that it does not require users' real identities. An account name will suffice. This allows people to speak without fear of retribution which would usually take the form of action against the dissident's loved ones left back home.[38]

The anonymity can serve a purpose beyond the protection of the activist. It can turn him or her into a blank slate on to which people project themselves making him or her into a sort of everyman. In her analysis of

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34 *Ibid*
35 Withnall, 'Ethiopians face five years in jail.'
36 Jamali, *Online Arab Spring*
37 *Haaretz*, 'Eritrean Regime Crimes Exposed by Anonymous Facebook User', 2 May 2016, https://www.haaretz.com/ world-news/1.717497 (27 October 2017) 38 *CCEIA*, 'Eritrea: An Exiled Nation'
38 *Ibid*

the anonymous 'Elshaheeed', the administrator of the 'We are Khaled Said' Facebook page which with many others helped catalyse the Egyptian people's uprising in early 2011, Linda Herrera notes that the cover of anonymity was used 'to cultivate an aura of an "every-youth."' She argues that this 'lack of specificity allowed members of the page to project themselves onto the admin, to see him as someone who shared their youthfulness, middle-class lifestyle, jokes, local knowledge, and emotions. An admin with an identity, a name, a face, a past, a location, known networks, and political associations would run the risk of repelling potential members.

In mystery is unity.'[39]

3.5 *Internet activism has impact offline*

One of the most important benefits of Internet activism in Africa is that it has shown itself able to spill from online platforms to offline engagements. This capability was best displayed in Egypt during the Arab Spring where Facebook groups such as the now famous "We Are all Khaled Said" issued the initial call for protests on January 25 that ultimately led to the eighteen day citizen's uprising which culminated in the President's removal.[40]

In sub-Saharan Africa, there have been a number of reports of online activism translating into offline demonstrations and protest. In October 2014, social media was used to mobilise people in Burkina Faso to protest against President Blaise Compaoré attempts to change the constitution to

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[39] Linda Herrera, *Revolution in the Age of Social Media: The Egyptian Popular Insurrection and the Internet*, (Verso, London, 2014) p 35

[40] *Ibid.*

remove term limits which would have allowed him to run for another term after 27 years in office.[41] Zimbabwean Pastor Evan Mawarire of the #ThisFlag protest proved that online activism can spill offline with devastating effect. His online call for a peaceful nationwide "stay-away" protest on 6 July 2016 was echoed offline by individuals through text messaging and word of mouth resulting in an unprecedented one-day closure of schools, businesses and most government offices across the country. The disconcertingly empty streets spoke volumes.[42] In early December 2015 the online campaign #Zumamustfall was launched as a protest against President Jacob Zuma who many felt was responsible for South Africa's economic crisis.[43] The online movement quickly spilled offline in what was described as 'the biggest protest since the end of Apartheid in 1994'[44] as thousands marched the streets demonstrating against the President.[45]

IV. THE WEAKNESSES OF INTERNET ACTIVISM

Despite the euphoric optimism about the Internet as a tool for spreading liberal ideals and democracy, some remain sceptical about its role in furthering these ideals. The technology historian Melvin Kranzberg's first

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41 Nolle, 'Social Media and its Influence.'

42 Chloë McGrath, 'What Everyone's Getting Wrong About Zimbabwe's #ThisFlag Movement: It's not just on the internet and it's not just about President Mugabe', *Foreign Policy*, 21 July, 2016, http://foreignpolicy.com/2016/07/21/what-everyones-getting-wrong-about-zimbabwes-thisflag-movement/ (29 October 2017)

43 *BBC News*, 'Zuma Must Still Fall': South Africa reacts to economic troubles', 14 December 2015, http://www.bbc.com/ news/blogs-trending-35094322 (31 October, 2017)

44 Nolle, 'Social Media and its Influence.'

45 *BBC News*, #ZumaMustFall: South Africans march against Jacob Zuma', 16 December 2015, http://www.bbc.com/news/ world-africa-35111636 (31 October 2017)

law: "Technology is neither good nor bad, nor is it neutral"[46] encapsulates the arguments put forward by many of these cyber-sceptics although some apparently go further and argue that the Internet might in some ways be bad for democracy.

4.1 *Internet activism is slacktivism*

The term 'slacktivism', a combination of the words slacker and activism,[47] has been used to describe scenarios where vibrant activism online has limited real life impact. Malcolm Gladwell, in an article published in *The New Yorker*, compares today's Internet activism to the civil rights movement in America in the 1960s. Civil rights activists participating in sit-ins and demonstrations ran considerable risks such as arrests by authorities and attacks by vigilante white groups. He notes that 'Activism that challenges the status quo—that attacks deeply rooted problems—is not for the faint of heart.'[48] Despite these obstacles they were able to persevere because of what he terms 'strong-tie' connections. The participants had strong personal connections to the civil-rights movement. Many had close friends and family who were also active in the civil rights movement. Traditional high risk activism, he argues, relies on strong-tie connections. This however, is lacking in Internet activism. Social media platforms are built around weak ties. The American political commentator, Micah Sifry,

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46 Eli Pariser, *The Filter Bubble: What the Internet is Hiding from You*, (Penguin Books Ltd, USA, 2011)

47 *Christensen, Henrik Serup, 'Political activities on the internet: slacktivism or political participation by other means?' First Monday* 16, 2 - 7 February 2011, http://firstmonday.org/ojs/index.php/fm/article/view/3336/2767 (7 November 2017)

48 Malcolm Gladwell, 'Small Change: Why the revolution will not be tweeted', The New Yorker, 4 October, 2010, https:// www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell (29 October 2017)

in his book, *The Big Disconnect*,[49] notes that while the Internet has made it easier for people to find other likeminded individuals and thereby build bigger networks, it is also making it harder to create meaningful bonds with those people. Twitter followers may never have met each other and Facebook simply enables one manage acquaintances and thus the thousand Facebook 'friends' do not exist in real life.[50] The result, Gladwell argues, is that online activists are less likely to engage in risky protest actions offline. In 2011, inspired by the Arab Spring demonstrations, Ethiopians planned for a 'day of rage' slated for 28 May in Meskel Square in Addis Ababa in an attempt to awaken a similar reform movement in Ethiopia. The campaign took on the name and slogan: "Beka!" – meaning "enough" in Amharic. The campaigners relied heavily on Facebook with numerous Ethiopians changing their profile picture to the "Beka!" logo. Unfortunately on 28 May the Arab Spring spin-off in Ethiopia was a failure. Though thousands had confirmed attendance in different towns around the country, very few in fact turned up.[51] Ironically, six years earlier in a pre-social media era, it was reported that 1 million people or more had gathered in Meskel Square in Addis Ababa to protest against the government in the run up to the 2005 elections.[52] As the Internet researcher

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49 Micah L Sifry, *The Big Disconnect: Why the Internet Hasn't Transformed Politics (Yet)*, (OR Books, New York, 2014) p. 22.

50 Gladwell, 'Small Change.'

51 Terje Skjerdal,'Why the Arab Spring Never Came to Ethiopia' in Bruce Mutsvairo (ed), *Participatory Politics and Citizen Journalism in a Networked Africa: A Connected Continent*, (Palgrave Macmillan, London, 2016) p 77-89

52 *Ibid*

and cyber-sceptic, Evgeny Morozov, points out, 'Given how easy groups can form online, it is easy to mistake quantity for quality.'[53]

Evgeny Morozov goes further and questions the effectiveness of online activism even when it appears to result in offline action. He argues that while tweets and Facebook posts may coincide with crowds gathering in the streets, this does not necessarily imply a causal link between the two. As he puts it in his book *The Net Delusion*, 'If a tree falls in the forest and everyone tweets about it, it may not be the tweets that moved it.'[54] Evgeny Morozov argues that much of the political activism facilitated by social media has nothing to do with the participant's commitment to ideas and politics in general and is in fact geared towards impressing his or her friends.[55] Online activism is simply a comfortable way of pretending to care and participants aim to receive social acknowledgement and praise from peers on the same network rather than achieve any real political or social change.[56]

Morozov views online activism as 'the ideal type of activism for a lazy generation.'[57] He argues that the availability of the slacktivist option may in fact push those who might have confronted an authoritarian regime with physical demonstrations and mobilisation to embrace the lazy online option instead. In this case, he argues, rather than aiding in the spread of

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53 Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom*, (Public Affairs, Philadelphia, 2011) p 187
54 *Ibid* p 16
55 *Ibid* p 186
56 Evgeny Morozov, 'Foreign Policy: Brave New World Of Slacktivism', National Public Radio, 19 May 2009, http://www.npr.org/templates/story/story.php?storyId=104302141 (29 October 2017)
57 *Ibid*

democracy, the Internet might in fact be a hindrance.[58] Morozov suggests that the publicity gains obtained through Internet activism may not be worth the organizational losses that traditional activist entities are likely to suffer when ordinary people turn away from conventional physical forms of activism and embrace more "slacktivist" forms which, while being more secure, are less effective.[59] Indeed, Morozov argues that the Internet might in fact be a tool for de-politicization. It is still used by most people as a means of entertainment. Young people may find comfort in their online movies, videos and memes and ignore the harsh political realities of the physical world. Young netizens are more likely to prefer online entertainment to reports documenting human rights abuses by their own governments.[60]

In *The Big Disconnect*, Micah Sifry notes that online activism is severely hampered by fleeting digital attention spans.[61] Content that goes viral online tends to move in 'fireworks-to-fizzle trajectories'[62] because social media users flit from one story to another drawn to their friends' changing interests and ever changing trending topics.[63] One of the best examples of this is the *Kony 2012* documentary saga. *Kony 2012* was a documentary released on 5 March 2012 by the humanitarian group Invisible Children that described the atrocities committed by, and efforts to capture, the Ugandan rebel leader Joseph Kony and his Lord's Resistance Army. The

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58 *Ibid*
59 *Ibid*
60 Morozov, *The Net Delusion* p 70
61 Sifry, *The Big Disconnect* p 22
62 Brian Stelte, 'From Flash to Fizzle', *New York Times*, 14 April, 2012, http://www.nytimes.com/2012/04/15/sunday-review/the-news-cycle-from-fireworks-to-fizzle.html?pagewanted=all (2 November 2017)
63 Sifry, *The Big Disconnect* p 22

30 minute video quickly went viral becoming a global sensation as the most watched YouTube video at the time[64] having received 100 million views in a matter of days.[65] The U.S. Senate quickly passed a bi-partisan resolution calling for Kony's capture.[66] The video also included a call to action dubbed 'Cover the Night' slated for April 20 intended to make Kony's name so notorious that his capture before the end of 2012 would be guaranteed. Volunteers were called to paper cities across the globe with posters demanding his arrest. However on April 20, just six weeks after the video had been released, the Cover the Night offline action was a dismal failure with hardly any people participating around the world.[67] Even the 8 minute video released by four U.S senators on 19 April urging young Americans to participate in the 'Cover the Night' had little to no effect on the turnout.[68]

In their analysis of the weaknesses of their abortive #Jan30 protest, students in Sudan, who had organised the protest online, pointed out faults that suggested slacktivism. It was claimed for instance that, 'You cannot expect an average Sudanese citizen to protest on the 30th of January after

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64 Mark Molloy, 'KONY 2012: Campaign shedding light on Uganda conflict a huge online success', 7 Metro March 2012, http://metro.co.uk/2012/03/07/kony-2012-campaign-shedding-light-on-uganda-conflict-a-huge-online-success-342668/ (2 November 2017)

65 *Ibid*

66 Scott Wong, 'Kony captures Congress' attention', *Politico*, 22 March 2012, https://www.politico.com/story/2012/03/ kony-captures-congress-attention-074355 (2 November 2017)

67 Rory Carroll, 'Kony 2012 Cover the Night fails to move from the internet to the streets', *The Guardian*, 21 April 2012, https://www.theguardian.com/world/2012/apr/21/kony-2012-campaign-uganda-warlord (2 November 2017)

68 Athena Jones, 'Senators invite Americans to sign anti-Kony legislation', *CNN*, 19 April 2012, http://edition.cnn.com/2012/04/19/politics/us-senators-kony/index.html (2 November 2017)

he just got his salary. The satisfaction of that will cover up the feeling of injustices and humiliation.' Similarly, it was claimed that protesters could not participate at 11:00am or 11:30am when everybody is either in the middle of their job or on the way to it. It was also claimed that students were constrained with lecture attendance.[69]

4.2 *Internet activists are vulnerable to surveillance*

Another weakness of Internet activism is that it leaves activists vulnerable to surveillance. The founder of WikiLeaks, Julian Assange, has acknowledged that while the Internet has been used to 'hold repressive governments…to account, it is also the greatest spying machine the world has ever seen.'[70] Some forms of surveillance are obvious. Statements, videos and pictures posted by activists using their social media accounts leave them vulnerable to state agents who can easily see them and trace the activists. Images and videos of protesters on the streets posted for encouragement on social media can even be used to track down the protesters. In northern Sudan anti-government groups on social media were penetrated by government agents when they made arrangements to meet each other during demonstrations against President Omar el-Bashir and many were arrested.[71] However, other forms of surveillance are less obvious. Mobile phone users are constantly having their position

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69 Patrick Meier, 'Civil Resistance: Early Lessons Learned from Sudan's #Jan30' *iRevolution*, 31 January 2011 https:// irevolutions.org/2011/01/31/civil-resistance-sudans-jan30/ (29 October 2017)

70 *The Guardian*, 'Julian Assange tells students that the web is the greatest spying machine ever', 15 March 2011, https:// www.theguardian.com/media/2011/mar/15/web-spying-machine-julian-assange (29 October 2017)

71 Jamali, *Online Arab Spring.*

triangulated by their mobile network operator. If there is an unregulated or corrupt relationship between the state and mobile network operators, the Internet may be compromised to enhance the surveillance capabilities of repressive regimes.[72] African governments have even been known to use sophisticated software to track dissidents. A journalist who had been arrested in South Sudan reported that during his interrogation recordings of him in intercepted phone conversations and emails he had sent were presented.[73] In March 2015 journalists working with the Ethiopian Satellite Television based in the United States that broadcasts independent news about Ethiopia reported that the Ethiopian government was attempting to use Internet spy tools to eavesdrop on them. An email with an attachment from an unknown email address claiming to have information about the upcoming elections was received. The journalists wisely forwarded the email to cyber security experts who determined that there was in fact surveillance malware in the attachment.[74]

4.3 *Internet activism can be used for harm*

Western observers often project liberal democratic qualities to all Internet activists which in reality is certainly not the case.[75] They tend to view any

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72 Comninos, 'Twitter revolutions and cyber crackdowns.'

73 Jill Craig, 'Social Media Crackdown: The New Normal for Africa?', *VOA*, 25 August 2016, https://www.voanews.com/a/ social-media-crackdown-new-normal-africa/3479435.html (31 October 2017)

74 Andrea Peterson, 'Spyware vendor may have helped Ethiopia target journalists–even after it was aware of abuses, researchers say', *The Washington Post*, March 9, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/03/09/ spyware-vendor-may-have-helped-ethiopia-spy-on-journalists-evenafter-it-was-aware-of-abuses-researcherssay/?utm_term=.4969d273ac44 (26 October 2017)

75 Ang, Yuen Yuen, 'Authoritarian Restraints on Online Activism Revisited: Why 'I-Paid-A-Bribe' Worked in India but Failed in China' *Comparative Politics*, 47, 1, (November 2, 2013). pp. 21-40

interference with Internet use as a crime against democracy. The ridiculously sanguine view of all activists in authoritarian societies as crusaders against oppressive and repressive regimes is dangerously naive and delusional. In an analysis of social media use by the Greek Nazi 'Golden Dawn' (GD) party, Kompatsiaris and Mylonas note that Web 2.0 platforms have enhanced easy access to and spread of decontextualised information and give visibility and an aura of 'righteousness' to otherwise questionable discourses such as advocacy for fascist and racist policies.[76] The researchers further note that such movements attempt to normalise their violent and racist attitudes and agendas using social media by posting comments, videos and pictures positioning themselves as heroes while vilifying their enemies.[77] In this way the Internet makes visible extreme discourses and practices that mainstream media would not have promoted.[78] The Internet is simply a tool like all previous communication tools that can be used to mobilise people either to great positive efforts or to great destruction. The devastating effects of modern communications technology were seen on the African continent in 1994 when *Radio*-Television Libre des Mille Collines (RTLMC) was used to demonise the Tutsi thereby preparing the population for genocide.[79] Similarly hate speech in the form of widely disseminated text messages threatening violence is believed to have fuelled the Kikuyu and Luo conflict in Kenya

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[76] Panos Kompatsiaris and Yiannis Mylonas, 'The Rise of Nazism and the Web: Social Media as Platforms of Racist Discourses in the Context of the Greek Economic Crisis', in Daniel Trottier and Christian Fuchs (eds), *Social Media, Politics and the State: Protests, Revolutions, Riots, Crime and Policing in the Age of Facebook, Twitterand YouTube*, (Routledge New York 2015) p 109

[77] *Ibid*

[78] *Ibid*

[79] *Rwandan Stories*, 'Hate radio prepared the Rwandan people for genocide', http://www.rwandanstories.org/genocide/ hate_radio.html (30 October 2017)

in 2008. The messages were so prolific that the Kenyan authorities considered shutting down the text messaging services of the mobile phone networks.[80] Hate speech inciting violence between ethnic groups in Kenya was again present in the 2017 election and this time was spread through platforms such as Facebook and Twitter.[81] In January 2010 the BBC reported that the violence in Jos, a city located in Nigeria's middle belt, in which over 300 people died, was fuelled by hundreds of text messages that were circulated creating tension between Christians and Muslims.[82] The Internet's powerful networking abilities can easily be used to galvanise masses of people into genocide and similar acts and worse yet in a more subtle and harder to detect manner.

4.4 *Internet activism tends to be elitist*

Ideas and positions expressed on social media in Africa may not represent the true feelings of the majority. Internet use is still not widespread in many African countries. As a result, it is mainly the middle class elite who have access to the Internet and these tend to have similar views and priorities as a social class. Therefore the views they express online may be theirs alone as a social class and not those of the whole country. In a study of South African journalist use of Twitter in Johannesburg, Glenda Daniels notes that social media in South Africa is 'a rose not yet in full bloom'. It 'is a

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80 *NPR*, 'Text Messages Used to Incite Violence in Kenya', 20 February 2008, http://www.npr.org/templates/story/story. php?storyId=19188853 (25 October 2017)

81 Keith Somerville, 'Kenya: Hate Speech Raises Its Ugly Voice Ahead of 2017 Elections', *Newsweek*, 22 June 2016, http:// www.newsweek.com/kenya-hate-speech-raises-its-ugly-voice-ahead-2017-elections-473064 (25 October 2017)

82 *BBC News*, 'Nigeria text messages 'fuelled Jos riots'', 27 January 2010, http://news.bbc.co.uk/2/hi/africa/8482666.stm (24 October 2017)

rather elite public sphere engagement model in action' rather than 'a Mouffian robust and more inclusive deepening of democracy at work.'[83] Bruce Mutsvairo notes that online activism can only be effective when everyone is digitally literate which is far from the case in any African country. He notes that Internet activism tends to be elitist in nature and disconnected from the feelings and immediate needs of the masses most of whom are in rural areas. He notes that '[e]litists want to see everyone participating online…but they have no idea that many in the country are struggling to climb out of crushing poverty. Potential protesters need to feed their stomachs first before joining online campaigns.'[84]

The dichotomy between the online and the offline world was highlighted in the first referendum on constitutional amendments held after the Egyptian uprising in March 2011. The majority opinion by Egyptian social media activists on social media was that the result would be an overwhelming 'no'. The end result was that more than 77 per cent voted yes. It became apparent to activists that what was discussed online did not necessarily tally with what was discussed in other spaces.[85]

4.5 *Internet activism is vulnerable to online government propaganda and control of the Internet*

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83 Glenda Daniels, 'South African Arab Spring or Democracy to Come? An Analysis of South African Journalists' Engagement with Citizenry through Twitter', in Mutsvairo (ed), Citizen Journalism in a Networked Africa.

84 Bruce Mutsvairo, 'Can Robert Mugabe be tweeted out of power?' *The Guardian,* 26 July 2016, https://www.theguardian.com/global-development-professionals-network/2016/jul/26/robert-mugabe-grassroots-protest-zimbabwe-social-media (29 October 2017)

85 Sara Salem, 'Creating Spaces for Dissent: The Role of Social Media in the 2011 Egyptian Revolution', in Trottier and Fuchs, *Social Media, Politics and the State*

Just like individuals and groups can use the Internet to drum up their causes, governments can use the Internet to spread their propaganda. Considering that governments usually have more resources than these individual and group activists, when they choose to use the Internet for such purposes it can be done to great and far reaching effect. An example was in 2011 where, in an ironic twist, while the Arab world was being shaken by the Facebook-Twitter inspired revolutions, students in Sudan with government encouragement took to the Internet to defend status quo declaring that they are unwilling to protest.[86] Moreover in countries where the people are paranoid about foreign intervention, Internet activists are easily discredited by accusations of being funded by foreign government agencies. Given the Internet's cross-border capabilities, such accusations are quite believable.[87]

Those who extol the inherent freedom of the Internet forget that governments have considerable direct and indirect control over it. In Africa it is relatively easy for governments to order Internet Service Providers (ISPs) to block access to critical websites and online platforms. Social media in particular is a frequent victim. However, such restrictions can be overcome by various means. A 2011 study by the Berkman Klein Centre for Internet and Society[88] noted the tools being used to circumvent Internet

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86 Deepa Babington, 'Sudan's cyber-defenders take on Facebook protesters', *Reuters,* 30 March 2011, http:// www.reuters.com/article/us-sudan-internet-feature/sudans-cyber-defenders-take-on-facebook-protesters-idUSTRE72T54W20110330 (29 October 2017)

87 Morozov, The Net Delusion p. 122.

88 Hal Roberts, Ethan Zuckerman and John Palfrey, '2011 Circumvention Tool Evaluation', *Berkman Centre for Internet and Society*, August 2011, https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/2011_Circumvention_Tool_Evaluation_1.pdf (30 October 2017)

restrictions and surveillance such as simple web proxies like TOR (The Onion Router), Virtual Private Networks (VPNs) and HTTP/SOCKS. VPNs have been used in many African countries to overcome social media blockades.[89] In Uganda in the 2016 February elections access to social media was blocked, however, many Ugandans were able to circumvent the block with VPN software.[90] The drawback is that Internet circumvention tools tend to be expensive, require a level of technical knowledge and are subject to abuse, for instance, by criminals who use tools like TOR to avoid detection when committing cybercrimes.[91]

Internet networking companies have shown a willingness to aid users in circumvention of government imposed restrictions in authoritarian regimes. To its credit, when Facebook was alerted that the Tunisian government was hacking into activists' accounts during the Arab Spring, the company took steps to protect the accounts.[92] When the Egyptian government blocked the Internet in early 2011, Google in collaboration with another tech company called SayNow created a way to post messages

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89 *BBC News*, 'How African governments block social media' 25 April 2016, http://www.bbc.com/news/world-africa-36024501 (30 October 2017)

90 Jill Craig, 'Social Media Crackdown: The New Normal for Africa?', *VOA*, 25 August 2016, https://www.voanews.com/a/ social-media-crackdown-new-normal-africa/3479435.html (31 October 2017)

91 Ethan Zuckerman, 'Internet Freedom: Beyond Circumvention', 22 February 2010 http://www.ethanzuckerman.com/ blog/2010/02/22/internet-freedom-beyond-circumvention/ (31 October 2017)

92 Alexis C. Madrigal, 'The Inside Story of How Facebook Responded to Tunisian Hacks', *The Atlantic*, 24 January 2011, https://www.theatlantic.com/technology/archive/2011/01/the-inside-story-of-how-facebook-responded-to-tunisianhacks/70044/ (31 October 2017)

to Twitter by making telephone calls to a specified number and leaving a message in what it dubbed a speak-to-tweet service.[93]

The emphasis on circumvention tools used to bypass the cyber-wall put up by repressive regimes has been criticised. Evgeny Morozov roundly condemns the popular "cyber-wall" metaphor used to describe the repressive regime's efforts to block access to particular websites arguing that it falsely suggests that 'once certain digital barriers are removed, new and completely different barriers won't spring up in their place—a proposition that is extremely misleading when Internet control takes on multiple forms and goes far beyond the mere blocking of websites.'[95] In an article titled *Why the Arab Spring Never Came to Ethiopia,* Terje Skjerdal argues that contrary to the claims that Internet activism does not depend on formal government policy, restrictive societies have cultural, technological and economic barriers beyond just the 'cyber-wall' that might be imperceptible to an outsider.[94] Restrictive laws and policies on Internet usage do have a chilling effect on the development of an Internet activism culture even if websites are not blocked or circumvention is available. Whereas the cyber-activism culture was well built and established in Egypt by the time of the Arab Spring going all the way back to 2004,[95] in Ethiopia, no such culture has developed. The political climate is so repressive that the number of news blogs in Ethiopia appears to be

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93 'Total internet blackout in Egypt', *Al Jazeera*, 1 Feb 2011, http://www.aljazeera.com/news/middleeast/2011/02/2011210459908692.html (1 November 2017) 95 Morozov, The Net Delusion p 45

94 Skjerdal, 'Why the Arab Spring Never Came to Ethiopia'

95 Sara Salem, 'Creating Spaces for Dissent: The Role of Social Media in the 2011 Egyptian Revolution', in Trottier and Fuchs, *Social Media, Politics and the State* p 171-188

dwindling rather than increasing.[96] In Tanzania, under the country's Cybercrime Act, it is criminal to insult the president online.[97] In 2016 a man was sentenced to three years in prison and a $3,190 fine for insulting the president.[98] The law also criminalises online publication of information which is 'false, deceptive, misleading or inaccurate.'[99] In October 2015, two Tanzanians were prosecuted for comments made on Facebook under the Cybercrime Act. One, a technology student, had claimed on Facebook that the country's Chief of Defence Forces had been hospitalized with food poisoning. The second had made a statement on Facebook that the Prime Minister 'will only become a gospel preacher.'[100] In September 2016 five other people were prosecuted for comments made on Facebook and WhatsApp.[101] One of them had simply criticised the police on Facebook claiming that they focused on opposition demonstrators instead of criminals. 'While they are preparing to fight the opposition, criminals are preparing to commit crime,' he wrote.[102]

The emphasis on circumvention tools stems from a view of authoritarian regimes as inept bumblers who have an irrational fear of the Internet, do

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96 Skjerdal, 'Why the Arab Spring Never Came to Ethiopia.'

97 Ndesanjo Macha, 'Tanzania's Cybercrime Act Makes It Dangerous to "Insult" the President on Facebook', 18 April 2016, https://advox.globalvoices.org/2016/04/18/tanzanias-cybercrime-act-makes-it-dangerous-to-insult-the-president-onfacebook/

98 Lily Kuo, 'Tanzania is threatening more citizens with jail for insulting the president on social media', *Quartz Africa*, 15 September 2016, https://qz.com/782239/five-tanzanians-were-charged-with-cybercrime-for-insulting-president-john-magufuli-on-social-media/ (31 October 2017)

99 *Ibid*

100 *Ibid*

101 *Ibid*

102 Rosina John, 'Five charged with insulting Magufuli', *The Citizen*, 15 September 2016, http://www.thecitizen.co.tz/News/ Five-charged-with-insulting-Magufuli/1840340-3381718-qbmx20z/index.html (1 January 2018)

not understand how it works and seek only to block it. This is naïve. Governments around the world and in Africa are adapting more sophisticated ways to mask their control over the use of the Internet. The government of Zimbabwe has contemplated simply creating its own social network sites which can easily be monitored.[103] This is not a chimerical dream. China has its own social network site which has proved to be popular. Other governments are simply making website blocks more difficult to detect. In 2016 when the Internet was blocked in Congo-Brazzaville, the communications minister denied this was happening via a tweet (as evidence that Twitter was still functioning). It soon became apparent that the order to shut down the Internet issued by the government had a list of phone numbers attached that were to remain connected-including the minister's.[104] It has been claimed that some governments simply slow down the Internet deliberately. For example it was reported that in the Kenyan 2013 election and the aftermath of the Garissa attack in 2015 the Internet was deliberately slowed down by the government.[105]

Goldsmith and Wu in their 2006 book, *Who Controls the Internet*, argue that the extent of government control of Internet content within their borders is grossly underestimated. The authors cite China as an example of 'what a government that really wants to control Internet communications can accomplish.'[106] Governments, they argue, can actually use the Internet as a tool for political control giving the lie to the

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[103] *BBC News*, 'How African governments block social media', 25 April 2016, http://www.bbc.com/news/world-africa-36024501 (30 October 2017)
[104] *Ibid*
[105] Craig, 'Social Media Crackdown'
[106] Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of Borderless World*, (Oxford University Press, New York, 2006) p 89

idea of the Internet as liberation technology.[107] The Chinese government Internet control is aimed at creating 'an Internet that is free enough to support and maintain the world's fastest growing economy, and yet closed enough to tamp down political threats to its monopoly on power.'[108] The fact that ISPs are private profit seeking entities that operate in a legal regulatory regime created and controlled by the very authoritarian governments the Internet is supposed to oppose is ignored. Authoritarian regimes can extend their control to the Internet by placing restrictions on ISPs. In Zimbabwe the government had a legal monopoly on telecommunications services until this was declared unconstitutional.[109] The government then adopted complex legal machinery for the processing of applications for telecommunications licences which still favoured monopoly conditions until these too were declared unconstitutional.[110] Authoritarian regimes may develop their digital communication infrastructure specifically to extend state power.[111] In Eritrea the only telecommunications company is the state-run EriTel which is notorious for signal jamming and tight online control. All Internet service providers must use the government-controlled gateway. Access to the Internet in the country is extremely limited and available only through slow dial-up

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107 *Ibid*

108 *Ibid* p 89

109 *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation, Attorney General Intervening* [1996] 4 LRC 489

110 *TS Masiyiwa Holdings (Pvt) Ltd and Another v Minister of Information, Posts and Telecommunications* [1997] 4 LRC 160

111 Edwards, Frank and Howard, Philip N. and Joyce, Mary, *Digital Activism and Non-Violent Conflict* (2013), Available at SSRN: https://ssrn.com/abstract=2595115 (1 January 2018)

connections. According to the UN less than 1 percent of the population goes online.[112]

The condemnation of rigid government control of the Internet in Africa by western liberal democracy governments rings hollow as these same governments appear to exert much the same level of control over the Internet in their jurisdictions. Western governments seek to regulate the Internet out of concerns for terrorism and cybercrime, however, by doing so they legitimise similar efforts—done primarily for political reasons—undertaken by authoritarian governments.[113] The same western governments and Internet theorists who extol the virtues of the Internet, chiefly, how the free dissemination of information will enable people hold their governments accountable, and roundly condemn any attempt to control online content, decry the rise of harmful content on the Internet such as fake news.[114] The Obama regime's extraordinary efforts to shut down the document archive site WikiLeaks including pressuring Internet Service Providers and webhosts to block access and funding to the site because it had information prejudicial to the government interests involved the same rhetoric of 'national security' that African governments use when they block websites in their countries. It is the same American regime that censured other countries for restricting such a 'critical tool for advancing democracy'. [115]

4.6 *Self-selection and filtering by ISPs creates polarisation*

[112] *CPJ*, '10 Most Censored Countries,'; *CCEIA* 'Eritrea: An Exiled Nation'
[113] Morozov, The Net Delusion p 224
[114] Ibid p 242
[115] Clinton, 'Remarks on Internet Freedom'

The Internet enables the user to pick his or her own network of communication and self-select their content in a way that avoids any disagreeable ideas or interpretations. The users of previous technology had to simply tune out the information with which they did not agree for example changing the channel on television or the frequency on a radio. The Internet however allows them to avoid any contrary information in its entirety.[116] Social media further compound this by placing the user in a network of like-minded friends and family that will often hold similar political views. Those they disagree with can easily be unfriended or blocked which allows users to avoid cognitive dissonance, or any mental discomfort they would feel when confronted or exposed to information that is contrary to their preconceived notions and ideas.[117]

Since December 2009 Google uses details such as where the user is logging in from, the browser being used and what the user had searched for before to make guesses about who the user is and what he or she is likely to be interested in. The search results are therefore customised to each user.[118] In effect this means that searching for a controversial term on the site might bring diametrically opposed results for those on different sides of the controversy. Many other popular sites online including news sites use data-laden cookies and personal tracking beacons so as to keep track of each user's preferences and provide more customised information for instance a sports fan is would therefore be more likely to find sports news.[119] This

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[116] Jason Gainous and Kevin M. Wagner, *Tweeting to Power: The Social Media Revolution In American Politics,* (OUP, New York, 2014) p 13
[117] Gainous and Wagner, Tweeting to Power p 14
[118] Pariser, The Filter Bubble
[119] *Ibid* p 8

creates a situation where 'personalization filters serve up a kind of invisible auto-propaganda, indoctrinating us with our own ideas, amplifying our desire for things that are familiar and leaving us oblivious to the dangers lurking in the dark territory of the unknown.'[120]

V. CONCLUSION

The value of the Internet as a tool for activists is undeniable. Though not necessarily better informed of current affairs, the public is certainly more informed about them as a result of the Internet. Mobilisation for different causes has been made easier and cheaper. However, it has also led to creation of a breed of armchair activists whose most radical action is changing their profile picture on a social media account. The Internet is still primarily a tool for entertainment for most people not political discourse. There are still many hurdles to jump before it can truly be considered liberation technology. Until then online activists should use it with at least some reservation. As Evgeny Morozv put it, 'Just because you can mobilize a hundred million people on Twitter…does not mean you should; it may only make it harder to accomplish more strategic objectives at some point in the future.'[121]

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[120] *Ibid.*, p. 13.
[121] Morozov, *The Net Delusion* p. 196.

A LEGAL REGIME PLAYING CATCH-UP: HOW MOBILE MONEY IS EVOLVING FASTER THAN EFFORTS TO REGULATE IT IN UGANDA

Ankunda Emmanuel*

ABSTRACT

Easy transfer of money and access to financial services are imperatives for financial and economic growth. Since its invention and adoption in the Philippines in 2000, the 'mobile money' system has gone on to become the fastest growing money transfer service in Uganda. But for all its benefits and challenges, mobile money continues to evolve faster than efforts at clear and comprehensive legal regulation, creating an endless game of catch-up and exposing the financial system to potential downsides.

I. INTRODUCTION

Unlike jurisdictions such as the Philippines and Tanzania, the mobile money service in Uganda lacks a comprehensive legal and regulatory framework.

The service falls within two distinct and independent sectors of regulation— telecommunications and Finance & Banking. This overlap creates confusion regarding the law applicable and feeds the multiplicity of ministries and government agencies involved, complicating oversight role distribution.

This paper examines the adequacy of the regulatory framework governing mobile money services in Uganda. Comparison is made with other jurisdictions regarding their legal regimes on the same and

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recommendations made on how to fill the existing gaps in the applicable law in Uganda.

II. THE ORIGIN OF MOBILE MONEY

Mobile money is one of the success stories of innovations triggered by the computer age in the Ugandan Finance sector today. With the liberalisation of the Ugandan economy came a number of digital innovations including but not limited to ATM technology, mobile banking and e-banking. It was indeed this liberalisation that encouraged telecommunication companies to take commercial advantage of the proliferation of cell phones in the country's rural and urban and open up mobile money services in Uganda.

Mobile money traces its origins in far South East Asia in the Philippines.[1] In 2000, Smart Communications, a telecommunications company in Philippines launched, in cooperation with Bank De Oreo, the first mobile money service under the brand name SMART money.[2] The service which used a SIM tool kit enabled customers to buy airtime as well as send and receive money domestically. This was followed in 2004 by a similar launch by Globe Telecomm of another mobile money service under the brand name G-Cash.[3] The service had a similar suit of functionality entirely using a mobile phone.

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1 Mobile Eco System Forum ' 10 Things You Need To Know About Philippine Mobile Money Market' 2014 https://mo bileecosystemforum.com/2014/05/30/10-things-you-need-to-know-about-the-philippine-mobile-money-market/ accessed 27th March 2018

2 Company Website, 'SmarT Money' https://smart.com.ph/About/profile/innovations-and-awards/smart-money Accessed 27th march 2018

3 Rizza Maniego, ' Mobile Money in the Philippines- Market, the Models and Regulation' https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/06/Philippines-Case-Study-v-X21-21.pdf Accessed 27th march 2018

For East Africa, mobile money was first used in Kenya in 2007 following the launch of the M-Pesa service by Safaricom. Very soon after its inception, M-Pesa quickly spread and by 2010, the service had become the most successful mobile phone based financial service in the developing world. Statistics from 2012 show that a stock of about 17 million M-Pesa accounts had been registered in Kenya while by June 2016, a total of 7 million M-Pesa accounts had been opened by Vodacom in neighbouring Tanzania.

In Uganda, the service was introduced by MTN Uganda in March 2009, apparently as a customer retention strategy to ward off intensifying competition from Warid Telecomm, a new entrant in the market which preferred an aggressive on and off discounting to build a customer base.[4] To date, four mobile network operators (MNO's) provide mobile money services and these are MTN Uganda through MTN mobile money, Airtel Uganda through Airtel Money, Africell Uganda through Africell Money and Uganda Telecomm through M-Sente.[5] The passage of time however saw the entry of other non MNO's such as MCash, Ezee Money and smart money onto the Ugandan Mobile money market.

III. USE, FEATURES AND BENEFITS OF THE SERVICE

Since its introduction on the Ugandan financial market, the use of mobile money has spread with uninterrupted ease. The number of registered mobile money subscribers in Uganda for instance grew from an estimated

[4] Rory Macmillan, "The evolution of Regulation in Uganda's Mobile Money sector," 2016. Retrieved at: www.macmillankeck.pro/media Accessed 5th March 2018

[5] Rory Macmillan ibid

600,000 in 2009 when the service was introduced to over 21 million in 2015.[6] While the use of mobile money remains primarily a person to person transfer, the service has evolved to enable customers make payments usually for utilities. An MTN report shows for instance that by 2015, the majority of utility payments were carried out using MTN Uganda mobile money services which facilitated an average of 71.4% of all utility payments monthly[7]. Other services offered by mobile money include the remote purchase of airtime, payment of school fees, University fees, taxes, parking, insurance, premiums, international remittances and savings.

2016 saw the launch of the mobile savings and loans by MTN Uganda in partnership with the Commercial bank of Africa. The product operates by allowing MTN Uganda mobile money customers to start a savings account from as little as UGX 50 million and earn an interest of between 2% and 5% depending on the amount saved. The interest on the savings is accrued and paid quarterly and the customer can schedule to deposit automatically on a daily, weekly or monthly basis.

Mo-Kash allows customers to apply for short-term loans of between UGX 3000 and UGX 1 million depending on the customer credit limit which is determined with reference to a customer's usage of other MTN Uganda services. Customers do not need to open a bank account to access the Mo-Kash service but can simply register for the service over the mobile money platform. Activation and transactions between Mo-Kash and MTN mobile

[6] MTN Uganda (2015), MTN Uganda is the leading financial services provider with its mobile money offering. [Media release.] Retrieved from http://www.mtn.co.ug/newworld/pressreleases/Documents/2015/October/Mobile%20Money%20 Thematic%20-%20Press%20Release.pdf

money are free for both savings and loans but loans attract an interest rate of 9% for a period of 30 days. Thereafter a penalty of a further 9% may be lodged against a defaulter.[7]

IV. PREREQUISITES FOR THE OPERATION OF MOBILE MONEY OPERATORS (MNO'S)

The bank of Uganda only approves mobile money operation when this is done in partnership with a Supervised Financial Institution (SFI).[8] The MNO therefore finds a bank they can partner with and the bank in turn applies for a letter of no objection from the central bank to offer mobile financial services. The letter is based on the legal agreement between the MNO and the bank and includes all the details of the partnership. The mobile money service provider is required to hold an escrow account in the partner SFI having the equivalent of all the mobile money that has been issued to their customers and agents.[9]

Any person or entity intending to offer mobile money services is required to adhere to certain conditions. The person must open up a limited liability company for this purpose. He must, as already noted partner with a licensed financial institution, proof of the person's financial position must be given, a business plan and risk management proposal and must have in place appropriate and tested technology systems.[10]

The central bank reserves the right to grant or deny the letter of no objection but upon application from an SFI, BoU takes into consideration

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7 Rory Macmillan ibid
8 Mobile Money Guidelines 2013 S (6) (a) (ii)
9 Rory Macmillan *ibid*
10 Mobile Money Guidelines 2013 S (6)

a number of matters which guide it on whether to grant or deny the letter of no objection. The arrangement governing the escrow account must for instance ensure that the licensed institution has authority to distribute the funds in the escrow account to mobile account holders in the case of insolvency or bankruptcy of the mobile money service provider. The licensed institution and mobile service provider must be able to reconcile the balances of the mobile money accounts and the escrow account on a daily basis and the technology proposed to run the mobile money service must be appropriate and thoroughly tested. The partnering licensed institution is required to ensure that the mobile money service provider has adequate measures to prevent money laundering and terrorist financing as well as ability to mitigate identifiable risks and ability to comply with the requirements on customer protection. The considerations are not exclusive and the Central bank may take into account any other matter it may deem necessary.[11]

Upon satisfaction of these requirements, a letter of no objection is granted to the SFI and the mobile money service is approved as a product of the licensed institution partnering with a mobile money service provider.[12]

V. EXISTING REGULATORY REGIME FOR MOBILE MONEY

Mobile money has passed as a great example of how a country can find creative solutions to building an enabling environment for innovation but issues remain, particularly regarding the adequacy or lack of its regulatory

[11] Mobile Money Guidelines 2013 S (6)
[12] Rory Macmillan, *op. cit*.

regime. The industry is overseen by two regulatory authorities—the Central Bank of Uganda and the Uganda Communications Commission.[14] The only regulation passed by far specifically targeting mobile money services is the Mobile Money Guidelines issued by the bank of Uganda in 2013. The guidelines were issued some four years past the emergency of mobile money services on the Ugandan market in response to demands for regulation of a mushrooming financial service that barely had any regulatory structure.

The Mobile Money Guidelines themselves have raised concerns with regard to the ambiguity surrounding their legality but it can be thought that as noted in the background to the Guidelines that mobile money along with mobile banking pertain to the larger area of mobile financial services, the Central bank in issuing the same acted within the powers granted to it under the Bank of Uganda Act to formulate and implement monetary policy directed towards economic objectives of achieving and maintaining economic stability.[13] The Guidelines have since 2013 been welcomed and treated as generally binding.[14]

By far, the Mobile Money Guidelines 2013 remain the only regulation having the force of law and regulating the Mobile money service. This is partly down to the fact that the National Payment Systems Bill 2016 which would govern mobile financial services has been drafted but has not gone through parliamentary approval process. A study was made on the need for a National Payment Systems Act and this was intended to address the challenges arising from the absence of a specific legislation that regulates

[13] The Bank of Uganda Act, Section 4 (1).
[14] Rory Macmillan, *op. cit.*

electronic payment systems. The study found the law necessary because of the increase of mobile money transactions, internet banking and credit / debit cash transactions in Uganda. The absence of the National Payment Systems Act therefore leaves the 2013 Guidelines as the only piece of legislation specifically targeting mobile money services.

The Guidelines of 2013 while when passed, an important and necessary tool to provide some sort of regulation for an area that had been largely ignored, the same cannot be said to be an adequate and long term regulatory framework to govern what has now become a very important financial service for the average person and the economy. The inadequacy of the guidelines is very evident in section 14 which treated the Guidelines as only an interim measure for enabling the operation of the mobile money service. The Guidelines tasked the Bank of Uganda in conjunction with other stakeholders to create a comprehensive regulatory framework through the necessary legal and regulatory changes but the same has not been done to date.[15]

VI. REGULATORY CHALLENGES AND SHORTCOMINGS

Mobile money services have presented regulatory challenges because they blur two distinct and independent sectors of regulation, that is to say the Telecommunications and Financial Banking Sectors. The Uganda Communications Act and the Financial Institutions Act both do not agree on a single or dual licensing framework and because of this, regulation of mobile money services involves an overlap between multiple ministries and government agencies and this has the damning effect of further

[15] Mobile Money Guidelines, 2013, S (14).

complicating the oversight needed. Like one researcher has observed, this situation arose because technology evolved faster than the regulatory regime which then had to play catch up.[16] The Guidelines of 2013 however attempt to delimit responsibilities to either regulating entity. Section 7(1) puts the Bank of Uganda in charge of approval and supervision of mobile money services which in turn confers on it the power to issue directives regarding mobile money operations. Section 7(2) on the other hand gives the Uganda Communications Commission responsibility to license and supervise MNO's. The UCC is required to ensure that the telecommunication networks on which mobile money platforms operate are effective. But as seen above, the guidelines were only meant to be an interim measure pending the enactment of more specific law. Macmillan has suggested the functional separation of mobile money services from mobile telecommunications.[17]

Like with most trades, competition challenges also present an issue for mobile money. There is no substantive legislation on competition in Uganda to date and although regulation is made within both the UCC Act and Mobile Money Guidelines of 2013, studies have shown that in practice, the emergency of dominant players can lead to concentration of the market often leading to and encouraging anti-competitive behaviour.[18] The UCC is mandated by the Communications Act no 1 of 2013 to undertake a number of functions in relation to licensing tariff regulation,

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16 Macmillan, R. (2016). Digital financial services: Regulating for financial inclusion. GSR16 Discussion Paper. Geneva: International Telecommunication Union (ITU). Retrieved from https://www.itu.int/en/ITU-D/Conferences/GSR/Documents/GSR2016/Digital_financial_inclusion_GDDFI.pdf

17 Rory Macmillan ibid

18 Rory Macmillan *ibid*

competition, spectrum management and economic regulation. This provision gives the UCC authority to regulate an extensive range of competition issues in the telecommunications sector. In fact, one of the functions of the UCC is to promote competition including the protection of operators from acts and practices of other operators that are damaging to competition and to facilitate the entry into the market of new and modern systems operators.

Despite the existence of this mandate conferred on UCC to promote competition, studies have shown that UCC has not played an active regulatory role in relation to mobile money services. These are strong enforcement measures, Macmillan has noted, but UCC has used them with regard to other services provided by telecommunication companies and not mobile money. This has had the effect of leaving mobile financial services only with regulation on competition in law but not practice. Indeed, practice has shown that there has been anti-competitive behaviour in the mobile money market, notably the 2015 court battle between Ezee Money Uganda Ltd and MTN Uganda Ltd.[19]

At the conclusion of the case, MTN Uganda was condemned to 2.3 billion in damages by the commercial court for anti-competitive behaviour against a downstream rival. When Ezee money had entered the mobile money market, it had contracted MTN Uganda for the provision of digital transmission as well as 30 fixed telephone lines. It had also contracted Yo! to provide aggregation services. MTN Uganda had subsequently cancelled its contract with Ezee money citing the fact that Ezee money was a direct

[19] High court civil suit no. 330 of 2013

competitor to its own mobile money business. They had gone ahead to coerce Yo! to cancel their own contract with Ezee money threatening to cut off Yo!'s access to their service. The effect of MTN Uganda's refusal to provide both USSD services and access to phone lines was found to have effected a 79% drop in the number of transactions by Ezee money. Ezee money was also forced to wait for about 9 months to restore its systems following MTN Uganda's breach of its contract. The terminals that had not been configured to use MTN Uganda's simcards had to be reconfigured at a significant expense to Ezee money. MTN Uganda's actions at the time appear to have succeeded in foreclosing Ezee money out of the mobile money business forcing the company to develop a new mode of operation.

Sitbon 2015 has identified a number of issues pertinent to competition in the mobile money market today.[20] First is the lack of interoperability and high off-net charges. As of 2018, there is no interoperability between mobile wallets in Uganda and this makes smaller rival networks less attractive than bigger ones like MTN Uganda. The unregistered off-net person receiving the transfer must make a physical withdrawal at the sending mobile money provider's agent. Macmillan has reasoned that the inconvenience of this generates a barrier to using mobile money providers other than those that have a larger number of active subscribers.

Network effects in the absence of interoperability are reflected for instance in pricing by both MTN Uganda and Airtel Uganda. Both network's prices for transfers to unregistered users are far higher than the equivalent they charge on transfer to registered users. For the tier UGX 30,001 – 45000

[20] Sitbon, E. (2015), "Addressing competition bottlenecks in digital financial ecosystems," Journal of Payments Strategy & Systems.

within which a large number of transactions fall, both MTN Uganda and Airtel Uganda customers must pay around 2800 (or around 6.2% of the upper limit of the transfer value of UGX 45000) to transfer to an unregistered user compared with UGX 1100 (or around 2.4% of the upper limit of the transfer value of UGX 45000) to a registered user.[21]

Access to telecommunication network services also presents a competition issue.[22] For other organisation such as banks to provide mobile money services to existing customers, they need to be able to provide access over mobile telecommunication networks. For those customers who have smart phones, this can be done via an app such as one for internet banking. Smart phone penetration however is low in Uganda and the main way through which access can be provided is via USSD access. The down ward side of this is that MNO's may engage in a constructive refusal to provide access by for instance putting in place a strict and lengthy process for such access.[23] This was one such issue in the Ezee money Uganda Ltd v MTN Uganda case.

On a brighter however and in a bid to promote competition, the Guidelines of 2013 explicitly removed agent exclusivity from mobile money services. There were no prohibitions on agent exclusivity when mobile money was launched in Uganda and the lack of prohibition meant that MTN could roll out an extensive agent network that exclusively provided MTN Uganda mobile money services.[24] The exclusivity was of course beneficial to MTN and improved their business case for investing in recruiting and training

21 Rory Macmillan *ibid*
22 Sitbon *ibid*
23 Rory Macmillan *ibid*
24 Rory Macmillan *ibid*

mobile money agents. The 2013 Guidelines however removed agent exclusivity although it took several months for exclusivity to be removed in practice and for agents to feel safe providing services for rival mobile money providers.[25] In the Ezee money v MTN Uganda case, one of the complaints by the plaintiff was that the defendant company's staff had physically attacked agents with Ezee money branding and court in the decision found this to be anti-competitive behaviour.

VII. COMPARISON WITH OTHER COUNTRIES

Macmillan in his study, commented, by way of contrast on the situation in Tanzania.[26] Tanzania's mobile money system bore similarities with Uganda's at its inception but players and stakeholders there seem to have made big strides since. Whereas Uganda's market seems to be concentrated in the hands of a few leading dominants, the market shares in Tanzania seem to be evenly distributed. As of September 2015, Vodacom had 38% of the market, Tigo 33% Airtel 27% and Zantel 2%. In terms of revenue estimates as at Jan 2016, Vodacom had a market share of between 53-54%, Tigo a share of about 40% and Airtel 10%.[27] As at 2015, the service offering of mobile money providers in Tanzania was more robust evolving beyond transfers to bill payments, mobile insurance products, merchant payment services and mobile savings and credit.[28]

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25 Rory Macmillan *ibid*
26 Rory Macmillan *ibid*
27 Roberts, S, Blechman, J & Odhiambo (2016). A comparative study of competition dynamics in mobile money markets across Tanzania, Uganda and Zimbabwe: Tanzania Country Paper. Johannesburg: Centre for Competition, Regulation and Economic Development (CCRED), University of Johannesburg.macmillan
28 Roberts, S, Blechman, J & Odhiambo 2016 *ibid*

The sector is governed by the Bank of Tanzania using a flexible and proactive approach. Regulation of the sector was similar to Uganda's in the beginning in that the central bank issued letters of no objection to banks partnering MNO's. The system has since been replaced following the enactment of the National Payment Systems Act. Mobile money systems in Tanzania today must obtain two kinds of licenses—a payments license in order to operate a payments' system and an electronic approval to issue e-money. A third licence can be acquired to enable the issue of payment cards. In addition to the Act, the Payment System Licensing and Approval Regulations of 2015 and the Electronic Money Regulations 2015 (EMR) provide other procedures and conditions for the operation of these licenses. Key requirements for these regulations include the legal separation of mobile money services from telecommunication services and the prohibition of exclusivity of the provider's agent networks.

Tanzania's mobile money sector additionally stands out because all the four MMT services have implemented bilateral account interoperability. Following a process of negotiation involving the Bank of Tanzania, the mobile money providers, two of the country's largest banks and a number of NGOs, the providers agreed on broad parameters for interoperability. Airtel money and Tigo-Pesa were the first to achieve account interoperability in august 2015 followed by Ezy Pesa in Feb 2016 and finally Vodacom M-Pesa.[29]

Tanzania is a success story comparatively speaking. The sector experienced rapid growth in mobile money transfer, achieved openness of

[29] Roberts, S, Blechman, J & Odhiambo (2016), *ibid.*

its market and yet maintains rivalry between the different operators allowing for low prices and rapid innovation and the availability of a variety of services. A key factor of this success has been the flexible and facilitating regulatory framework. The sector regulation at the launch of mobile money was light touch and this facilitated the growth of the sector. However subsequent regulation encouraged entry by removing agent exclusivity and reduced barriers to entry by facilitating interoperability between the various players.[30]

VIII. RECOMMENDATIONS

There is general need for a comprehensive law and policy to regulate the operations of mobile money services in Uganda. It's already been noted that the Mobile Money Guidelines 2013 were only meant to be an interim measure pending the enactment of more specific law. Aumu suggests that the law should be detailed as to the roles of the different stakeholders in the MMS and also grant the banks more access to the accounts or records of transactions so as to check the operations of MNO's in regard to operations that are prone to fraud.[31]

There is also need to pass a specific law to deal with competition challenges. The competition policy should be tailored to apply rules to

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[30] Roberts, S., Macmillan, R., & Lloyd, K. (2016). A comparative study of competition dynamics in mobile money markets across Tanzania, Uganda and Zimbabwe: Synthesis report. Johannesburg: Centre for Competition, Regulation and Economic Development

[31] Mackay Aumu as of March 2013 was the Acting director, commercial banking department at the bank of Uganda. In Grappling With The Regulation of Financial Innovations in Uganda : A Case Study of Mobile Money Services authored by James Muhindo and published in the Makerere Law Journal 2013, he is reported to have stressed that the absence of proper law regulating MMS is not only in their knowledge but the ministry has raised concern about it and are in the process of drafting a law

make sure that MNO's compete fairly with each other. This would be important to stop dominant players in the market from blocking other players from entering or participating freely in the market like was in the Ezee money v MTN case. Competition is important because it encourages enterprise and efficiency, creates a wider choice for customers and helps reduce prices as well as improving quality.

Catherine Nansubuga in her presentation to firm members at Kampala Associated Advocates stressed the need for amendment of the Bank of Uganda Act to provide the bank with authority to regulate the payments sector.[32] She added that the introduction of a payments law should still be seen as a high priority for the healthy growth of the sector. A National Payment Systems law is necessary due to the increase of mobile money transactions, internet banking and credit / debit cash transactions in Uganda.

Neil Davidson notes that due to the nature of MMS, there are certain governance or operation challenges that may be resolved by outsourcing the management of such activities to technically qualified bodies such as banks and operators that may have outsourcing experience.[33] Once a bank or operator has decided which parts of the MMS it wishes to and is technically in position to manage, it can identify a counterpart or other player who can handle the other activities which it cannot handle. Muhindo James observes in respect of this for instance that training of agents or

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[32] Catherine Nansubuga is a senior associate at Kampala Associated Advocates. She made a presentation to the firm on Mobile Money Regulation in Uganda.

[33] Neil Davidson, "Mapping and effectively structuring operator-Bank relationships to offer mobile money for the unbanked" 2011, p. 13.

Auditing of accounts and other transactions can be outsourced to technocrats for better running of the business.[34]

Muhindo James suggests a synergy of stakeholders to regulate the different areas of mobile money.[35] He in particular emphasizes the need for MNO's and commercial banks to work closely to ensure that the existing loopholes in the system are not exploited by scrupulous people to engage in acts of illegal transactions and money laundering across borders or in the extreme being used by terrorist organisations to fund their activities. There is need, he says, for all stakeholders including security personnel and Uganda Revenue Authority to work together especially in relation to trans-border transactions. Ssonko has observed that this can be achieved through an open business model that encompasses all stakeholders.

IX. CONCLUSION

In general, the law governing the operation of mobile money services in Uganda is vague because of the absence of a specific law that regulates how telecommunication companies go beyond voice calls and SMS to offer a service that is exclusively financial in nature at a great scale.

The objective of this paper was to appraise the operation of mobile moneys services and substantiate the need for a comprehensive legislation governing both MNO's and commercial banks in relation to MMS.

There is need for a specific law regulating MMS but in the interim, Uganda's mobile financial services sector is a great example of how a

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[34] James Muhindo " Grappling With The Regulation of Financial Innovations In Uganda: A case Study of Mobile Money services," Makerere Law Journal 2013

[35] *Ibid.*

country can find creative solutions to building an enabling environment for innovation without incurring unnecessary risks.

MISSION IMPOSSIBLE: THE FUTILITY OF CONSTITUTIONAL CHECKS ON THE OFFICE AND PERSON OF THE PRESIDENT

Kansiime Mukama Taremwa*

"I am not an employee. I hear some people saying that I am their servant; I am not a servant of anybody. I am a freedom fighter; that is why I do what I do. I don't do it because I am your servant; I am not your servant. I am just a freedom fighter; I am fighting for myself, for my belief; that's how I come in. If anybody thinks you gave me a job, he is deceiving himself. I am just a freedom fighter whom you thought could help you also." — ***President Yoweri Kaguta Museveni.***[1]

I. INTRODUCTION

Almost all critics of President Museveni's three decade grip on power in Uganda have highlighted the irony of the promise of fundamental change in 1986 and the reality of how history has repeated itself in Uganda over the last three decades. The question of how far the President—as a person—can use his office to achieve his personal agenda is one that dominates airwaves and all manner of informal conversations and may very well be the most discussed subject in this country.

The constitutional checks that were hoped to test the power of this office have proved most impotent owing to a number of reasons ranging from the

* LL.B III (2017-18), Makerere University School of Law.

1 Address to the nation on 26th January 2017 on the 31st Anniversary of the NRM Rule in Uganda.

lack of a culture of constitutionalism, to a rampant culture of patronage that has engulfed the operations of government in this country. The office of the President thus remains a most helplessly powerful office that entraps the person of the President in a desperate need to cling to it. An excerpt from one of the President's speech captured above is the summary of how insufficient anyone is against the President's whims and wishes.

II. AN OVERVIEW OF CONSTITUTIONAL POWER AND AUTHORITY IN UGANDA

The 1995Constitution of the Republic of Uganda (hereafter referred to as the Constitution) provides that all power belongs to the people who shall exercise it in accordance with the Constitution.[2]It provides further that all authority and power that is exercised by government or its agents is derived from the Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.[3]It would appear therefore that there is a glaring question of power from the onset, a conflict between who 'the people' are and the Constitution itself. What is, as between the people and the constitution, the more powerful or the custodian of power in the country?

In trying to resolve that question, the constitution then makes a most unequivocal proclamation in Article 2, as being the supreme law governing the country and having binding force on all authorities and persons throughout Uganda.[4]It further elaborates that any other law or custom that

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2 Article 1(1) of the 1995 Constitution of the Republic of Uganda.
3 Article 1(3)
4 *Paul Ssemogerere and Zachary Olum v. Attorney General*, Constitutional Petition No.3 of 2000.

contravenes this constitution is null and void to the extent of its inconsistency. The constitution thus adopts a clearer approach to power dynamics than it did in article 1 when it places the people without distinction under the supremacy of the constitution. It is clear therefore that the framers of our Constitution did not intend to place the Constitution at the mercy of any person hiding behind Article 1; they sought to place the people under the time honoured guidance of the Constitution.

The question of power then takes on an institutionalized form with the divisions in the arms of government; the executive, legislature and the judiciary.

Article 77 of the Constitution establishes the Parliament of Uganda as the state legislature, and Article 79 subsequently empowers it to make laws on any matter for the peace, order, development and good governance of Uganda. Any exercise of legislative power must be under the authority of Parliament. Article 78 which deals with the composition of parliament, reveals that the army shall be represented in parliament amongst other groups as parliament may determine.[5] It is crucial to inquire into the interests that the army will represent in the corridors of power, and on this we shall elaborate later.

As if by design, the first thing mentioned in the chapter dealing with the executive is on the office of the President. The Constitution sets out to create or elaborate on the executive arm without revealing that there shall be a President of Uganda who shall be the Head of State, Head of

[5] Article 78(1)(c)

Government and Commander-in –Chief of the armed forces and also the Fountain of Honour.[6] This means that whatever executive power represents, it starts with the office of the President. The President takes precedence over all persons in Uganda and enjoys Presidential immunity in both civil and criminal proceedings for as long as he or she holds office.[7] The framers of our Constitution then deem it necessary to point out that executive authority of Uganda is vested in the President and this authority is to be exercised in accordance with the Constitution and the laws of Uganda.[9]The import of these provisions is that nothing should be done for and on behalf of Uganda without the authority of the President. Anything that is deemed executive power or its exercise must be a thing sanctioned by the President.[8]This is of course not problematic per se, it becomes an issue when the constitution confers upon the President various powers with a very vague checks and balances mechanism.

The pyramid of power then continues to take shape with the conferment of judicial power on the courts in Article 126, who exercise it under the Constitution on behalf of and in conformity with the values, norms and aspirations of the people of Uganda. It becomes very apparent then that the framers of our Constitution intended to protect the sovereignty of the people and their integrity through the avenue of the judiciary.[9]In fact the duty of the courts in protecting constitutional order is very central to the 1995 Constitution as enunciated by Article 137 and fortified by the

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6 Article 98(1)
7 Article 98(2,4,5)
8 Prof. Gilbert Bukenya v Attorney General, Constitutional Petition No. 30 of 2011, paras 10-15.
9 Centre for Health Human Rights and Development v Attorney General, Constitutional Petition No.1 0f 2015.

observations of Justice Kanyeihamba thus, "…It is the duty of this Court to ensure that Constitutional equilibrium between the organs of government and citizens is maintained at all times."[10]

So in very elaborate terms, the Constitution in its institutionalization of power creates a system of checks on the exercise of power by any arm. If Parliament disregards the Constitution, the courts will come to save the situation. If the executive misuses its power, parliament will come to check them, and that interplay is supposed to be manifest within the government but this is the ideal.[11]The reality is appalling!

III. REALITY CHECK ON CONSTITUTIONAL CHECKS AND BALANCES ON THE PRESIDENCY

Every functioning democracy must operate within a context of accountability to the people using existing mechanisms of checking the concentration of power in one individual much like a monarchy. Checks and balances exist in the spectrum of separation of powers to create a situation where each arm of government through its various departments can call the other to account for its exercise of constitutional power and authority. The expected benefit of this is that there shall be no place for the culture of impunity in governance.[12]That no single individual exercising power shall overstep or underutilize their constitutional mandate.

It is in this context therefore that I demonstrate how these mechanisms have failed to stop the person of the President from being a danger to the office

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10 Brigadier Henry Tumukunde vs Attorney General and Anor, Constitutional Appeal No.2 of 2006.

11 Ibid

12 Cehurd and ors v AG, supra

of the President and to the nation. I say a danger because as Winston Churchill once said, "power corrupts but absolute power corrupts absolutely."

In 2011, the parliamentary Public Accounts Committee (PAC) left the precincts of parliament to go and inquire into the role of the president in the compensation of Hassan Basajjabala's Haba group of companies.[13]PAC was of course exercising its constitutional mandate as a committee of Parliament under Article 90 of the Constitution which provides that these committees are necessary, for the efficient discharge of the functions of parliament broadly expressed by Article 79(3). It is interesting to note that under the Constitution, these committees have the powers of the High court for enforcing witness attendance and examination of the same on oath, affirmation or otherwise. That they can compel document production and even make arrangements for examining witnesses abroad. It is therefore of great concern that a committee that can summon was instead summoned. That it had to travel to a witness' place instead of the witness submitting to its direction is in itself a big blow on the power of Parliament to check the excesses of a sitting President. However, that situation demonstrates an even more deep seated crisis in the framework of power which is the whole idea of Presidential immunity. How can a Parliamentary committee's power of the high court be exercised against a sitting president yet Article 98(4) and (5) protects such a President from civil or criminal court action? How could this committee even be efficient or effective if it cannot meet the President at its

[13] https://www.newvision.co.ug/new_vision/news/1004349/museveni-meets-pac-committee

convenience but at his? The implications of this are many but most crucially is the idea that the President at his convenience would have so much time to cover up his tracks, put away evidence and even gain an advantage of plausible deniability.

On the other hand, it means that the President would be subjected to civil and criminal proceedings in which case, it would be unconstitutional. The underlying implication of this is that the committee of Parliament inquiring into the actions of the President is operating on very unfamiliar terrain that borders between engaging in unconstitutional action and being left powerless in exercise of its functions. In the end, it is an impotent committee that can at best only caution the President but cannot recommend court action. It becomes clear then that these hope that the framers of our Constitution had in the power of Parliamentary committees to aid the system of checks and balances was a misplaced hope.

It could only check the people with trivial power but not he who holds the full armor of executive power, the President. It is therefore not surprising that in all its lifetime, the Public Accounts Committee of Parliament has led to the end of the political and administrative careers of ministers and bush war heroes but the person who appointed them somehow comes out spotless and continues to wield so much power.[14] This has prompted some judicial officers to decry this impunity that exonerates the people high up in the food chain. This apparent power that the committees have is at best an illusion when it comes to the office and person of the President. It is

[14] PAC has implicated Former Ministers Khiddu Makubuya, Syda Bumba, Jim Muhwezi, and Mike Mukula, Former Vice President Gilbert Bukenya and other public servants but not the President, whose name always appears in the investigative process by the committee.

perhaps important to demonstrate that the efficiency of checks and balances in the Constitution are further weakened by the privilege of immunity granted to the President. This immunity shields the President from court action in the guise of being too occupied with the affairs of the state as was elaborated on by the Supreme Court of the Philippines in ***Soliven v. Judge Makasiar.***

The reasoning behind this notion is that the office–holder of the Presidency must devote undivided attention to his office and court action is an unnecessary distraction. In Uganda's case, it is debatable whether the President's office creates any distraction or the person of the President is his own distraction. The President is seen as the end of all disputes in this country and while this causes institutional handicaps, it is also the real unnecessary distraction. Why should the President be teaching Ugandans about rain water harvesting yet the country has Resident District Commissioners and other officials at that level? Why should the President fire public officials under the direct supervision of the District Service Commission? Is this not an exaggerated sense of self-importance that creates the real unnecessary distractions? Is it not clear that instead of the President devoting time to his Executive duties, the President spends more time finding out how resolutions can be passed by his puppet Parliamentary caucus, resolutions not necessarily connected to his effective exercise of executive authority?

In Uganda's case, where the President exercises power outside the constitutional limits, it would be impractical to hide behind presidential immunity so as to be absolved from responsibility. Yet the reality is that the President benefits from this privilege and as such, Ugandans can never

know if their President is exercising power within the limits of the Constitution. Court action would be a very necessary distraction if the President disregarded the law. The reading of Article 137(3) of the Constitution would suggest that the President, just like "any person or authority," is subject to the jurisdiction of the Constitutional court in respect of actions or omissions that are alleged to be unconstitutional. In fact when the Constitutional court tested it in *Tumukunde v AG*, it held that the actions of the President can be challenged in that court but the proper person to sue would be the Attorney General.[15]However, that provision is redundant in light of the reality of the Presidential immunity.[16]The constitutional court decision on that particular matter is also very vague because it grants power and takes it away in the same sentences. Why should the government as an entity pay for the mistakes of the person of the President? What would be an avenue to protect the Constitution would from wanton violations becomes very impotent when the person of the President is a subject of its jurisdiction.

In understanding the way in which the immunity accorded to the President cripples the system of checks and balances, it is crucial to be alive to the fact that most Ugandans were opposed to the inclusion of a provision in the Constitution that guaranteed the President immunity from prosecution. The Odoki Commission reported that the people were unwilling because past Presidents had abused this provision and that the President is like any

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15 Tumukunde v. AG, Constitutional Petition No.6 of 2005, Joint Judgement of Kikonyogo, DCJ and Kitumba, JA.

16 Justice Tsekooko, JSC observed this vagueness when he pointed out that the holding of the Constitutional Court on the matter of Presidential immunity was "superfluous and creates quandary and is likely to lead to misunderstanding and misinterpretation of the ratio decidendi of the decision."

other person.[17] The compromise was drawn from the Commission's recommendation that the office of the President must be shielded from shame and embarrassment culminating into the public losing trust and confidence in the office.[18]However, in my opinion, this office has already subjected itself to ridicule and many Ugandans have lost trust in its integrity and dignity. In fact, a court process would do a lot in restoring this trust. The people would believe in the office more if its occupants were not getting away with impunity. In fact, even what would appear as a chance to prosecute a person who was President after leaving office, is a problematic aspect because if the President did anything unlawful in his official capacity, he cannot be brought to court after leaving office on the basis of such acts or omissions, Article 98(5) could be invoked as a defence.[19]The underlying point is that the President or his actions are beyond the court's competence. In effect even if Article 98(5) was to mean that the president's official actions will be scrutinized, it would ignore the context of Uganda's history and the longevity of the rule of president Museveni. Will there be evidence by the time the President leaves office? All these contexts are ignored by the provisions on presidential immunity.[20]

In fact, if the president is truly as under Articles 98 and 99, the Fountain of Honor and has mandate to defend and protect the Constitution, he or she

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17 The Report of the Uganda Constitutional Commission: Analysis and Recommendations, Uganda Printing and Publishing Corporation (1992), para. 12.81.

18 Jamil Ddamulira Mujuzi, "Recent Developments–Actualités Presidential Immunity from Criminal Prosecution" in The Ugandan Constitution: Drafting History And Emerging Jurisprudence", African Journal of International and Comparative Law 22.1 (2014), p.141-142

19 Mujuzi, ibid, p.146

20 Mujuzi, p.148

must not expect to benefit from a privilege that essentially encourages him or her to use his office for anything illegal. The President must first and foremost be under the law, bound by the law and act as the law requires not to be given the benefit of doubt on whether he or she will ever use his or her sense of judgment to bypass the law and then hide behind the garb of Presidential immunity. The President must be exemplary when it comes to observing constitutional integrity.[21]The other issue is that the President is supposed to act as an example even to his subordinates so as not to give them the impression that they can use his immunity to absolve themselves from responsibility.[22] Otherwise, if the circumstances remain as such, the courts and their power to check the operations of any person as enunciated in Article 126, 137, 59, etc. will remain as they are now, impotent with respect to the office and person of the President.

The biggest constitutional form of checks and balances is the sovereignty of the people. Their role in defence of the Constitution is from the onset provided for by the Constitution. They can check the President through not voting for him if he or she seeks re-election, they can use their Parliamentarians to impeach the President and they can resist any person or group that attempts to undermine the power and force of the Constitution among other things.[23]However, in Uganda especially in light of the excessive power that is enjoyed by the President, people power is largely an illusion. This comes; down to the culture of patronage that dilutes the power centres.

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21 Ibid, p.143-144
22 Prof. Gilbert Bukenya v Attorney General, Constitutional Petition No.30 of 2011.
23 Articles 1 and 3 of the Constitution.

Patronage has been defined as an asymmetric relationship between regimes and political parties in power. The relationship is an explicit or implicit quid pro quo exchange of goods and services for political support. Patronage thus is both ideological and pragmatic for the person in political office to maintain a grip on power. In post 1995 Uganda, this culture is something the President has employed to cripple any semblance of clamour for checks and balances from the people.[24]

In Uganda, elections are heavily commercialized and a lot of money is given out to voters during elections as the Supreme Court observed in ***Kiiza Besigye vs Yoweri Museveni***. In fact Justice Tsekooko in his minority opinion in the 2001 presidential election noted that giving out gifts, ordering salary increase in an election campaign and causing the signing of contracts during campaign period was an offence under the Presidential Election Act.[25]All these are elements of patronage in an election. It should be noted that such sentiments are the closest the courts have come to imputing blame on a sitting president albeit crippled by the fact that in such proceedings it is the presidential candidate on trial and not the President. More important is that these election petitions challenge the actions of a candidate fused with his position as a president and seek to actualize the sovereignty of the people exercised through elections. If the highest court in the land in three separate presidential election petitions demonstrates that the use of state power and resource in favor of a sitting president influenced his re-election, then it lends credence to the fact that patronage

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[24] Vick LukwagoSsali, Patronage, clientelism and economic insecurity in Uganda, https://www.pambazuka.org/governance/patronage-clientelism-and-economicinsecurity-uganda

[25] Presidential Election Petition No.1 of 2001, Judgement of Tsekooko, JSC, p.639

affects the electoral process in Uganda. This also means that there is no way the environment littered with acts of patronage can facilitate a free and fair election which ought to reflect the general will of the people. Therefore patronage closes the most direct form of checks and balances through the voice of the people that should be heard during elections. The most disconcerting thing about this patronage is that it is facilitated by both the person and office of the President.

This culture of patronage is so systemic that it even affects the indirect approaches that Ugandans could rely on to check excesses of Presidential power. Kabumba et al observe that the NRM policy of *districtization* became a reservoir of political capital that the President could tap into whenever he needed to obtain political support.[26]The linkage between this and the futility of checks and balances is that the President almost always only sanctions creation of a new district if it will get him an increased number of parliamentarians. Every new district means at least one new constituency and one seat for the woman Member of Parliament. In essence, creation of new districts has the effect of enhancing patronage networks.[27] The effect of this is that the President has a bunch of cronies seated in the national assembly to simply act at the beck and call of the Commander-in-Chief. They are called the NRM caucus, they meet in Kyankwanzi quite regularly and also visit the State House quite occasionally. They are always naming their price to the President and the

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[26] Militarism and The Dilemma of Post-Colonial Statehood: The Case of Museveni's Uganda, Busingye Kabumba, Dan Ngabirano and Timothy Kyepa, pp.118, Development Law Publishing.

[27] Vick Lukwago Ssali, Patronage, clientelism and economic insecurity in Uganda, https://www.pambazuka.org/gover

President almost always meets it. Nothing done by these parliamentarians is of any interest to the Ugandan common man; it is all for the interests of the President. The absurdity about this situation is that the Speaker of the National Assembly is more often than not in sync with this betrayal in the corridors of power.[28] So in one instance they will take a 5 million shillings bribe to remove presidential term limits and on other days, they will exchange the age limit for an extension of their tenure to seven years from the original five. Sometimes this culture of patronage takes the rudimentary money-for-political-favour approach and on other occasions it is a more sophisticated negotiated compromise of political interests that the President and the MPs have. This therefore means that one of the clearest forms of checking the Presidency which is in the provisions of Article 107 of the constitution is dealt a heavy blow because the astronomical number of MPs that belong to the ruling party can never allow for the President to suffer an impeachment process.[29] It is impossible if even conceivable.

The looming presence of the military in the civilian affairs of our country also renders most of the checks and balances very inconsequential. It should be noted that Uganda's history is heavily littered with negative presence of the armed forces. The army has historically been a bad omen for our politics but especially a very infamous ally of every sitting President. In terms of influence over executive power, the army still

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[28] Edward Ssekandi failed to protect Brig. Tumukunde from resignation by force in 2005 and the Supreme Court faulted him for this, Rebecca Kadaga presided over the controversial Age Limit Bill which was clearly not in the interests of most Ugandans.

[29] Article 107(6) requires that two thirds of all MPs vote to lead to the impeachment of a sitting President. However, the NRM presence in Parliament is already more than two-thirds.

remains a very visible and invisible hand. The Uganda Peoples' Defence Forces as created by the Constitution ought to be non-partisan and subordinate to civilian authority.[30] The rationale for this was that the army should not be a political outfit but a national army. That it should not be held at ransom by its founder but be at the instruction of the people of Uganda. The implicit promise in this provision was that from then on the army would not advance the narrow political agenda of the NRM, but would rather serve as a truly non-partisan professional army at the service of all Ugandans without distinction.[31] However, these hopes that Ugandans has in the army were mere illusions. The UPDF has increasingly become a personal army. In fact, it has stood in the way of all manner of constitutional checks and balances against the office and person of the President. It is very difficult to blame the army because the UPDF is an army that evolved from the rebel outfit known as the National Resistance Army. Its founder is Yoweri Museveni and as successive CDF's have described him, he is the leader and mentor of the men and officers of the Uganda Peoples' Defence Forces. In truth, there is absolutely no way the army as it is now can do anything for the people of Uganda if it is against the person of the President. So in essence, the army is not patriotic in nature, it does not serve national interests but the interests of the President. No wonder, it has been at the heart of constitutional violations and unwarranted changes like in the case of the invasion of parliament during the debate on the age limit bill or the siege on the courts by the black mambas during the trial of the PRA suspects. Its place in the national assembly has been questioned by most commentators and the **Tumukunde**

[30] Article 208(2) of the 1995 Constitution.
[31] Busingye, Ngabirano and Kyepa, p. 80.

case demonstrated that the UPDF MPs were simply supposed to be "listening posts" of the regime, a notion that the Supreme Court rejected vehemently.[32] The court also called for a revision of the place of the military in the parliamentary life. As it stands therefore, the army or any one in Uganda for that matter cannot check the President and this means therefore that the President is on a vacation, susceptible to the seductions of impunity and free from the conviction of constitutional conscience because irrespective of what the Constitution may say in Article 1, Article 98 says in very clear terms and it seems the more practicable, that the President takes precedence over all persons in Uganda. That is the tragedy of our times.

IV. CAN WE SALVAGE ANYTHING?

It is a very difficult task one is given in finding a permanent or at least sustainable solution to this dilemma of power. The reality is that we are dealing with a situation that is at the very foundation of our nation both in colonial terms and in post- independence times.[33] Yet if one is tasked to look at the future and salvage anything, it would be prudent to refer to and fast track the recommendations of the Supreme court in the three Presidential election petitions which deal with the questions of the fusion of the state and the Presidential candidate who is an incumbent President

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[32] Justices Kanyeihamba rejected the idea that UPDF MPs served only the interests of the UPDF, he observed rather that they like any other MP had the fundamental duty to do as Article 79 commands them and that the UPDF Code of conduct placed against the Constitution was simply a guide book and not a binding instrument as is the case with the Constitution.

[33] Joe Oloka Onyango, "Taming the President: Some Critical Reflections on the Executive and the Separation of Powers in Uganda", East African Journal of Peace and Human Rights, vol. 2, issue 2, 189-192.

during an election season, the call for reforms in the electoral process both in law and practice and the need to empower institutional frameworks.

It would also be prudent to revisit the presence of the UPDF in Parliament and to honestly have a constitutional review especially in light of the fact that the post 1995 generation is now a generation that is at the center of policy frameworks, a generation that is the product of that noble constitution but also one that must be the architect of a more honest, durable, applicable and relevant constitutional making process. One where the vagaries of war do not hung over our heads to cause us to abandon sleep out of the fear to dream. That is the way in which the Presidency can meet some firm resistance. The power of a youthful population which is unafraid to craft a future for themselves. That may be the answer to this dilemma.

IMPUNITY IN THE FACE OF INJUSTICE: THE UNRESOLVED PROBLEM OF TORTURE IN UGANDA

Ntungwerisho Colman*

ABSTRACT

The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is guaranteed absolutely by the Constitution of Uganda and cemented within the Prevention and Prohibition of Torture Act (PPTA) of 2012. Despite this comprehensive legal framework, enjoyment of the right remains a myth and violations continue unabated for the most part. At the heart of the persistence of torture and the government's indifference thereto lie the problems of proliferated security agencies, the creation of illegal detention facilities and a dangerously underfunded police investigations department.

I. INTRODUCTION

On the 18th of October, 2018 a short video of a Uganda Young Democrats (UYD)[1] member being battered and forcibly whisked away in a minivan bearing a fake licence plate by several armed men went viral, eliciting widespread condemnation.[2] In the video, the events described astonishingly occur in the middle of a daylit street in the city centre. The perpetrators, now known to be soldiers within the army, have since been charged before a Unit Disciplinary Committee[3] with the light offence of

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1 The UYD is a youth wing of the Democratic Party in Uganda.

2 Draku Franklin, '*Gunmen brutalise man in Kampala in broad daylight,'* Daily Monitor, October 19, 2018. http://www.monitor.co.ug/News/National/Gunmen-brutalise-man-Kampala-broad-daylight/688334-4812774-15ntnxjz/index.html

3 A Unit Disciplinary Committee is a military court established under Section 195 of the UPDF Act of 2005, with jurisdiction to try non-capital offences under the Act.

'conduct prejudicial to good order and discipline' which carries a maximum punishment of dismissal from the army with disgrace.[4]

In August, only two months earlier, several opposition Members of Parliament were tortured by the Special Forces Command—the Presidential Guard—following an incident in which the Presidential convoy had been stoned by crowds supporting an opposition candidate for the position of Member of Parliament.[5] One of the victims, the Hon. Francis Zaake, was dumped at a local hospital where he was placed on life support[6] and has only recently made a return to a state of non-life-threatening health. Instances of torture meted out against journalists in relation to the events surrounding the elections above abound as well.[7]

About a year before all these events, the media was awash with gruelling images of tortured suspects in the investigation of a police chief's assassination.[8]

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4 Lumu david & Odeng Michael, *'Five junior soldiers who were captured in video allegedly brutalising Yusuf Kawooya, have been charged at the army court,'* New Vision, 21st October, 2018. https://www.newvision.co.ug/new_vision/news/1488121/kawooyas-tormentors-charged-army-court

5 Bagala Andrew, *'Arrest soldiers in torture of MPs, Kadaga tells Museveni,'* August 28, 2018. http://www.monitor.co.ug/News/National/Arrest-soldiers-in-torture-of-MPs--Kadaga-tells-Museveni/688334-4731690-4a7abm/index.html

6 Kahungu Thembo Misairi, *'MP Zaake on life support at Rubaga hospital,'* Daily Monitor, August 17, 2018. http://www.monitor.co.ug/News/National/MP-Zaake--life-support-Rubaga-hospital/688334-4717184-dgw69jz/index.html

7 Tusingwire Serestino, '*Media rights groups condemn torture, detention of journalists in Uganda,'* Daily Monitor, August 22, 2018. http://www.monitor.co.ug/News/National/Media-rights-groups-slam-torture-detention-journalists-Uganda/688334-4723346-11if5rpz/index.html

8 Kigongo Juliet, *'Kaweesi murder suspects to be given Shs80m over torture,'*Daily Monitor, October 12, 2017. http://www.monitor.co.ug/News/National/Kaweesi-murder-suspects-given-Shs80m-over-violation-rights/688334-4136524-w91uar/index.htm

Clearly, Uganda's known negative record of torture continues to grow with these and more harrowing incidents. But to what end? And why is the law seemingly inadequate to stem the violations?

The right to freedom from torture or inhuman cruel and degrading treatment in Uganda is guaranteed under Article 24 of the 1995 Constitution. It is also classified as a non- derogable right.[9] Uganda has gone further to protect this right by enacting the Prevention and Prohibition of Torture Act (PPTA) 2012. Under international law, this right is provided for under various international human rights treaties which Uganda has acceded to. These include the Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) , the African Charter On Human And People's Rights(ACHPR) and the Convention on the rights of the child (CRC) among others. All these covenants explicitly state that it is an absolute right from which no derogation is permitted or ever justifiable and is therefore recognised under international law as a peremptory norm. No war or national emergency however dire can ever justify torture.[10]

According to the UNCAT, 'torture' is—

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,

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9 Article 44(a), Kyamanywa Simon v Uganda, Constitutional Reference No. 10 Of 2000 Arising From Cr. Appeal No. 16 Of 1999

10 Article 5 of the ICCPR,

> punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." [11]

The PPTA on the other hand defines torture to mean:

> "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..."[12]

Therefore, the PPTA widens the definition of torture to include private individuals and non-state actors unlike the international law definition which requires a perpetrator to be a state official or its agents. It imposes individual responsibility for acts of torture and for supervisors to be held liable in cases where they either condoned or were aware of the on-going acts of torture.

However, despite this existing legal framework, the right to freedom from torture and inhuman or degrading treatment remains one of the most

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[11] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Article 1. (Uganda ratified the CAT in 1986).

[12] S.1 of the PPTA 2012

violated human rights. In fact, of all the awards for human rights violations awarded by the Uganda Human Rights Commission (UHCR), about 72% are awards related to torture.[13] Uganda's protection of the right to freedom from torture and inhuman cruel or degrading treatment has been minimal. Numerous reports by the UHRC[14] and other global NGOs like Human Rights Watch[15] have repeatedly decried the violations of this right but only minimal steps have been taken by the government or the identified organisations to remedy the problems and these have been at face value. UHRC has pointed out state security agencies especially the police and the army as the main perpetrators of torture.

A report published by the *Commonwealth Human Rights Initiative* had this to say about the Uganda police,

> "Uganda does not have a democratic, accountable police service. Instead, it has a heavily militarised, colonial-style regime police force that is firmly under the control of the ruling government. The interests of the Government are placed far ahead of the protection of Uganda's people. The police are responsible for widespread human rights violations, and they have not been held to account."[16]

II. WHY DOES TORTURE PERSIST?

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13 UHRC report 2011
14 UHRC Report 2016
15 UHRC report 2011, Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda, Human Rights Watch, 2009
16 (Commonwealth Human Rights Initiative (2006) *The Police, The People, The Politics: Police Accountability in Uganda, p.1)*

Three years after the enactment of the PPTA, not a single perpetrator of torture had been convicted under this law[17] and yet it is an undeniable fact that torture has remained prevalent during those three years.

Despite ratification of all the key international human rights instruments, the government has failed to protect human rights domestically, or to take significant steps to address the problem of systemic and pervasive torture and prolonged illegal detention.[18] It has been recognised that Uganda's legal framework on torture is more than adequate and only requires competent, professional, well trained technocrats with specialized skills to hold perpetrators accountable and accord justice to victims of torture.[19] Presently, these skilled technocrats are absent. The question therefore is why has torture persisted in Uganda? Why is there a very big gap between commitment and compliance?

According to research carried out by the African Centre for Treatment and Rehabilitation of Torture and Violence Victims (ACTV) the reasons for the gap between the law and its enforcement are; the lack of awareness about human rights, abuse of authority, poverty, the lack of deterrent punishment for the offenders and weak legislation.[20]

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17 ACTV, situational analysis on the prevalence of torture in Uganda report- June 2016 p. 61.

18 Violence, instead of vigilance, torture and illegal detention by Uganda's rapid response unit, Human Rights Watch 2011 https://www.hrw.org/report/2011/03/23/violence-instead-vigilance/torture-and-illegal-detention-ugandas-rapid-response (last accessed 4th march 2018)

19 ACTV, situational analysis on the prevalence of torture in Uganda report- June 2016 p. 20.

20 ACTV, situational analysis on the prevalence of torture in Uganda report- June 2016

The threat of terrorism especially in the post 9/11 era has provided basis for many democracies to justify the use of torture or at least to turn a blind eye to its use.[21] The general response after terrorism attacks has been to use extra legal means to counter the threat often at the expense of the respect and fulfilment of human rights.[22] For instance, the United States of America used torture methods like sleep deprivation and prolonged hooding to extract information from detainees in its special detention facilities for terrorists like Guantanamo bay in Cuba and Bagram in Afghanistan.[23] Uganda's response to terrorism has not been any different if the Kyadondo bombings case of Uganda V Hussein Hassan Agade, Idris Magondu and 11 others[24]and the Muslim cleric case[25] are anything to go by.

The Supreme Court of Israel provides probably the best guidance on how governments should handle terror threats while maintaining observance of human rights. It has held that "even in the face of the harsh reality of continual terror unleashed against Israeli citizens, interrogation methods such as cuffing, hooding, loud music, deprivation of sleep and positional abuse are absolutely forbidden under international and Israeli law

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21 Kearns, Erin. The Study of Torture: Why It Persists, Why Perceptions of it are Malleable, and why it is Difficult to Eradicate. (2015). Laws. 4. 1-15. 10.3390 /laws 4010001.

22 Lawyers Committee For Human Rights, Assessing The New Normal: Liberty And Security For The Post- September 11 United States p. 73 (2003)

23 Amnesty international, United States of America: the threat of a bad example, p.10 (August 2003);

24 High Court International Crimes Division Criminal Session Case No. 0001 Of 2010)

25 Uganda v. Sheikh Siraje Kawooya, Sheikh Muhamad Yunusu Kamoga and 12 Others (Criminal Session Case No. HCT - 00 - ICD - CR - SC - No. 004 OF 2015)

particularly when used in combination."[26] The court also rejected the ticking time bomb argument holding that torture could never be justified, even in the case of a ticking bomb.

Courts world over have condemned stress and duress techniques similar to those reported in Uganda as torture or other cruel, inhuman or degrading treatment. The European Court Of Human Rights has prohibited a certain set of techniques that had been used in Northern Ireland, involving protracted standing on tip-toes, hooding, loud noise, and deprivation of sleep, food and drink.[27]

Unlike some governments like that of China that have fallen for the temptation of justifying torture,[28] the Ugandan government recognises the absolute prohibition of torture in all circumstances although it is undisputed that torture continues to thrive under its nose.

2.1 Illegal detention facilities and multiple paramilitary forces / security agencies

[26] Judgment on the interrogation methods applied by the GSS, (Supreme Court Of Israel, Sitting At The High Court Of Justice, September 6, 1999), available at http://uls.africa2trust.com/SearchAdvocate.aspx last accessed 4th March 2018

[27] Ireland v. United Kingdom, case No. 5310/7, judgment of the European Court of Human Rights. (January 18, 1978).

[28] In the aftermath of the 9/11 terrorist attacks, the USA used what it called 'enhanced interrogation methods which it argued did not amount to torture but were clearly inhuman and degrading in nature. The rendition program and the "torture memos" drawn up by the Department of Justice and the Pentagon in 2002 and 2003 also justified US actions that were equivalent to torture. The Israeli government also tried to justify its use of torture in interrogation of terror suspects, a view that was rejected by its supreme court in its judgments on the interrogation methods applied by the GSS.

The existence of various paramilitary groups that carry out civilian policing has removed safeguards for the prevention of torture hence rendering the various legislations ineffective. These include the Police special investigations unit in Kireka, which has over the years changed names from Operation Wembley, Rapid Response Unit and more recently the Violent Crime Crack Unit (VCCU). There is also the Joint Anti-Terrorism Taskforce (JATT), the Internal Security Organisation (ISO), the Chieftaincy of Military Intelligence (CMI) and the External Security Organisation (ESO) and more recently crime preventers. The powers of these groups are undefined and are not established under any law. Suspects arrested by any of the above named groups are often kept in un-gazetted places like safe houses and without access to their families or lawyers.

At the turn of the century, cases of torture were most prevalent in what came to be known as safe houses, the most notorious being on Kololo hill.[29] However, torture cases today even occur at gazetted detention facilities like the infamous Nalufenya police station.[30] The most common torture methods in Uganda have been identified to include *'kandoya'* (where suspects hands and feet are tied together at the back), water torture, sleep deprivation, tying weights onto the male genitalia, introduction of pepper in the eyes, pulling out finger nails, unsanitary detention conditions and

[29] Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda, Human Rights Watch, 2009

[30] http://www.monitor.co.ug/News/National/Nalufenya-look-inside-dreaded-police-station/688334-3935154-gmx0xd/index. html Nalufenya; a look inside the dreaded police station (last accessed 4th march 2018)

psychological torture such as blindfolding and threats of infection with HIV among others.[31]

The impunity of the state and its agents including but not limited to the security and law enforcement forces has contributed to the problem of torture. Reports detailing torture have repeatedly brought into question Uganda's commitment to fulfilling its human rights obligations.[32] In 2011, the Human Rights Committee (HRC) urged the Government of Uganda among others to

> "take immediate measures to investigate the excessive use of force and incidents of torture by the security forces and to prosecute and punish its perpetrators; Eliminate detention facilities known as "safe houses"; Improve overall conditions of prisons and adopt relevant measures to tackle the problems such as overcrowding, unsatisfactory state of prisons and shortcomings in the supply of health care and …allow non-governmental organizations and the Human Rights Commission of Uganda to have access to detention centres."[33]

2.2 Chronic underfunding of the police's Investigations Department

The Criminal Investigations Department (CID) of the police that is charged with the responsibility of investigating crimes is chronically underfunded,

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[31] UHRC report, 2016 pp 9; Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda, Human Rights Watch, p. 5.

[32] Human Rights Watch, investigation needed into violence in Kasese https://www.hrw.org/news/2017/03/16/uganda-investigation-needed-violence-kasese last accessed January 27th 2018.

[33] HRW Submission to UPR (2011); available at https://www.hrw.org/news/2011/03/29/universal-periodic-reviewuganda

and this prevents it from adopting modern methods of investigations. According to the Uganda Police, the CID requires at least Shillings 2.1 million to investigate and conclude one capital offense case and it records an estimated 50,000 capital offenses annually. However, under the current police budgetary allocation CID can only resolve 3 Percent of capital offences.[34] Complicated cases like the Kyadondo bombings case[35] that involved cross border investigations witnesses and dozens of witnesses have even cost as much as 300 million shillings.[36] As a result of failure to gather sufficient evidence, the police resort to use of illegal means like torture to obtain confessions from suspects and hence occasioning further injustice. In the Kyadondo bombings case for instance, the court established by means of a trial within a trial that some of the confessions had been obtained through torture and they were thus excluded from evidence.

Similarly, the trial of those accused of murdering the former police spokesperson AIGP Kaweesi has been plagued by torture accusations by the police and armed forces. For instance, the mayor of Kamwenge Town Council in South West Uganda Mr. Geoffrey Byamukama, was tortured while in detention to the point of having rotting legs.[37] In addition, Mr. Abu Rashid Mbazira was arrested together with his 12 children a clear

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34 https://ugandaradionetwork.com/story/police-cid-can-only-resolve-3-of-capital-offences-due-to-budget-shortfallsPolice: CID Can Only Resolve 3 Percent of Capital Offences Due to Budget Shortfalls (last accessed 4th march 2018)

35 Uganda V Hussein Hassan Agade, Idris Magondu and 11 others (High Court International Crimes Division Criminal Session Case No. 0001 Of 2010)

36 http://www.informereastafrica.com/content/after-6-year-wait-and-shs300m-trial-uganda-holds-breath-decision-worst-terror-case

37 How I was tortured; Mayor Byamukama narrates ordeal. The Independent, 02- 08 June, 2017 35 Article 37 (b) of the Convention on the Rights of the Child.

violation of the Convention on the Rights of the Child (CRC) which prohibits the arbitrary and unlawful deprivation of a child's liberty.[35] Both of these incidents shocked Ugandans and were strongly condemned by the Uganda Law society.[38]

In October 2017, High Court Judge Oumo Oguli ordered the State to pay Ush80m (about $22,000) to each of the 22 people being tried on charges of murdering the former police spokesperson Andrew Felix Kaweesi after medical evidence showed that they had been tortured while in custody.[39] The judge faulted the state for failing to account for the injuries the suspects' sustained while in detention at the Nalufenya detention facility. These injuries were not only visible in court but were also further confirmed by medical examination done by the African Centre for Treatment and Rehabilitation of Torture Victims which also revealed mental torture inflicted on the suspects.[40]

In many cases involving high media coverage and publicity like the murder of high profile people, or the Kyadondo bombings where the police are under great pressure from the public to provide answers, it has resorted to torture to extract information from suspects. Despite all these cases where security forces are implicated in torture, not a single officer was charged under the Prevention and Prohibition of Torture Act. Instead, the police

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38 Uganda Law Society, The Right To Freedom From Torture, Cruel, Inhuman Or Degrading Treatment Is A Constitutional Right and Must Be Respected, 15th May 2017. http://www.uls.or.ug/site/assets/files/1288/uls_statement_on_torture.pdf (accessed on 27th January 2018)

39 Unreported (Still pending before court)

40 Uganda court orders government to compensate murder suspects over torture, http://www.theeastafrican.co.ke/news/ Uganda-compensate-Kaweesi-murder-suspects-for-torture/2558-4136716-eu1g2bz/index.html (accessed on 27th January 2018)

have adopted the strategy of punishing its officers under the disciplinary rules. The punishments for breaching the police rules are light as compared to those prescribed under the PPTA as some of the accused walked away with negligible sanctions like demotion and severe reprimand.[41]

III. BREAKING THE CYCLE; SUGGESTIONS FOR THE PREVENTION OF TORTURE

There is need to abandon the old methods of police investigations that sought to establish the guilt of a suspect through confessions and embrace the scientific methods that concentrate on fact/truth finding. In any case, expert consensus is that torture does not work.[42] Military interrogators have concluded that torture is not an effective way to gather accurate and reliable information.[43]

In this regard, police efforts to modernise their investigation methods are handicapped by the chronic underfunding to the criminal investigations department. Whereas President Yoweri Museveni has repeatedly mentioned the need for installation of CCTV cameras in major parts of the country, this has not been done and there was no allocation for their procurement in the national budget 2017/2018. In a letter to the heads of the security forces, the president observed that "even if the suspects do not admit their guilt, if the investigators do their work well through [finger-

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41 Officers convicted for beating Besigye supporters, http://www.monitor.co.ug/News/National/Officers-convicted-for-beating-Besigye-supporters/688334-3797362-14s3s3qz/index.html (last accessed 4th March 2018)

42 Kearns, Erin & Young, Joseph. (2017). "If Torture Is Wrong, What About 24?" Torture and the Hollywood Effect. Crime & Delinquency, p. 5.

43 Janoff-Bulman, R. (2007). Erroneous assumptions: Popular belief in the effectiveness of torture interrogation. *Peace and Conflict: Journal of Peace Psychology,* 13, 429-435.

prints, photo-graphs, DNA tests, eye-witnesses, the use of other scientific methods, the use of dogs etc.], the criminals can get convicted."[44] The registration of telephone SIM cards as well as issuing of Identification cards to every Ugandan after capturing their biometric information are steps in the right direction.

Reforms to enforce the constitutional provision that directs the presentation of a person before court to be charged within 48 hours after arrest should be enacted. This is because torture in most cases happens within these first 48 hours. In addition, the suspect should be allowed access to a lawyer in the shortest time possible and more importantly should be given the opportunity to be accessed by members of his family. According to the Standard Minimum Rules for the Treatment of Prisoners, "an untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them," subject to reasonable security restrictions.[45]

Parliament should ratify the Optional Protocol on the Convention Against Torture (OPCAT)[46] which requires states to establish National Preventive

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44 http://www.statehouse.go.ug/media/presidential-statements/2017/05/16/presidents-statement-torture President's Statement On Torture (last accessed 4th March 2018)

45 Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), rule 92. The Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2015(the Luanda Guidelines), Guideline 4.

46 Optional Protocol on the Convention Against Torture (OPCAT, adopted by the UN General Assembly on 18th December 2002

Mechanisms (NPMs)[47] to conduct independent oversight of the treatment of those in prisons and other detention facilities as a safeguard to ensure adherence to treaties and national laws banning torture. Since most of the torture in Uganda happens in detention facilities, this would go a long way in preventing torture. The National Preventive Mechanisms would also be more effective than the one- off visits that have been carried out in the past by UHRC and Members of Parliament where they have even had to seek permission from the heads of the respective security agencies.[48]

To guarantee non-repetition of torture or ill-treatment as well as combat impunity for violations of the right to freedom from torture, the government should establish effective clear instructions to public officials on the provisions of the PPTA and the UNCAT, especially the absolute prohibition of torture.[49] The state must provide regular training to the police and other military and security forces on human rights law especially specific training on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).[50] In addition, all

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47 NPMs have access to all persons who are held in confinement and all relevant information about places of detention. NPMs can interview confined persons without other witnesses present, visit places of confinement, and provide recommendations to the relevant authorities for improvements in the conditions of detention and for preventing abuse of confined persons.

48 UHRC Report 2016, Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda, Human Rights Watch, http://www.monitor.co.ug/News/National/Parliament-investigate-Nalufenya/688334-3931104-format-xhtml-geunxp/index.html (accessed March 2018)

49 Para 18,General Comment No. 3 of the Committee Against Torture

50 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 16 December 2005

detention facilities should be gazetted and their legality clarified as required under international law. According to the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island guidelines) all persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations.[51]

In addition, pursuant to General Comment 2 of the Committee against Torture which directs states parties to make the offence of torture punishable as an offence under its criminal law, the perpetrators of torture among the security forces should not be shielded from criminal sanctions by administrative and disciplinary proceedings as has been the case in Uganda. The PPTA which establishes the offence of torture and prescribes a penalty should be enforced. In the past the police have preferred the lighter charge of assault instead of torture.[52] For instance, the former Old Kampala Divisional Police Commander Joram Mwesigye was convicted in March 2017 of assaulting a WBS television Cameraman for actions which could have easily amounted to torture under the PPTA as the victim has since become paralysed.[53]

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51 Guideline 20.

52 Former Old Kampala DPC Joram Mwesigye guilty of assaulting journalist http://www.monitor.co.ug/News/National/Former-Old-Kampala-DPC-assaulting-journalist/688334-3844742-gu0g9jz/index.html (accessed March 2018)

53 One year later; journalist crippled by police yet to get justice http://www.monitor.co.ug/News/National/One-year-laterJournalist-crippled-police-yet-justice/688334-3025782-ahg9v0z/index.html (accessed march 2018)

Government should also honour its financial obligations resulting from compensation orders to victims of torture which it has either failed or deliberately refused to honour. The UHRC has noted that the delayed payment of the tribunal awards to victims of torture affects their specialised treatment and rehabilitation who in most cases have lost their livelihoods.[54]Under Article 14 of the UNCAT, all states parties are required to "ensure in their legal systems that the victim of an act of torture obtains redress and has an enforceable right to fair, prompt and adequate compensation, including the means for as full rehabilitation as possible." Redress includes the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[55] Restitution aims to restore the victim to his or her situation before the violation of his rights was committed. Rehabilitation refers to the restoration of function or the acquisition of new skills required by the changed circumstances of a victim in the aftermath of torture or ill-treatment and can include medical and psychological care as well as legal and social services.

A key element of the PPTA is the authority granted to private individuals to carry out private prosecution of perpetrators of torture. Under the PPTA[56] criminal proceedings under the Act may be instituted by any person, other than a public prosecutor or a police officer who has reasonable and probable cause to believe that an offence has been committed by any person under the Act. This provision was tested by

54 UHRC Report 2016 p. 17.
55 Comment 6 of General Comment No. 3 of the Committee Against Torture
56 Section 12 1(c) of the PPTA

human rights lawyers under the Network for Public Interest Lawyers (NETPIL) in 2016 when they sued the then Inspector General of Police (IGP), Gen Kale Kayihura and 20 other police officers accusing them of torturing supporters of opposition leader Col. Dr. Kizza Besigye.[57] However, the trial was sabotaged by *Boda Boda 2010* a quasi militia loyal to the IGP as its members gathered around the court threatening to lynch the lawyers thus disrupting proceedings. The case collapsed after the Director of Public Prosecutions took over the file and lost interest in the matter. Although this avenue was unsuccessful at the time, there is hope that private prosecutions can offer suitable remedies in cases against other perpetrators of torture in less politically potent cases.

In conclusion, civil society organisations and human rights activists can only go so far in the fight against violation of the right to freedom from torture, inhuman, cruel and degrading treatment if political will is absent. However, even in the absence of political will, the unique mechanisms under the PPTA and international law should be embraced to stop state impunity and put an end to the injustice that has been occasioned as a result of this impunity.

[57] Kayihura won't go to court http://www.monitor.co.ug/News/National/Kayihura-won-t-go-to-court---Odongo/6883343347050-100cxjmz/index.html (accessed March 2018)

'STAYISM' AND THE NATIONAL RESISTANCE MOVEMENT: THREATS TO REGIME CHANGE IN MUSEVENI'S UGANDA

Muhumuza Nimrod*

ABSTRACT

Three decades after its rise to power in what was Uganda's fifth extra-constitutional transfer of authority, the NRM (synonymous with Museveni) continues to maintain its grip in ways that threaten to all but destroy the very democratic objectives its bush-war struggle was predicated on. In the process, it has outspent its inherited goodwill to enable peaceful, institutional transition of power. For longevity, it has turned to curtailing civil and political rights, de-institutionalising democracy, militarising the state and supplanting institutions in favour of an over-imposing Presidency. Importantly, present threats to regime change are traceable to the attitudes and power dynamics of pre-colonial societies in Uganda, the imposition of the so-called over-developed state as well as the elite parasitic hangers-on in the post-colonial state. Hope for genuine change, lies in collective citizen action or agency.

I. INTRODUCTION

On the 25th of January 1986, the National Resistance Army-Movement (NRM), a Marxist-Leninist guerilla outfit, marched into Kampala and overthrew the military junta of Tito Okello, which had itself lasted just nine months in power, following a putsch of Milton Obote's government. The NRM's takeover was the fifth extra-constitutional 'transfer' of power in Uganda, then only a 24 year old independent country from the British colonial rule. Against that backdrop of political turmoil, the NRM promised to restore political, economic and social power to the people

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primarily through ensuring free and fair elections and upholding the 'sovereignty of the people'. However, the NRM's continued stay in power and the methods it employs to achieve that objective threatens to destroy the democratic process on which it premised its struggle.

This paper seeks to problematize and explain the refusal and failure of the NRM to peacefully transfer power whenever it has been required to do so by constitutional and legal imperative. The paper is divided into three sections. The first part critiques the view that Uganda's democratic deficit squarely lies at the hands of the British; part two substantively argues that the NRM has squandered the international and local goodwill it inherited to build institutions which would guarantee peaceful transfer of power through democratic means and; part three suggests what sort of reforms are required to set Uganda onto the democratic path.

II. REGIME CHANGE: A WORKING DEFINITION

A political regime is a set of rules, procedures, and understandings, governing political participation.[1] These rules determine the distribution of power and prescribe who may engage in politics and how. A regime change has been defined as a shift from one set of political procedures to another, from an old pattern of rules to a new one. It is a period of uncertainty during which the shape of the new political dispensation is contested for by incumbents and opposition parties.[2]

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1 MJ Gasiorowski 'An overview of the political regime change dataset' (1996) 29(4) *Comparative* Political Studies 470.

2 M Bratton & N van de Walle Democratic Experiments in Africa: Regime Transitions in Comparative Perspective (1997) 9-10.

The NRM is a manifestation of a classical semi-democratic regime. This is one where:

> ...a substantial degree of political competition and freedom exist, but where the effective power of elected officials is so limited, or political party competition is so restricted, or the freedom and fairness of elections are so compromised that electoral outcomes, although competitive, still deviate significantly from popular preferences; and/or civil and political liberties are so limited that some political orientations and interests are unable to organize and express themselves.[3]

The goal of any political transition, specifically in a country with a history as turbulent as Uganda's, should be to move towards a democratic regime where there is *meaningful and extensive competition* amongst individuals and organised groups for all effective positions of government power at regular intervals without the use of force; the existence of a highly inclusive level of participation in the selection of leaders and policies without the exclusion of any major social group and; has sufficient level of civil and political liberties to ensure the integrity of political competition and participation.[5]

Long-term rulers, such as Uganda's Museveni or Rwanda's Kagame, may be effective in stabilizing erstwhile broken countries. It has even been argued that rebuilding fragmented societies may be easier without the complications of competitive politics and that the NRM was forced by prevailing circumstances to extra-constitutionally take power and that its

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[3] Gasiorowski (n 1 above) 471.

popularity at that time expressed the 'general will' of many Ugandans despite its lack of any democratic credentials.[4] However, 'stayism' which is the failure or refusal by long-term rulers to relinquish power, is ill-advised for countries seeking political maturity and full democratization.[5] Political violence does occur in societies either during the process of regime transition or after the fall of long-staying leaders. One can point to the genocide in Rwanda after the assassination of Juvenal Habyarimana in 1994, the descent into chaos of the Democratic Republic of Congo after the fall of Mobutu Seseseko in 1997, the civil war which gripped Côte d'Ivoire after the death of Felix Houphouet-Boigny in 1993 and the more recent unfortunate example of Libya after Muammar Gaddafi. These examples all demonstrate the imperative for *peaceful* regime change.

III. PRE-COLONIAL UGANDA AND THE ERA OF 'COLONIAL INTRUSION' AND 'DISTORTION.'

There has always been a temptation, within and without academia, particularly on matters democratic and good governance, to examine Uganda in truncated epochs most epitomised by phrases such as "pre-colonial," "colonial," and "post-colonial" Uganda. This paper seeks to locate a common thread throughout those periods which explains the

4 C. Onyango-Obbo 'Africa's Big Men can deliver but they must know when to go' *The Guardian*, 24 February 2016 https:// www.theguardian.com/global-development/2016/feb/24/africa-big-men-deliver-know-when-to-go-elections (accessed 9 March 2018).

5 Onyango (n 5 above).

failure of our democratic experiment.[6] This paper argues that there are several current threats to regime change in Uganda and it traces these threats from the attitudes and power dynamics of pre-colonial societies in Uganda, the imposition of the so-called over-developed state as well as the elite parasitic hangers-on in the post-colonial state of Uganda.

3.1 Haunted by ghosts of the past

The modern state of Uganda was forged out of a variegation of pre-colonial political systems with varying adherence to a semblance of democratic ideals.[7] These systems ranged from varying degrees of centralised

[6] Blame for Uganda's post-colonial democratic failings is placed at the feet of Britain, the colonial power, for distorting and disrupting the political and socio-economic structure of various Ugandan societies, and introducing the Westminster model that the country was not familiar with. While that charge is not totally unfounded, it does not, in our view, adequately explain the disregard of democratic values, traditions, and norms. It falls short of examining the failures of imbuing Ugandan society with the agency to demand or engineer regime change through legitimate and/or constitutional means. See H Alavi 'The State in post-colonial societies: Pakistan and Bangladesh' *New Left Review 1* (74) July-August 1972, S Amin, 'Understanding the Political Economy of Contemporary Africa' (2014) 39 (1) *Africa Development* 15-26 CODESERIA.

[7] J. Mugaju, 'A Historic Background to Uganda's No-Party Democracy,' in J. Mugaju and J. Oloka-Onyango (eds.) *No-Party Democracy in Uganda: Myths and Realities* (2000) 10.

despotism, namely: monarchies and[8] decentralised gerontocracies.[9] The common theme of both systems of governance was the exclusion of ordinary members of the community, either by design or default, from these deliberations but also the expectation to be bound by the decisions which the councils or kings had made.[10] The blueprint of democracy and the ability to change leadership, manifested through, for instance, representative systems which encouraged popular participation and enhanced the agency of the populace in decision making was, for the most part, absent in pre-colonial Uganda.

It is arguable as to whether the British distorted Uganda's political structure by imposing a foreign, unworkable and authoritarian system of administration to which Uganda's democratic deficit can be traced. The colonial period lasted less than a century and, in administering the protectorate through indirect rule, the British left the autochthonous and authoritarian political systems largely intact and instead used these administrative systems which they found in place that were based neither

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[8] The monarchies which were prevalent in southern and western Uganda were inherently undemocratic. There was no popular participation by the people in their own government and succession from one king (it was almost always patrilineal) was usually violent. See S.R Karugire *A Political History of Uganda* (2010) 21.

[9] J. Mugaju, 'A Historic Background to Uganda's No-Party Democracy' in J. Mugaju and J. Oloka-Onyango (n 8 above) 10. Decentralised societies were governed by a council of elders in which *male elders* participated in public debate and decision making. Notions such as 'gender inclusivity' or 'universal adult suffrage' were non-existent. Furthermore, these elders were not chosen by the community but rather earned their seat on these councils usually by virtue of their age or status in the community, not on merit. Although decisions in these councils were reached by consensus, some elders wielded more clout derived from their wealth, perceived magical powers or demonstrated military clout.

[10] Mugaju, 'A Historic Background to Uganda's No-Party Democracy,' in J. Mugaju and J. Oloka-Onyango (n 8 above) 10.

on the will nor the consent of the governed.[11] They formalized the hierarchical structure of society with the governor at the top, his subordinate provincial and district commissioners in the middle rung and the traditional or appointed chiefs at the bottom.[12] In fact, the introduction of a coercive state apparatus upped the ante as local politicians jostled for positions within the new colonial administration because it accorded with the authoritarian streak which many leaders in "pre-colonial" societies had enjoyed.[13]

One cannot divorce the authoritarian and predatory proclivities of Uganda's post-colonial rulers from their pre-colonial provenance, the imperial interlude notwithstanding. That the country's post-colonial leaders have been inclined to remain in power for life or to resolve political differences militarily speaks to the failure of Ugandans collectively to embrace democracy as a means of mediating the tensions which afflict any fledgling state which is problematic because it keeps the country in a cycle of violent regime changes.

3.2 Independent Uganda: The Triumph of Hope Over Pragmatism

For a brief period between 1962 and 1966, it seemed like an independent Uganda had struck the democratic jackpot. A constitutional framework which had been the product of tedious and delicate negotiations seemed to be holding, despite the tensions which simmered underneath.[14] It

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11 G Thompson *Governing Uganda: British Colonial Rule and its Legacy* (2003) 13.
12 GW Kanyeihamba *Constitutional and Political History of Uganda: From 1894 to Present (*2010) 15.
13 Karugire (n 9 above) 137.
14 Karugire (n 9 above) 170-197.

unraveled after four years when the then Prime Minister, Milton Obote, abrogated the independence constitution and declared himself executive president; ramming not one but two constitutions through parliament without any substantive debate, let alone country-wide consultation.[15] Barring one very questionable general election in 1980, there was no other opportunity for Ugandans to exercise their constitutional right to choose their leaders. The judiciary and parliament were effectively neutered and 'real' power lay in whoever commanded the loyalty of the armed force.[16]

IV. THE MUSEVENI REGIME: FROM HOPE TO DESPAIR

This section examines the threats to regime change in Uganda through the lenses of the NRM and Museveni regime. The president has himself indicated in several fora that the problem of Africa was leaders who hold onto power even after they have lost legitimacy or popular support.[17] The Museveni regime had enough international and local goodwill to effectively restructure the country's political landscape and set it on a democratic path where power could be transferred peacefully from one civilian leader to another.[18] Museveni had promised a break with the past era of leaders who clung on to power even when they did not have the mandate to do so; arguing in 1986 that his government 'was not a mere

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15 Kanyeihamba (n 13 above) 100.

16 G Thompson *African democracy: Its Origins and Development in Uganda, Kenya and Tanzania* (2015) 176-177.

17 YK Museveni *What Is Africa's Problem?* (2000) 143.

18 Thompson (n 17 above) 229.

change of guards but a fundamental change in the politics of the country'.[19] This aspiration has not been realized, as will be illustrated below.

4.1 Curtailing Civil and Political Rights

Ominously, the Museveni regime's first major move was to ban political parties and introduce the so-called 'movement system'. This was effectively a 'no-party' system of government in which political parties and their activities were banned.[20] In the absence of political parties which provide a platform for free, and even-handed contestation for state power, violent regime change becomes not just necessary but inevitable.[21] Political parties are part and parcel of every free and democratic state and are premised on constitutional provisions which guarantee freedom of association, assembly and, most importantly, provide a platform for dissent. Their ability to recruit members and campaign freely, offer alternative policies and programme to the electorate and contest elections is one of the foremost harbingers of a democratic system which imbues legitimacy to any victorious party or government.[22] Political parties are the foremost institutions which provide an alternative to the serving government for the electorate. With their ability to mobilize and organize

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19 S Rule 'Rebel Sworn In as Uganda President' The New York Times 27 January 1986 accessed at https://www.nytimes. com/1986/01/30/world/rebel-sworn-in-as-uganda-president.html 9 March, 2018.

20 Mugaju, (n 8 above) 9. This government later enacted the Movement Act, CA 261 that prohibited the mobilization, recruitment and any related political party activities.

21 JJ Barya, 'Political Parties, the Movement and the Referendum on Political Systems in Uganda: One Step Forward, Two Steps Back?' in Mugaju and Oloka-Onyango (n 8 above) 26.

22 JJ Barya, 'Political Parties, the Movement and the Referendum on Political Systems in Uganda: One Step Forward, Two Steps Back?' in Mugaju and Oloka-Onyango (n 8 above) 33.

sections of the populace, political parties operate as a shield against dictatorship and ensure Ugandans exercise their agency through supporting candidates, platforms and ideologies of their choice.[23]

In Uganda, political parties were banned for 30 years, from 1986 to 2006, and could not raise funds, convene delegates' conferences or sponsor candidates on the spurious premise that they were responsible for the sectarianism which threatened to rip the country apart after independence.[24] All electoral contestants had to campaign on the 'individual merit' system, which meant they could not rely on any political party support to endorse their candidature. Simultaneously, the NRM which was a political party in all but name and title, sought to entrench itself by setting up grassroots institutions known as local councils and openly campaigning for candidates who supported the 'movement' system during the local council elections in 1991 using state resources, while its political opponents were hamstrung by the requirement to adhere to the movement system.[25]

This move had a two-fold effect: it limited the possibilities for making politics issue-based and instead transformed them into personality-cult politics and; it weakened the primary institutions which could challenge the undemocratic aspects of any undemocratic government.[26] The NRM,

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[23] JJ Barya, 'Political Parties, the Movement and the Referendum on Political Systems in Uganda: One Step Forward, Two Steps Back?' in Mugaju and Oloka-Onyango (n 8 above) 33.

[24] J. Mugaju, 'A Historic Background to Uganda's No-Party Democracy,' in Mugaju and J. Oloka-Onyango (n 8 above) 10.

[25] M Mamdani 'Pluralism and the Right of Association' Centre for Basic Research cited in AM Tripp *Museveni's Uganda: Paradoxes in a Hybrid Regime* (2010) 116.

[26] Kanyeihamba (n 13 above) 100.

which spent the last three decades stifling political parties while entrenching itself, garnered over 87% of all parliamentary seats and 90% of local government seats in the last general election.[27] Such arithmetic does not bode well for democracy and, while it is tempting to blame a 'disorganized opposition,' the political reality is that the NRM, fused with the state, and has left the opposition with very little room for manoeuvre.[28]

When the political space was eventually opened in 2006, it came with a poisoned chalice: the NRM sought to trade the move towards political pluralism in exchange for removal of term limits allowing the president to stand again raising the spectre of an imperial presidency in Uganda.[29]

4.2 Presidentialism and the Undermining of Democratic Institutions

The term 'presidentialism' refers to the concentration of power in the office of the president.[30] The counterweight to the exercise of this presidential power, or so the drafters of the 1995 Constitution hoped, would be a vibrant legislature and steadfast judiciary. The move towards presidentialism, concretized in 2005 with the abolition of presidential term limits,

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27 M. Mulondo, 'Opposition is too weak, says DP MP Luttamaguzi,' The New Vision 4 January 2017 accessed at https://www.newvision.co.ug/new_vision/news/1443313/opposition-weak-dp-mp-luttamaguzi accessed on 10 March, 2018.

28 According to Human Rights Watch, the NRM was merely attempting to obscure the basic reality of its partisan dominance of the political process in Uganda. See Human Rights Watch, 'The Movement System: Towards a One-Party State in Uganda?' in Hostile to Democracy: The Movement System and Political Repression in Uganda 1999 accessed at http:// www.hrw.org/legacy/reports/1999/uganda/: 12 March 2018.

29 AM Tripp Museveni's Uganda: Paradoxes in a Hybrid Regime (2010) 30.

30 J. Rubongoya Regime Hegemony in Museveni's Uganda: Pax Musevenica (2007) 132.

foreshadowed a shift away from the core tenets of democracy and peaceful transition, that is, trust and accountability to the people.[31] Instead, the formal/legal structures which are responsible for ensuring an accountable and legitimate government are subordinated to the informal, patron-client networks of power headed by the president thus making peaceful regime change virtually impossible.

The biggest institutional casualty of presidentialism has been Parliament, the organ through which the people can hold the Government accountable and demand for changes whenever such need arises. During the infamous debates to scrap presidential term, and age-limits, parliamentarians were literally bribed by the executive to push through the reforms despite surveys which indicated that up to 85% of the country was opposed to the move.[32] An impotent parliament cannot prevent the inexorable abuse of the system of checks and balances. In one candid admission about the real motive behind the amendments, the Government Chief Whip in Parliament stated 'we cannot legislate ourselves out of power.'[33]

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31 Tripp (n 30 above) 24.

32 I Manzil, 'MPs to get Shs 29 million for age limit consultation' *The Daily Monitor* 23 October 2017 accessed at www.monitor.co.ug/News/National/MPs-get-Shs29-million-age-limit-consultation/688334-4152368-25k45y/index.html accessed on 11 March 2018. Also see '85% percent Ugandans oppose age limit amendment' The Daily Monitor 9 December 2017 accessed at www.monitor.co.ug/News/National/85-percent-Ugandans-oppose-age-limit-amendment/688334-422120057hjvsz/index.html accessed on 10 March 2018.

33 P Katunzi 'What would we miss if we didn't have 10th Parliament' *The Observe*r 31 January 2018 accessed at www.allafrica.com/stories/201801310149.html 9 March 2018.

The president has also cultivated a persona which does not accord with democratic transformation.[34] He has referred to himself as the only individual with a viable ideology for the country,[35] dismissed the opposition as 'ideologically bankrupt' with 'no plan' for Uganda, even as calls have intensified for him to step down at the end of what would be his fifth term in office.[36]

The rise of presidentialism has paralleled the expansion of the neo patrimonial state which does not depend on the consent of the governed and political competition for its legitimacy. Political support can be mobilized through the extensive use of a patronage network spread out across the country, especially at local levels of power.[37] Patronage networks are essentially non-coercive mechanisms through which popular support is maintained by appointment of regime-friendly civil servants and any dissent can have very dire consequences;[38] the use of government

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[34] AM Mwenda 'Personalizing Power in Uganda' (2007) Journal of Democracy 18 (3) 26.

[35] S. Mwesigye 'Museveni: We are many visionaries but am [the] best' The Observer 30 September 2012 accessed at www. observer.ug/news-headlines/21274-museveni-we-are-many-visionaries-but-i-am-best 9 March 2018.

[36] 'Politics not about words and protests - Museveni lectures opposition' The Insider 8 December 2017 accessed at www. theinsider.ug/index.php/2017/12/08/politics-not-about-words-and-protests-museveni-lectures-opposition 10 March 2018. Also see George Muzoora 'I am not anyone's servants, says Museveni' The Daily Monitor 27 January 2017 accessed at http://www.monitor.co.ug/News/National/I-am-not-anyone-s-servant--says-Museveni/688334-3789590whwy85/index.html 9 March 2018.

[37] Tripp (n 30 above) 116.

[38] BBC News 'Uganda nurse suspended for complaining to [opposition leader] Besigye on TV' 10 December 2015 accessed at http://www.bbc.com/news/world-africa-35065221 8 March 2018.

funds to 'buy loyalty' during campaign season and;[39] the use of tender boards responsible for awarding contracts and tax collection rights.[40]

This system has been so efficient that NRM swept local government elections during the last general election relegating opposition parties to third place with NRM-leaning independent candidates placing second.[41] This is one of the main threats to regime change in Uganda because the opposition cannot match the state in terms of resources and bureaucratic reach to attempt to even the scales. The main opposition party nearly splintered due to disagreements as to how combat this patronage system.[42]

4.3 Elections and De-Institutionalising Democracy

The corollary to a strengthened executive branch is a weakening of institutions such as the electoral commission, which are constitutionally mandated to ensure peaceful regime change. The independence of these organs is often compromised and undermined to retain executive power. Article 60 of the 1995 Constitution permits the president to appoint commissioners to the electoral commission who are then perfunctorily

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39 Y Mugerwa & N Wesonga 'Museveni to give out 18 million hoes' *The Daily Monito*r 23 November 2015 accessed at http://www.monitor.co.ug/SpecialReports/Elections/Museveni-to-give-out-18-million-hoes/859108-2968140-8egrq6z/index.html 8 March 2018.

40 M Mulondo (n 28 above).

41 Tripp (n 30 above) 116.

42 In the contest for the leadership of Uganda's leading opposition party, there was stark contrast between the strategies offered by the two candidates: either continue with the confrontational "defiance" method or to painstakingly build grassroots structures to counter NRM's network. See B Amamukori, 'Defiance vs grassroots mobilization in FDC race' The New Vision, 24 November 2017. Accessed at https://www.newvision.co.ug/new_vision/news/1466325/muntu-amuriat 11 March 2018.

vetted by the legislature.[43] Dictators love elections because they are used as façades to give the impression that people have a say in who governs them.[44] For the NRM, elections are a mechanism which *affirms* its power and not a means of ensuring free and fair democratic contestation.[45] Political contestation and dissent in Uganda have become almost treasonable and what should be a pluralistic contest between political parties is a contest for the capture of the state.[46] Electoral rules are often manipulated to exclude opposition parties and candidates from running an effective campaign against incumbent regimes which are often fused financially and bureaucratically with the state.[47]

Opposition candidates are often restricted in their access to the media.[48] One of the most egregious attempts to misuse electoral rules to manipulate an election was an opinion ostensibly given by the Attorney General advising the electoral commission not to nominate one of the main

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43 Constitution of the Republic of Uganda, 1995, art 60.

44 J Gettleman 'Instead of Democracy, Uganda Moves Toward Dictatorship Light' *The New York Times* 17 February 2016. Accessed at: https://www.nytimes.com/2016/02/18/world/africa/uganda-firmly-under-one-mans-rule-dusts-off-trappingsof-an-election.html on 12 March 2018.

45 A. Izama & M Wilkerson 'Uganda: Museveni's Triumph and Weakness' (2011) 22 (3) Journal of Democracy 77.

46 DK Kalinaki 'Voters went to sleep in 2016, woke up in 1980' *The Daily Monitor* 25 February 2016 accessed at www. monitor.co.ug/OpEd/Columnists/DanielKalinaki/-UgandaDecides-Voters-sleep-woke-up-/878782-3091144-i3jmi9/index. html 7 March 2018.

47 The Supreme Court has found in two presidential election petitions challenging the victory of president Museveni that the use of state resources by the incumbent during the campaigns tilted the scales against his opponents.

48 The African Centre for Media Excellence 'Monitoring Media Coverage of the 2016 General Elections in Uganda' accessed at https://www.scribd.com/doc/316433277/Monitoring-Media-Coverage-of-the-2016-Elections-Final-Report-highlights on 8 March 2018. The report found a bias of media coverage in favour of the president.

contenders for the 2006 presidential elections, who had been charged with treason arguing that, "[a]lthough he is presumed innocent until proven guilty, it certainly cannot be said that Besigye is on the same level of innocence as that of the other presidential candidates..."[49]

The opinion, from the country's top legal advisor, prompted so much scorn, derision, and mockery within and outside legal circles, both locally and internationally, to the extent that some thought it was authored by a political henchman within statehouse who required the Attorney General to append his signature.[50]

Calls for electoral reform from the judiciary, civil society organisations, coalition of political parties and even donors have barely registered with the government for obvious reasons.[51] It is through a compromised electoral system that the government can save face even as it struggles for legitimacy.

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49 W. Ross 'Museveni rival should not stand' BBC News 9 December 2005 accessed at http://news.bbc.co.uk/2/hi/afri ca/4514980.stm 10 March 2018. For the full opinion, see Khiddu Makubuya: 'Why Besigye can't stand' The Daily Monitor 10 December 2005.

50 Ross (n 50 above).

51 J. Barigaba 'EU calls for electoral reforms in Uganda' The East African 19 June 2011 accessed at http://www.theeastafrican.co.ke/news/EU-calls-for-electoral-reforms-in-Uganda/2558-1185132-kevmsf/index.html 8 March 2018.

4.4 'Don't intimidate us, we have the support of the army.'[52]

Although Uganda is no longer a military regime and the government presents itself as civilian-led, the spectre of militarism hangs over the country's political landscape like the sword of Damocles.[53] The rationale for military support is simple: if you cannot rule by consent, you govern by fear and force. The armed forces are the iron fist thinly disguised by the velvet glove of an ostensibly representative democracy.[54] On several occasions, the idea of an army take-over has been mooted by members of the ruling elite whenever they have felt their grip on power threatened.[55] The armed forces are a strong deterrent to those who would dare mount a

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[52] These were comments made by the state minister for investment, one of the major proponents for the amendment of the Constitution removing age limit to allow President Museveni contest (and inevitably win) the presidency essentially turning Uganda into a presidential monarchy. While most commentators believed that she had vocalised an open secret, the Ugandan army quickly distanced itself from her comments possibly to save the remaining shreds of the legitimacy of the constitutional amendment process. G Ssali 'Do not intimidate us, we have the support of the army' The Independent 15 September 2017 accessed at https://www.independent.co.ug/support-army-dont-intimidate-us-age-limit-nrm-mps 9 March, 2018. Also see MT Kahungu, 'UPDF High Command distances itself from age limit debate' 93.3 KFM 21 September 2017 accessed at www.kfm.co.ug/news/updf-high-command-distances-itself-from-age-limit-debate.html 10 March 2018.

[53] S. Amanyire & F Basiime, 'I am going nowhere-Museveni' The Daily Monitor 14 February 2008 accessed at www.monitor. co.ug/News/Education/688336-728862-ke2cwt/index.html 8 March 2018 in which the President reportedly remarked "It's me who hunted and after killing the animal, they want me to go, where should I go?" in apparent reference to his bush war struggle that took him to State House in January 1986.

[54] B Kabumba, D Ngabirano & T Kyepa Militarism and the dilemma of post-colonial statehood: the case of Museveni's Uganda (2017) 55.

[55] 'Museveni tells MPs: Army can takeover' The Daily Monitor 18 January 2013 accessed at www.monitor.co.ug/News/National/Museveni-tells-MPs--Army-can-take-over/688334-1668782-i1kjtj/index.html 11 March 2018. Also see Paul Watala, 'We shall not hand over power to opposition-Colonel Bantariza' The New Vision 5 December 2017. Accessed at: https://www.newvision.co.ug/new_vision/news/1466983/hand-power-people-protect-us-bantaliza 13 March, 2018.

challenge, and have been used to intimidate and browbeat (literally, in some cases) members of the other branches of government which do not tow the 'official' position.[56] Shadowy security agencies have invaded and intimidated both parliament and the high court whenever both organs have appeared to step out of line with the official position of the executive branch.[57] It is no exaggeration to argue that in Uganda the government derives its power not from the ballot but from the bullet. Some scholars argue that:

> [I]t is the gun and the capacity for, and ever present threat of, the use of military force by the executive that currently overshadows the parliament and the judiciary and creates the facade of democracy within which raw and unmitigated political power is exercised by an increasingly narrow group of people.[58]

So important is military support to regime survival that defense spending for this financial year was increased by 27%;[59] this is despite President Museveni's constant proclamations that Uganda is enjoying its most

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56 Tripp (n 30 above) 31.

57 Human Rights Watch 'Uganda: Government Gunmen Storm High Court Again' 5 March 2007 accessed at https://www. hrw.org/news/2007/03/05/uganda-government-gunmen-storm-high-court-again 14 March, 2018, also see Ssemujju Ibrahim Nganda, 'The day Museveni guards invaded parliament,' The Observer, 4 October 2017. Accessed at http://observer.ug/viewpoint/55238-the-day-museveni-guards-invaded-parliament.html 14 March 2018.

58 B Kabumba 'The illusion of the Ugandan Constitution' AfricLaw 27 September 2012 accessed at https://africlaw. com/2012/09/27/the-illusion-of-the-ugandan-constitution 7 March 2018.

59 M Mulondo 'Defence Budget to increase by sh 400bn' The New Vision 9 January 2017 accessed at https://www.newvision.co.ug/new_vision/news/1443674/defence-budget-increase-sh400b 17 March 2018.

peaceful era in over 500 years.[60] It is also instructive that President Museveni's most credible challenger for the presidency in the last four election cycles is a retired colonel who has borne the brunt of state's coercive apparatus for the temerity to challenge his former commander-in-chief.[61] Other dissidents who have dared to follow Col. Kizza Besigye's example or fallen out with the regime have either fled into exile or been put on trial on all manner of spurious charges.[62]

Recruitment practices within the army, particularly of its top brass, have been drawn from the west of the country, mostly from the president's ethnic group as he seeks to co-opt them into his patronage network and forestall any potent defections which could challenge his grip on power.[63]

4.5 ECONOMIC GROWTH, DONORS AND THE RENTIER MIDDLE CLASS

Since 1986, Uganda has recorded impressive economic growth of between four and six percent per annum.[64] Economic growth is generally believed to create conditions for democratization in the long term. An educated and empowered middle class cannot easily be cowed by the repressive apparatus of the state and is able to hold the state accountable. Ideally, according to classical Marxist ideology, the state would have to draw its

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60 'Museveni: I can confidently tell you that the future is bright,' The Independent, 31 December, 2016. Accessed at: https:// www.independent.co.ug/museveni-can-confidently-tell-future-bright/ 8 March, 2018.

61 Ssali (n 53 above).

62 Ssali (n 53 above).

63 Tripp (n 30 above) 32.

64 The World Bank 'Uganda Economic Update Fact Sheet' 8 February 2018 accessed at http://www.worldbank.org/en/ news/feature/2017/02/08/uganda-economic-update-fact-sheet 5 March 2018.

legitimacy and survival from an endogenous bourgeoisie class.[65] Instead, Uganda has been beset by hide-away peasants and a professional rentier class beholden to the state for survival. Majority of Ugandans live in rural areas as subsistence farmers and have, despite poor service provision, provided the greatest support for the NRM in all competitive election cycles. The peasant class does no more than it needs to feed themselves and their families and do their best to avoid interactions or confrontation with the state.[66]

The middle and business class, whose very survival depends on the state either through direct employment or the award of contracts, have mostly shied away from attempts to hold the government accountable and, where necessary, demand regime change. It is no wonder that the few individuals calling for regime change in Uganda are those who have previously been part of the ruling party or military elite and have broken ranks with the government for one reason or the other.[67] The struggle for democracy has therefore been left to opposition politicians, jobless youth and a handful of professionals and academics.[68]

Donor funds have served as a double edged sword in the struggle for democracy and regime change in Uganda. Foreign aid legitimizes the authoritarian regime while simultaneously supporting civil society and encouraging political pluralism as a condition for continued funding.

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65 Alavi (note 7 above) 20.
66 Mwenda (n 35 above) 34.
67 M Khisa 'Managing elite defection in Museveni's Uganda: the 2016 elections in perspective' (2016) 10 (4) *Journal of Eastern African Studies* 729-748.
68 Mwenda (n 35 above) 29.

V. CONCLUSION

There is no better guarantee of a return to constitutionalism, peaceful regime change and democratic governance than the exercise of citizen agency through meaningful participation in the civic and political activities of their country. There are two obscure, rarely discussed provisions of the Ugandan Constitution which the drafters thought very important as to include them in the first chapter of the document. Article 3 provides for the defence of the Constitution and prohibits any person(s) from taking or retaining control of government in an unconstitutional manner.[69] It proscribes as treasonable, the suspension, overthrow, abrogation or *amendment* of the Constitution in an unlawful manner and requires Ugandans to defend the Constitution as a matter of right and duty. Article 4 requires the state to promote awareness of the Constitution by translating it into Ugandan languages and requiring that its provisions be disseminated in all education, and armed forces training institutions.

These provisions give Ugandans the agency to demand, by whatever means, a return to constitutionalism and adherence to constitutional provisions, and to require that democratic principles such as those manifested through free and fair elections are upheld. There is no getting

[69] Constitution of the Republic of Uganda, 1995, art 3. 72 Constitution of the Republic of Uganda, 1995, art 4.

around the fact that any demands for peaceful regime change must be made by Ugandans.[70]

[70] "Earlier generations of Ugandans could have blamed their failures on war, poverty and pestilence. We do not have such luxuries. The failures that stare us in the face– schools that don't teach, hospitals that don't treat, farms that don't produce, taps that don't run, bulbs that don't light, cops that don't police, economic growth without development or jobless growth, a predatory state and so on – are entirely of our making. Daniel K. Kalinaki 'How shall we explain to our kids how we came to be so mediocre?' *The Daily Monitor* 2 March 2017. Accessed at: http://www.monitor.co.ug/OpEd/Editorial/How-shall-we-explain-to-our-kids-how-we-came-to-be-so-mediocre-/689360-3833046-qsah82/index.html 15 March 2018.

A REVIEW OF THE NATIONAL HEALTH INSURANCE BILL AND ITS POTENTIAL IMPACT ON THE ACCESS TO HEALTH SERVICES

Jordan Tumwesigye*

ABSTRACT

Uganda's first National Health Insurance Bill (NHIB) was tabled before Parliament in 2007. More than a decade later, a validly passed and functional Act remains elusive even with the tabling of a second Bill in 2014, displaying a dismal record in the country's prioritisation of the right to health. But assuming the 2014 Bill was passed today, would it suffice and be suited to the achievement of its objectives? This review reveals that the 2014 Bill is afflicted with several lacunae that will adversely affect its efficacy and operationalisation if enacted as is.

I. INTRODUCTION

Uganda's attempts to provide Universal Health Coverage (UHC) started in 2007, when the National Health Insurance Bill (NHIB) was tabled before parliament. It generally sought to provide universal healthcare for all Ugandans. Since then, a second Bill (2014) was been tabled. Failure by Parliament to pass the Bill, more than a decade after the first tabling is proof that the right to health has been given short shrift. But what may be said, by way of review, of the 2014 Bill? Is it, as it presently stands, a viable solution to the country's health-related problems?

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This paper considers the 2014 Bill in the light of recent developments in the arena of the right to health. It also explores the relationship between the right to health and UHC and how proper UHC leads to the realisation of the former. An analysis of the legal, administrative and institutional framework of the Bill follows as of course and from this analysis, lacunae have been identified and their remedies suggested. Lastly, anticipated challenges with the operationalisation of the Bill are investigated with the aid of other jurisdictions' experiences.

II. GENERAL OVERVIEW

Despite significant reduction in Uganda's infant and maternal mortality rates in 2016,[1] the numbers indicate that more needs to be done. The National Health Insurance Bill 2014 (NHIB) was aimed at introducing the concept of Universal Healthcare Coverage (UHC) in Uganda following the success stories of Kenya and Rwanda in the region. The long title of the Bill provides *inter alia* for the provision of benefits that are provided under the Bill to all registered beneficiaries. If this can be realised for everyone in the country, then Uganda will be among the few success stories of developing countries that have succeeded in achieving UHC. Taking steps towards achieving UHC in Uganda is commendable, as this is what dominates the global agenda regarding the area of health policy.[2]

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1 National Demographic Health Survey 2016. The survey shows that infant mortality rate has gone down to 43 deaths per 1000 live births in 2016 from 54 in 2011 and maternal mortality has reduced from 438 deaths per 100,000 live births to 336 deaths in 2016.

2 Abuya, T., Maina, T. and Chuma, J. (2015). Historical account of the national health insurance formulation in Kenya: *experiences from the past decade*. [online] BMC Health Services Research. Available at: https://bmchealthservres.biomedcentral.com/articles/10.1186/ s12913-015-0692-8 [Accessed 3 Jun. 2017].

This is especially against the backdrop of statistics indicating that almost half of Africa's health expenditure is said to come from Out Of Pocket Payments (OOP).[3] It therefore becomes necessary to subsidise personal expenditure on health such that the entire Ugandan population can have access to affordable healthcare considering that a large percentage of Ugandans continue to live below the poverty line and therefore cannot afford proper healthcare. However, continuous political bickering is the largest bottleneck hindering the realisation of this goal.[4]

The 2016 statistics indicate a measly private insurance penetration of 0.73 which has since dropped from 0.76 in 2015.[5] This is indicative of the fact that insurance penetration in the country remains really low.[6] The other problem with private insurance lies in its high cost. For instance in 2011, the annual health insurance cost for IAA Insurance, one of the private insurance providers in the country, was Shs. 350,000 per year.[7] From this, it is safe to argue that private insurance only benefits a few and serves to defeat the purpose of achieving Universal Health Care.

Litigation on the right to health in Uganda has been spearheaded by civil society organisations such as Centre for Health Human Rights &

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3 "Health Insurance in Africa? There Should Be an App for That", Zandre Campos, *Huffington Post Available at* http://m. huffpost.com/us/entry/9307102 (last accessed 16 July, 2017 at 09:13A.M)

4 "National Health Insurance Scheme for Uganda in the offing" Isaac Khisa *The Independent* Available at www.independent.co.ug/national-health-insurance-scheme-uganda-offing/(Accessed 12 January, 2018)

5 Uganda Insurers Association overview of the Insurance Industry, August 2017, Available on www.uia.co.ug/overview-of-the-insurance-industry-august-2017 (Accessed 12 January 2018)

6 www.monitor.co.ug/Business/Insurance-penetration-Uganda-still-report/688322-3862050-1lwnlvz/index.html (Accessed 12 January 2018)

7 www.monitor.co.ug/Business/Prosper/688616-1107284-hf2il5/index.html (Accessed 13 January 2018)

Development (CEHURD). The cases litigated paint an awful picture of the often preventable conditions which most poor Ugandans suffer and die from. Regrettably, these are the persons who cannot afford private health insurance.

The state ought to embrace Universal Healthcare Coverage in order to make the healthcare system more inclusive of the poor.

III. RELATIONSHIP BETWEEN THE RIGHT TO HEALTH AND UNIVERSAL HEALTHCARE COVERAGE

The World Health Organisation (WHO) has defined health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[8] The right to health is therefore a fundamental right upon which other rights can be based.[9]

In General Comment 14, the Committee on Economic Social and Cultural Rights imposes obligations on the state to ensure the full realisation of the right to health. These obligations are the obligation to respect, protect and fulfil the right to health.[10] Under the obligation to respect, state parties are obligated to refrain from denying the equal access of health services to all persons.[11] The obligation to protect on the other hand includes the obligation to adopt legislation to ensure equal access to health care.[12] The

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8 The World Health Organisation Constitution. Available at: www.who.int/about/mission/en/ (Accessed 4 April 2018)

9 General Comment 14 on the Right to the Highest Attainable Standard of Health, *Committee on Economic Social and Cultural Rights*, Adopted on 11 August 2000 at Page 1

10 Ibid at Page 12

11 Ibid

12 Ibid

obligation to fulfil requires that states give sufficient recognition to the right to health in their respective political and legal systems by way of legislative implementation.[13] General Comment 14 also puts in place essential elements of the right to health which are: Availability, Accessibility, Acceptability and Quality (AAAQ).[14] In accessing the effectiveness of health systems, these four elements ought to be looked at and measured up against the said health systems.

On the other hand, UHC has been defined by the WHO as ensuring that all people have access to needed promotive, preventive, curative and rehabilitative health services, or sufficient quality to be effective, while also ensuring that people do not suffer financial hardship when paying for these services.[15]UHC embodies three related objectives namely: equity in access to health services, that the quality of health services is good enough to improve the health of those receiving health services and financial-risk protection which is meant to ensure that the cost of healthcare does not put people at risk of financial hardship.[16]

The WHO has attempted to show the relationship between the right to health and UHC by looking at the norms embodied in each.[17] Firstly, the right to health like UHC promotes comprehensive health-care-services as

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13 Ibid at Pages 12-13
14 Ibid at Pages 4-5
15 World Health Organisation, universal health coverage, accessible at www.who.int/healthsystems/universal_health_coverage/en/ (Accessed 4 April 2018)
16 Ibid
17 *Anchoring universal health coverage in the right to health: What difference would it make?* Policy Brief, World Health Organisation at Page 10 20. Op. Cit. Note 17

opposed to disease specific services. Indeed, the definition of UHC goes beyond access to cure diseases but also entails rehabilitative services.[20]

Secondly, UHC aims to put to an end discrimination that is brought by OOP payments.[18] Non-discrimination is a principle which is in line with the right to health too. According to General Comment 14, the right to health is closely dependent on the realisation of other rights among which is freedom from non-discrimination.[19] Furthermore, the right to health also entails accessibility of health facilities, goods and services for all without discrimination.[20]

Thirdly, the element of quality appears in both the right to health and UHC. The right to health provides for the AAAQ framework of which quality is also part. Under quality, health services have to be medically appropriate and of good quality.[21] For UHC to provide the desired result and hence lead to the realisation of the right to health, stakeholders ought to pay close attention to the quality of the services provided.

What can therefore be seen from the relationship between the right to health and Universal Health Coverage is that the latter has to be brought within the AAAQ framework of the former whilst bearing in mind the state obligations in General Comment 14. It is essential that the enactment and implementation of the NHIB takes these into account.

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18 Op. Cit. Note 19 at Page 11
19 Paragraph 3 of General Comment 14
20 Paragraph 12(b) of General Comment 14
21 Paragraph 12(c) of General Comment 14 Clause 3 of the Bill

IV. LEGAL, ADMINISTRATIVE AND INSTITUTIONAL FRAMEWORK OF THE BILL

4.1 Legal Framework

The Bill provides for the compulsory registration of everyone resident in Uganda for health insurance except for those who are already under a private commercial health insurance scheme.[25] This is an important and progressive aspect of the because it furthers the practical realisation of UHC. If most Ugandans are registered under a health insurance scheme, this will reduce the OOP payments which will in turn reduce on death under preventable circumstances which leads to a realisation of the right to health. The effect of Clause 3 is that it obligates all Ugandans to register for health insurance and doesn't make registration under the National Health Insurance Scheme compulsory.

Clause 11 of the Bill provides for health insurance of indigent persons. However the Clause is silent on how indigence is to be determined. Clause 11(3) provides that indigent persons shall be determined using a procedure laid down under the Bill but this procedure is not laid down anywhere in the Bill. Whereas it is evident that the Bill seeks to have equity in accessing health insurance in line with the WHO guidelines, the absence of criteria for identifying indigent persons undermines this cause and the right to health.

The Bill also provides for contributions to the National Health Insurance Scheme (NHIS).[22] It states that these shall be by monthly statutory deductions of 4% from the salaries of members stipulated under Clause 5

[22] Clause 12

with an equivalent contribution from the employer. For the case of indigent persons, the Clause states that the contributions for the NHIS shall be obtained from the amount paid by government funds appropriated by parliament for the NHIS. This Clause is the most contentious and the main reason why the Bill has not yet been passed into law.[23] The total premium of 8% is far too low especially for low-income earners. For instance, Ugandans who earn Shs. 500,000 a month or less would be entitled to Shs. 40,000 or less in insurance. This is approximately just $11 and yet the World Health Organisation recommends the minimum contribution of $30-40 in public insurance. This premium will in the long term provide low quality healthcare to low income earners which goes against the element of accessibility thus undermining the right to health of low income earners. In addition, the 2017/18 budgetary allocation was only 6% to the health sector despite the government promising to commit at least 15% of its budget to the same in the Abuja Declaration. In light of such, it is unrealistic to legislate that the indigent persons' contribution shall be taken out of parliamentary appropriation. It is either that the premiums for the indigent shall be incredibly low or none at all which potentially affects the right to health of the indigent.

The NHIB violates the constitutional freedom from discrimination where it purports to exclude 'hospitalisation related to obesity' from its benefits.[24] To exclude persons with obesity related illnesses from treatment is discrimination and defeats the right to health element of accessibility

[23] Op. Cit. Note 4
[24] Schedule 1 of the Bill

because it means that those whose illness is as a result of obesity shall not be hospitalised hence shall not benefit from the NHIS.

4.2 Administrative and Institutional Framework of the Bill

The Bill establishes the NHIS as a body corporate with the ability to sue and be sued in its name.[25] Clause 5 highlights the membership of the NHIS as comprising of public servants and private employees within a form of employment with four employees. The functions of the Scheme are stipulated under Clause 7 and include *inter alia* to collect funds and deposit them in accordance with the Bill, accredit and supervise healthcare providers as well as enter into contracts with them. Clause 9 stresses the independence of the Scheme in the performance of its duties. Part IV of the Bill provides for the staff of the NHIS and these include the Managing Director,[26] who shall be in charge of the implementation of policies and programmes agreed upon by the Scheme and the day to day management of the Scheme.[27]Clause 26 provides that there shall be other staff as may be necessary for the effective performance of the functions of the Scheme.

Part III of the Bill provides for the Board of Directors of the Scheme. The Board of Directors shall be the governing body of the Scheme and is charged with the general direction and supervision of the NHIS.[28]The Board is made up of 6 members in line with Clause 13(3). Clauses 16 and 20(4) provide for the remuneration of members of the Board and committee members to the Board. This again raises questions regarding the source of this remuneration as the Bill remains silent about this. If

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25 Clause 4
26 As provided for Under Clause 23 of the Bill
27 Clause 24
28 Clause 13(1)

Board remuneration is gotten from the contributions to the Scheme, it could mean less money available for healthcare services which would then mean less quality which in turn negatively impacts on the right to health.

Furthermore, the Bill provides under Part IX for regional health insurance offices. The Board is charged with the establishment of these offices within the respective regions.[29] The functions of the regional health offices is to perform the functions of the Secretariat within the region,[30] recommend healthcare providers within the region[31]and handle complaints arising out of the region.[32] Decentralisation is important for the eventual realisation of UHC because it means more Ugandans gaining access to health insurance which will in turn promote their right to health.

Another structure under the Bill is the National Health Insurance Appeals Tribunal which is established under Part X of the Bill. The Tribunal shall accordingly be made up of a Chairperson and four other members who qualify to be members of the High Court.[33] The Clause goes on to state that these persons shall have knowledge and expertise in medicine or social insurance.[34]Clause 61 of the Bill provides for the Registrar of the Appeals Tribunal who must be qualified to be a registrar of the High Court. The Tribunal is charged with the power to review decisions made by the Scheme and can affirm, vary or set aside the decision by the Scheme.[39]

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29 Clause 54
30 Clause 54(3)(a)
31 Clause 54(3)(b)
32 Clause 54(3)(e) and Clause 55
33 Clause 56(2)
34 Clause 56(4)

Appeals of decisions taken by the Tribunal are to the High Court in line with Clause 65 of the NHIB.

These structures are important for the realisation of UHC since one institution checks on the powers of the other and vice versa. This in turn helps in accountability and ensuring that the Scheme is not abused, nor its funds misused and swindled. This helps to promote the right to health since effective healthcare is delivered to the beneficiaries under the Scheme.

V. LESSONS FROM OTHER JURISDICTIONS

5.1 The United States of America

The Patient Protection and Affordable Care Act, 2010 was enacted during Obama's tenure amidst bitter political bickering from the Republican Party. Within one year of The Affordable Care Act being put in place, the number of uninsured Americans dropped by 25 percent.[35] With the rising to power of Donald J. Trump, the World Health Organisation urged his administration to expand the Affordable Care Act and work towards the goal of ensuring healthcare for all Americans. This was against the backdrop of Republicans claiming that the Act created unwarranted government interference in the private industry and in personal healthcare.[36] President Trump has continuously threatened to repeal the Act. The lesson Uganda can take from the US is that with continued

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[35] Tavernise, S., Goodnough, A. and Abelson, R. (2014). *Is the Affordable Care Act Working?* New York Times. Available at: https://www.nytimes.com/interactive/2014/10/27/us/isthe-affordable-care-act-working.html?_r=0#/ [Accessed 4June, 2017].

[36] Nebehay, S. (2016). *WHO urges Trump to expand Obamacare, ensure healthcare for all*. [online] Reuters. Available at: http://www.reuters.com/article/us-usa-trump-who-idUSKBN13Y29U [Accessed 4 June 2017].

political bickering, the realisation of UHC remains far-fetched and an illusion.

5.2 Thailand

Thailand is one of the few success stories of UHC amongst developing countries. It introduced a Universal Coverage Scheme (UCS) in 2001 following a death toll of 17,000 children below the age of five, the previous year.[37] By 2011, UCS had covered 98% of the entire population. Key pointers from the UCS is that it is implemented in every province.[38] The Thailand system has incentivised medical practitioners through salaries to serve the rural population.[39] By 2016, the premium stood at $80 per person which is primarily funded by general income tax.[40] Lots of lessons can be taken from the Thailand example for Uganda. Firstly, it is important to decentralise the Scheme as already pointed out. Additionally, incentives for medical practitioners ought to be considered for the better running of the NHIS, and the Scheme's premium should be set at a minimum of $ 30 to meet the desired and required threshold of Quality.

VI. RECOMMENDATIONS

6.1 The Bill has to be structured in accordance with the AAAQ framework: accessibility affordability, acceptability, and quality. For instance, low

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37 "What Thailandcan teach the world about universal healthcare" Sue George, *The Guardian* [online], Sue George, Available at www.theguardian.com/health-revolution/2016/may/24/thailand-universal-healthcare-ucs-patients-government-political [Accessed 5 April 2018]

38 Ibid

39 Ibid

40 Ibid

premium calculations could in the long term mean poor quality medical services which in turn negatively impacts the right to health

6.2 While the Bill is well-intentioned, it ignores various basics. For instance, the Act appears to be wholly hinged on Medicaid and ignores Medicare. Medicaid is meant for the low-income earners whereas Medicare is meant for people who are 65 years and older and have unique diseases, for instance dialysis for kidney related disorders. Such persons are unique and their insurance coverage is obviously different from the normal one because it is more expensive. The Bill should be adjusted to include Medicare. Older persons should be divided into those who can afford and the indigent. Their insurance could be co-insurance. Co-insurance is where the beneficiary pays a certain percentage of their treatment while the other percentage is covered by the Scheme

6.3 The first schedule of the Bill ought to be revised to make sure that treatment is not discriminatory. As earlier pointed out, not including 'hospitalisation related to obesity' borders on discrimination and this ought to be changed.

VII. CONCLUSION

Whereas the government's unwillingness is attributable to the delay in the passing of the National Health Insurance Bill, a closer look at the Bill itself reveals conspicuous lacunae which ought to be dealt with before its enactment. While the Bill is an important step towards realisation of the right to health and Universal Health Coverage, the lacunae discussed afore could affect service delivery and render the Bill passed into law another

relic on Uganda's expansive shelf of enacted albeit non-operational jurisprudence.

THE LONG SEARCH FOR FAMILY: AN ANALYSIS OF INTERCOUNTRY ADOPTION UNDER THE CHILDREN (AMENDMENT) (NO. 2) ACT 2016 OF UGANDA

Denise Louise Nakiyaga Babirye*

ABSTRACT

The Children (Amendment) Act of 2016 places intercountry adoption as the last option available to orphaned, abandoned or legally relinquished children after domestic adoption, domestic legal guardianship and institutional care. The rationale for this is the argument that intercountry adoption fuels child trafficking. But in the context of the Ugandan society which is largely averse to domestic adoption and legal guardianship, and in the light of the fact that institutional care is adverse to children's growth and development, the limitations placed on intercountry adoption are counterintuitive to the paramount consideration of the best interests of the child. While intercountry adoptions may be abused by corrupt elements to enable trafficking, the solution lies in cleaning up the domestic regulation system to sieve these out rather than throw the baby out with the bathwater and eliminate the greater good of legitimate intercountry adoptions altogether.

I. INTRODUCTION

Intercountry adoption dates back to the 1960s and has been on the rise since.[1] The United States (US) Department reported that in 2013/2014, Americans adopted 6,441 children from around the world; 201 of them were adopted

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1 UNICEF's position on Intercountry Adoption, available at, https://www.unicef.org/media/media_41918.html

from Uganda.[2] This statistic has not changed, making it the third biggest source country in Africa compared to Democratic Republic of Congo (DRC) and Ethiopia, two of the biggest source countries for adopted African children.[3]

Although the total numbers of adoptions are not necessarily very high when compared to other African countries like Ethiopia, the problem with adoptions of Ugandan children is that most of them start out as legal guardianships and are finalized outside the country by the adoptive parents.[4] This raises fundamental concerns regarding the procedures being used, the checks and balances therein to safeguard children and the remedies available to children in instances of unsuccessful adoptions.[5]

In addition to the foreign prospective parents evading the restrictions by successfully applying for legal guardianship within days and then completing the adoption process back home,[6] reports have also revealed widespread corruption in the intercountry adoption process with Ugandan parents bribed, tricked or coerced into giving up their children to foreigners, mostly from the US.[7]

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2 U.S Department, Bureau of Consular Affairs, *Intercountry Adoption*, available at, https://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/uganda.html

3 *Ibid.*

4 http://www.alternative-care-uganda.org/resources/adoption-study-march-2015.pdf

5 *Ibid.*

6 Uganda tightens foreign adoption rules to thwart child trafficking, available at, http://www.reuters.com/article/us-uganda-children-adoption-idUSKCN0W61OI

7 *Ibid.*

International adoptions in Uganda as governed by The Children Act of 1997,[8] prior to the amendment, were to be granted if the prospective adoptive parents stayed in Uganda for at least three years fostering a child under the supervision of the Probation and Social Welfare Officer before filing a case,[9] this was however not enforced as discovered through the Thomson Reuters Foundation investigation.[10] The investigation found that the process and the system of adoption were marred with corruption, negligence and deceit. These discoveries prompted the Ugandan Parliament to enact the new legislation, The Children (Amendment) Act 2016,[11] whose objective, among others, is to enhance protection of a child, to provide for the guardianship of children and to strengthen the conditions for intercountry adoption.[12]

This new Act amends the law on intercountry adoption in Uganda; it is now considered as the "last option available to orphaned, abandoned or legally relinquished children" in need of permanency although the adoptive parents need only to stay for one year prior to the application and the faster route of claiming legal guardianship is only available to Ugandan citizens.[13]

Every child enjoys the right to know and be cared for by his or her parents.[14] Children have a need to be protected, nurtured and loved by permanent and

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8 The Children Act, Cap 59 of the Laws of Uganda.
9 *Ibid.*, section 46 (1) (a) and (b).
10 Tom Esslemont and Katy Migiro, *Fraud and deceit at the heart of Uganda adoptions to United States*, May 28th, 2015, http://www.dailymail.co.uk/wires/reuters/article-3101833/Fraud-deceit-heart-Uganda-adoptions-United-States.html
11 The Children (Amendment) Act 2016: assented to by the President of Uganda on May 5th 2016 and commenced on June 2nd 2016.
12 *Ibid.*
13 *Ibid.*, Sections 13 and 14.
14 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force September 2nd 1990, Article 7 (CRC).

loving parents and protected from the drastic costs of institutionalization.[15] Although thousands of people reckon and as research has shown that institutions are not a safe haven for children, many Ugandan child welfare advocates believe that orphanages are more acceptable than international adoption.[16]

While the Ugandan government through a number of campaigns is encouraging domestic adoptions, they are still low reason being that it is a fairly new concept with many misconceptions and myths,[17] giving room for international adoptions to prosper as a lucrative business for the people involved alongside excessive abuse.

This paper analyzes the incentives of this new law, which are, as argued by the protagonists to be the shutting of escapes exploited by child traffickers. The paper will analyze whether, considering the best interests of the child, the amendments made by the Children (Amendment) Act will rob needy children of the chance at a better life overseas,[18] and thus preventing something good from happening.

II. THE ADOPTION LAW

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15 Elizabeth Bartholet and David Smolin, *"The Debate"* in *Intercountry Adoption: Policies, Practices, and Outcomes* (Ashgate Publishing, 2012), available at, http://www.law.harvard.edu/faculty/bartholet/The_Debate_1_13_2012.pdf

16 *UNICEF's Fingerprints: Hurting Orphans in Uganda, Children Deserve Families*, September 6, 2013, http://childrendeservefamilies.com/unicefs-fingerprints-hurting-orphans-in-uganda/

17 *Alternative Care for Children in Uganda*, http://www.alternative-care-uganda.org/domestic-adoption.html

18 Serginho Roosblad, *Uganda Tightens Foreign Adoption Rules*, March 17th 2016, http://www.voanews.com/a/uganda-tightens-foreign-adoption-rules/3242138.html

Every child is entitled to a name, identity, nationality, a record of his or her birth and the right to know and be cared for by his or her parents.[19] Bhagwati J noted in ***Lakshmi Kant Pandey vs Union of India***,[20] that these rights are only possibly enjoyed if the child is brought up in an atmosphere of love and affection and of moral and material security, which is in a family—the biological family being the most affable environment.[21]

In situations where the biological parents or any other near relatives are not available to look after the child, the next best alternative is to find an adoptive parent for the child so that he or she can grow up under a loving care and attention of the adoptive parents.[22] All effort should be made first to find domestic adoptive parents but if it is not possible, foreign adoptive parents can take up the child.[23] This is better than leaving the child to grow up in an institution where it will have no family life, no love, and no affection of parents which might lead the child to live a "life of destitution, half clad, half-hungry and suffering from malnutrition and illness."[24]

This holding was later reduced into rights provided under the UN Convention on the Rights of the Child (CRC) which obligates State parties to protect a child who is temporarily or permanently deprived of his or her *family environment*, or in whose own best interests cannot be allowed to remain in that environment by ensuring that there is alternative care available

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19 CRC, *Supra* n. 14, Articles 7 and 8.
20 *Lakshmi Kant Pandey vs Union of India* 1984 AIR 469, 1984 SCR (2) 795, https://indiakanoon.org/doc/551554
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*

for such a child.[25] Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.[26]

When considering the abovementioned solutions, due regard ought to be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.[27] It should be noted that the use of the words "family environment" broadens the meaning of family to include more than just the biological family. This family environment, however, should not conflict with the child's best interests.[28] The CRC recognizes that inter-country adoption may be considered as an alternative means of child's care among a range of different options, if the child cannot be cared for in *any suitable manner* in the child's country of origin.[29] The CRC has been interpreted to favor both foster care and institutionalization in the country of origin over intercountry adoption,[30] and setting a wide meaning for the kind of care that is suitable for the children for with the use of the phrase "in any suitable manner".[31]

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25 CRC, *Supra* n.14, Article 20 (1) and (2).
26 *Ibid.*, Article 20 (3).
27 *Ibid.*
28 *Lakshimi v Union of India*, *Supra* n.20.
29 CRC, *Supra* n.14, Article 21 (b).
30 David M. Smolin, *Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption*, Chapter 9, *The Intercountry Debate: Dialogues Across Disciplines*, edited by Robert L. Ballard, Naomi H. Goodno, Robert F. Cochran and Jay A. Milbrandt, Cambridge Scholars Publishing, 2015, at page 263.
31 Elizabeth Bartholet, *Should The U.S. Ratify The CRC? A Look At The Pros And Cons*, February 23, 2011, http://www.aapss.org/news/elizabeth-bartholet-should-the-u-s-ratify-the-crc-a-look-at-the-pros-and-cons/

The Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention)[32] post-dates the CRC as it was adopted in 1994 taking into consideration the concerns raised about the CRC. The Hague Convention provides a framework for Convention countries to work together to ensure that adoptions take place in the best interests of children and to prevent the abduction, sale, or trafficking of children in connection with intercountry adoption.[33] It was recognized that intercountry adoption was creating serious and complex human and legal problems and that the absence of existing domestic and international legal instruments indicated the need for a multilateral approach. Under the Hague Convention, intercountry adoption should take place after possibilities for placement of the child within the state of origin have been given due consideration and that an intercountry adoption is in the child's best interests.[34] This provision allows prioritizing of the best interest of the child over exhausting domestic options, and this is where it diverges from the CRC, which is interpreted by the proponents of intercountry adoption as favoring it more than the CRC.[35]

Uganda is not a signatory to the Hague Convention and this has been taken to be the root cause of the increase in the numbers of adopted children as the protective considerations provided therein are not strictly adhered to and has been approached by actors from receiving countries to 'compensate' for the fall in adoption numbers from the countries that signed the Hague

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32 This Convention is accessible on the website of the Hague Conference on Private International Law, www.hcch.net, under "Conventions" or under the "Intercountry Adoption Section".

33 United States Department of State Bureau of Consular Affairs, *The Hague Convention on Intercountry Adoption: A Guide for Prospective Adoptive Parents*, https://travel.state.gov/content/dam/aa/pdfs/PAP_Guide_1.pdf

34 *Hague Convention*, Supra n.32, Article 4 (b).

35 Smolin, *Can the Center Hold?* Supra n. 30.

Convention.[36] However, this has been refuted by some critics of the Hague Convention who argue that although the Hague Convention "was supposed to help unparented children get nurturing parents and permanent homes, its entire influence has been entirely negative as it has closed the doors of intercountry adoption.[37] The Hague Convention has been interpreted more restrictively with strict adherence to the requirements provided therein which has left out the countries that cannot meet the requirements.[38]

At the Regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) provides for the rights of the children.[39] The ACRWC provides for the right of every child to be part of a family as the basic unit of society, the right to enjoy parental care, protection and the right to reside with his or her parent.[40] Inspired by the CRC, it provides that intercountry adoption should enjoy the same safeguards and procedures as those of the national adoption and should be the last resort after the alternative care options of domestic adoption and foster care have been exhausted.[41] The ACRWC brings into context the African culture to which the notion of adoption is unfamiliar.

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36 Nigel Cantwell, *The Best Interests of the Child in Intercountry Adoption*, pages 42-43, https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf

37 Elizabeth Bartholet, *The Hague Convention: Pros, Cons, and the Potential*, Chapter 8, *The Intercountry Adoption Debate:Dialogues Across Disciplines*, edited by Robert L. Ballard, Naomi H. Googno, Robert F. Cochran and JayA. Milbrandt, page 239 and 241.

38 *Ibid.*, page 241.

39 African Charter On The Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, (1990), entered into force November 29, 1999, available at, http://pages.au.int/acerwc/documents/african-charter-rights-and-welfare-child-acrwc

40 *Ibid.*, Articles 18, 19 and 20.

41 *Ibid.*, Article 24.

Nationally, the Constitution of Uganda recognizes the rights of children to know and be cared for by their parents or those entitled by law to bring them up.[42] This is further reiterated in the Children Act.[43] The Children Act provides for both domestic and intercountry adoption. Prior to the amendment, for an intercountry adoption to be granted under exceptional circumstances, the prospective adoptive parent ought to have stayed in Uganda and fostered the child for thirty six months under the supervision of the Probation and Social Welfare officer.[44] Substituting the "three years" with "one year" and authorizing the High Court to waive certain requirements in "exceptional circumstances" this section has been amended by the Children (Amendment) Act, 2016.[45] Although the legislation has conversely softened some of the requirements of procuring intercountry adoptions, it has also introduced new provisions in the section of the law that provide that "intercountry adoption *shall* be considered as the *last option available* to the orphaned, abandoned or legally relinquished children, along a *continuum* of comprehensive child welfare services."[46] The Act further defines what constitutes "continuum of comprehensive child welfare services" to include a "broad range of preventive services and community based family-centered alternative care options which may include; family preservation, kinship care, foster care and institutionalization."[47]

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42 The 1995 Constitution of Uganda, Article 34 (1).
43 The Children Act, *Supra* n.8, Section 4.
44 *Ibid.*, Section 46 (1).
45 The Children Amendment Act, *Supra* n.11, Section 14.
46 *Ibid.*, Section 14 (6).
47 *Ibid.*, Section 14 (7).

Furthermore, the Amendment restricts applications for legal guardianship to only citizens of Uganda.[48]

This Amendment comes as a response to the current vices and weaknesses in Uganda's intercountry adoption system which is marred in corruption, deceit and bribery,[49] which has caused some countries to close their borders to children from Uganda, for instance, in June 2012 the Netherlands informed the Ugandan government of their intentions to stop all adoptions from Uganda due to the level of corruption and bad practices involved in the international adoption process.[50] The Parliament hopes that with this new law will help to curb these vices and provide a stronger child protection system with the new authority in place, the National Children Authority; this is yet to be achieved as the law is still fresh. However, what is left unanswered is whether it is in the best interests of the child to have institutionalization, as an option for alternative care, considered before intercountry adoption. Over the past years, there has been an increase in the number of institutions and consequently children in those homes in the country. There are over 50,000 children in this alternative care option.[51] This increase is not commensurate with the low level of domestic adoptions in the country. There are a number of reasons why domestic adoption is alarmingly low- it is a western concept not understood in Uganda, where there has been a long tradition of children being shared across the extended family, likewise

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48 *Ibid.*, Part VIA, Section 43A (2).

49 *Bribery and Graft: Ugandan families tricked into giving up children for U.S. adoption*, http://www.catholic.org/news/international/africa/story.php?id=60825

50 *Uganda's child adoption 'market' brings misery and confusion*, https://www.theguardian.com/world/2014/oct/06/uganda-child-adoption-market-confusion

51 *Domestic Adoption: Alternative Care Framework Uganda*, https://www.alternative-care-uganda.ord/problem.html

the concept of "orphan" was alien. Thus children have been placed in "orphanages" especially those funded by outside charities, to gain a better education. [52]

The effect of institutional care on children and society at large is monumental. Analytical epidemiological study designs show that young children placed in institutional care are at risk of harm in terms of attachment disorder and developmental delays in social, behavioral, cognitive domains, physical growth, neural atrophy, and abnormal brain development.[53] These delays are caused by the lack of a one-on-one relationship with the primary caregiver in these institutions.[54] Therefore as noted by Bhagwati J in the case of ***Lakshmi v Union of India,***[55] if it is not possible to find suitable domestic adoptive parents, it is better to give the child in adoption to foreign adoptive parents than to allow the child to grow up in an orphanage or an institution. It is in the child's best interest.

III. THE ROLE OF THE BEST INTERESTS OF THE CHILD IN INTERCOUNTRY ADOPTIONS

In contrast with Article 3 of the CRC, which provides that the best interests of the child shall be the "primary consideration" in all actions concerning children, in matters of intercountry adoption, it is the "paramount consideration".[56] This paramount consideration has been said to be the cause

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52 *AFRICA: The 'new frontier' in international adoption*, http://www.adoptionhoksbergen.com/index.php/nl/2-algemeen/87-africa-the-new-frontier-in-international-adoption

53 *Domestic Adoption: Alternative Care Framework Uganda, Supra* n. 51.

54 *Ibid.*

55 *Lakshmi Kant Pandey vs Union of India*, *Supra* n.20.

56 CRC, Article 21; See also ACRWC, 1991, Article 24.

of the split in both sides.[57] Although international human rights law dealing with children positions best interests within the boundaries of all the other rights affecting them, the way the principle is to be operationalized has remained necessarily undefined.[58] These challenges are magnified when looking at intercountry adoption as its determining factor.[59] There is a thin line between "child saving" and the condemnation of "child trafficking" which has given rise to a heated debate over what makes up the best interests of the child in this matter.[60] The confusion is escalated by some of the testimonies given by the child adoptees, who expose the challenges and experiences they go through as transnational children; many trans-racial adoptees deal with issues of racism, low self esteem and identity crises. [61] While there is a general agreement that the best interests of the child should be the paramount consideration in intercountry adoption, there is no consensus on who decides what is in a child's best interests or on what basis that decision should be made.[62] The CRC Committee has tried to define what

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57 Jacqueline Bhabha, *Child Migration and Human Rights in the Global Age,* Family Ambivalence: The Contested Terrain of Intercountry Adoption, Chapter 3.

58 Cantwell, *The Best Interests of the Child in Intercountry Adoption,* Supra n.36, Foreword, page vi.

59 *Ibid.*

60 Cantwell, Supra n.58.

61 Ed. Jane Jeong Trenka et.al., "Introduction ", "Disappeared Children and the Adoptee as Immigrant" "From Orphan Trains to Babylifts" Lifelong Impact, Enduring Need", "From Victim to Survivor" "Tending Denial" in *Outsiders within: Writing on Transracial Adoption* (South End Press, 2006), pages 1-7; 105-114; 139-149; 179-204.

62 Cantwell, *The Best Interests of the Child in Intercountry Adoption*, Supra n.36, page 5.

encompasses the "best interests of the child" through a General Comment but it remains vague and confusing.[63]

Cantwell, in answering the question of the role of the best interest principle in intercountry adoption, argues that the way the best interests principle is used today, that is, essentially to ensure the best possible protection of rights, stands in stark contrast to its origins, which was to fill in or compensate for the absence of rights.[64] He contends that "determining best interests needs to be a thorough and well-prescribed process directed, in particular, towards identifying which of two or more rights-based solutions is most likely to enable children to realize their rights, bearing in mind that the other people affected by those solutions also have their own human rights."[65] To him, the best interest principle should no longer be the benchmark in intercountry adoptions, rather it is one of the several ways to attain the optimal achievement of benchmarks established in the CRC and the Hague Convention.[66]

Cantwell draws an analogy with the best interest determination process proposed by the UN High Commissioner for Refugees to identify durable solutions for unaccompanied and separated refugee children,[67] to come up with a checklist for a best interest assessment and determination process on

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63 Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1), Committee on the Rights of the Children, http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

64 Cantwell, Supra n.36, page 9.

65 *Ibid., page 10.*

66 *Ibid.*

67 UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, http://www.unhcr.org/4566b16b2.pdf

intercountry adoption that must be taken into account to ensure that national policies on intercountry adoption correspond to children's best interests. He lists key issues to be covered, the considerations to make and the ultimate outcomes.[68] The key issues are: child's freely expressed opinions and wishes, situation, attitudes and capacities of the child, the level of stability and security provided, potential to keep or reintegrate the child with the parents, physical and mental health of the child, education opportunities, any special developments, potential adjustments to the new arrangements, continuity with the child's ethics, religion, cultural or linguistic background and lastly, suitability of the possible care options available.[69] However, as rightly noted by the CRC Committee, the importance of these elements may differ depending on a particular case as will therefore different elements can be used in different ways in different cases and in situations of conflict, the elements will have to be weighed against each other to find a solution that fits well with the best interests of the child.[70]

Similarly, the Uganda's Children Act provides the necessary factors to consider when defining the welfare principle, which is the guiding principle in making a decision relating to a child.[71] These are; the child's wishes if they are able to express them, the child's age, sex and other background information and overall needs the harm suffered or likely to be suffered, the capacity of the parents or guardians to provide for the child, and the likely effects of any changes in the child's circumstances.[72]

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68 Cantwell, *The Best Interests of the Child in Intercountry Adoption*, Supra n.36, page 5.
69 *Ibid.*, page 58-59.
70 CRC Committee, General Comment No. 14, Supra 63, paragraph 52ff.
71 The Children Act, Cap 59, Laws of Uganda, Section 3.
72 *Ibid.*, First Schedule.

By way of concluding this section, despite its vagueness, the best interest of the child principle is the paramount consideration that has to be held with high regard in matters of intercountry adoption. It is the main dissonance between the "proponents" and the "opponents" of intercountry adoption to determine the conditions under which the best interests of the child support intercountry adoption as a positive solution to the unparented children in institutions or societies.[73] This calls for timely determination, protection and investment in these interests intervention. Uganda should invest in human resource for this task whose main goal would be to strengthen families, ensure domestic adoption and where necessary guarantee that it is in the best interests of the child put up for intercountry adoption as an alternative care option.[74]

IV. FROM STEWART TO SILAS: INTERCOUNTRY ADOPTION IN UGANDA

Uganda's child protection system has been dubbed fraudulent, exploitative and dishonest. Thomas Reuters Foundation investigation discovered that Ugandan poor families have been bribed, tricked or coerced into giving up their children to U.S. citizens and other foreigners for adoption.[75] Freda Luzinda, who worked at the U.S. Embassy in Kampala, Uganda for two years processing adoption visas, now the Uganda National Director of *A Child's Voice*, an NGO promoting child rights and welfare, testified that

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73 Cantwell, *The Best Interests of the Child in Intercountry Adoption*, Supra 36, page 81.

74 *Ibid.*

75 *Fraud and deceit at the heart of Uganda adoptions to United States*, http://www.dailymail.co.uk/wires/reuters/article-3101833/Fraud-deceit-heart-Uganda-adoptions-United-States.html#ixzz4SUxHq28V

"many birth parents do not understand that adoption is permanent. They believe they may get their children back later. These misconceptions are part of the problem, but not the only problem."[76]

This was ideally visualized through the story of Stewart Bukenya, now Silas Hodge. In June 2009, Adam and Jill Hodge took Stewart Bukenya, born to Hasifa Nakiwala and Festos Matovu, to the US at the age of five, after they obtained legal guardianship by a decision from the Family Division of the High Court.[77] The legal guardianship was premised on the falsification of the death certificate that evidenced the death of the boy's father and that Hasifa was planning on leaving her children to go and live with another man.[78] On reaching their home in Forest County, Mississippi US, the Hodge parents successfully applied for Stewart's adoption and subsequently changed his name to Silas Hodge.[79] The truth was unveiled in 2011 when Hasifa and Matovu claimed that they did not understand the papers they signed as they were not translated into their language; they claimed that they were promised that their son would return every two years "for a holiday", and there would be frequent communication, but that they had only received few photographs through the lawyer that finalized the process, Isaac

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[76] Todd Schwarzschild, *Red flags wave over Uganda's adoption boom*, March 2, 2013, CNN, http://www.cnn.com/2013/02/27/world/africa/wus-uganda-adoptions/

[77] In the Matter of Application for Legal Guardianship by Jonathan Adam and Jill Renae Hodge, HCT-000 MA 0213, Family Division of the High Court of Uganda.

[78] Solomon Sserwanja, *Taken & never returned: When adoption profits the middleman* and *Taken & Never Returned: Family accused of selling son to American Family*, Published on Apr 19, 2013, https://www.youtube.com/watch?v=yEeDL70WKOA and Published on April 22, 2013 https://www.youtube.com/watch?v=kTy6vtcxMg, respectively.

[79] Solomon Sserwanja, *Taken & never returned: Tracing little Stuart Bukenya in the US*, Published on Apr 22, 2013, https://www.youtube.com/watch?v=wv7hnlcF9qQ

Ekirapa.[80] Hasifa Nakiwala and Festos Matovu are still paying the price of the decision they made to give up their child for what they thought was merely legal guardianship and not a surrender of their parental rights.[81] Unfortunately, the court is now *functus officio* so the parents have to wait until Stewart, now Silas, becomes an adult and can decide whether or not he would like to return to Uganda or stay with his adoptive family.[82]

Although intercountry adoptions have saved a vast number of children from growing up with no loving and caring family, Stewart's story exposed the heartaches suffered by the unfortunate and despairing families who are further disadvantaged by the underclass child protection system in Uganda, to the advantage of the conning individuals who utilize the opportunity to make it a lucrative business. The other revelation is the fact that legal guardianships obtained in Uganda are sometimes used as a shortcut to adoptions, that is, they are turned into adoptions once the foreign families return to their homes.[83] This is the core motivation raised by the Parliament of Uganda for restricting legal guardianship to Ugandan citizens only in the amendment citing that the children are hard to trace because they are usually taken out of the country.[84] The question to ask therefore is whether this

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80 *Supra* n.78.

81 Solomon Sserwanja, *Taken & never returned: Adoption or Legal Guardianship*, Published on Apr 22, 2013, https://www.youtube.com/watch?v=K1nC7dPaiOE

82 *Ibid.*

83 Agnes Nandutu, *Parliament debates law to ban foreign adoption*, NTV News, Published on Mar 2, 2016, https://www.youtube.com/watch?v=MGFsZsxfDPc

84 Parliament of Uganda, *Parliament passes Children Bill; restricts guardianship to nationals*, http://www.parliament.go.ug/index.php/about-parliament/parliamentary-news/784-parliament-passes-children-bill-restricts-guardianship-to-nationals

measure is in the best interests of the child, or whether this is the best measure that will reduce the child trafficking cases in Uganda?

V. THE STRUGGLE TO FIND 'FAMILY' UNDER THE CHILDREN (AMENDMENT) ACT 2016

The Children (Amendment) Act 2016, which was tabled in Parliament in 2004, was finally passed by Parliament after a long wait.[85] This is apparently the new protector of the children who have been trafficked, laundered and had their rights violated under the guise of intercountry adoption with its objectives including, to strengthen the conditions for intercountry adoption and to strengthen the provisions for guardianship of children.[86] The legislation however softens some requirements for applying for intercountry adoption; it shortens the time required for residence in Uganda and for fostering the child from three years to one year,[87] and grants the Court the power to waive any of the requirements for the application and grant of intercountry adoption.[88] The major changes in the law are that it provides that intercountry adoption will be the last option considered after all other comprehensive child welfare services and secondly, provides for guardianship in Uganda, restricting it to only Ugandan citizens as discussed earlier. The amendment further introduces the rescission of adoption orders in exceptional circumstances where it is in the best interests of the child, cases of fraud or misrepresentation.[89]

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85 Save the Children, *Uganda Parliament Passes Children Act*, March 22nd 2016, https://uganda.savethechildren.net/news/uganda-parliament-passes-children-act

86 The Children (Amendment) Act 2016, Long Title.

87 *Ibid.*, Section 14 (a) and (b).

88 *Ibid.*, Section (c).

89 *Ibid.*, Section 15.

The discussion as to whether or not intercountry should be the last resort is an enduring one. Elizabeth Bartholet, a devoted advocate for intercountry adoption who is actually mothering two sons from Peru,[90] and David Smolin, who is keen on exposing the clashing perspectives about intercountry adoptions, debated the issues over intercountry adoptions.[91]

Bartholet refers to the legal structure surrounding adoption as designed to serve the best interests of the child as a myth, which was shattered during her experience of becoming an adoptive parent.[92] She believes that children's most basic need is "…the need to be nurtured from infancy on by permanent and loving parents. Children have related needs to be protected against the conditions that characterize life in orphanages, on the streets and in most foster care."[93] Bartholet recognizes that the ideal situation is when the parents raise their own children but this is impossible and the number of unparented children is growing and this will be so for the days to come.[94] This calls us to all do our part to get as many children as possible out of the orphanages into nurturing homes, which can be done by firstly supporting family reunification and if it is not possible, adoption serves these children with the best option, not after foster care or institutional care.[95] Furthermore, Bartholet disagrees with the general meaning of the "subsidiarity principle",

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90 Elizabeth Bartholet shares her exciting and inspiring journey to adoption in her book, *Family Bonds: Adoption and the Politics of Parenting*, Houghton Mifflin Company, Boston New York, 1993

91 Elizabeth Bartholet and David Smolin, *The Debate, Intercountry Adoption: Polices, Practices and Outcomes*, Chapter 18, Ashgate Publishing, 2012, available at, http://www.law.harvard.edu/faculty/bartholet/The_Debate_1_13_2012.pdf

92 Bartholet, *Supra* n.87, Introduction, page xv.

93 Bartholet and Smolin, *Supra* n.88, Part I: Bartholet's Position, page 371.

94 *Ibid.*

95 *Ibid.*

that is domestic adoption over intercountry adoption. While defining this principle, Bartholet states that the CRC and the Hague Convention defer on sovereignty. They both provide that states should exercise preference for the in-country adoption but unlike the CRC, the Hague Convention requires "due consideration" of the in-country placement before intercountry adoption and other family care.[96] She continues to argue that the "Hague Convention was designed to take a step beyond the CRC in the direction of validating international adoption and limiting the in-country preference." [97] In conclusion, Bartholet believes that "…there should be no preference whatsoever for placing children in-country whether in institutions, foster care, or even adoption…if children's best interests are the driving consideration, instead the goal should be to place the unparented children as early in life as possible in families and provide them with the best chance for healthy environment."[98]

On the opponents side of the debate is David Smolin. He argues that the child is not born not only the parents but also the broader extended family, thus to him, the phrase "unparented children, those living without family care including institutionalized care" has multiple ambiguities and misleading because a child that has no family ties has never existed, the better term would be "separated child".[99] He continues to argue that the subsidiarity principle preserves the child's right to maintain continuity with her culture, language, community, and nation even if he or she is not with the original

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96 Bartholet, *Should The U.S. Ratify The CRC? A Look At The Pros And Cons,* Supra n.31.
97 Bartholet and Smolin, *Supra* n.88, page 373.
98 *Ibid.*, page 375.
99 *Ibid*., Part I: Smolin's Position, page 381-382.

family which are lost in adoption.[100] Smolin thinks, "…it is wrong to assume that all children living without their parents in what is considered an "institutional setting" are in need of adoption or are unparented."[101] Smolin concludes that "most children who truly need adoption…. are older children and children with special needs", these children are often ignored or passed over and it is only the corrective measure is the subsidiary principle.[102] To him, the greatest threat of the future of intercountry adoption is the denial and the failure to adequately respond to its prevalent and serious abusive practices.[103] In conclusion, Smolin argues that there should be a requirement for Hague accreditation or apply its standards to agencies placing children from non-Hague Convention nation; there should also be adequate investigation and prosecution of child laundering and other abusive practices.[104]

The foregoing discussion uncovers the divergent views on intercountry adoption especially on the fact whether it is in the best interests of the child or not exposing the sensitivity of this phenomenon. However, taking into consideration the fact that Ugandans are not in the behavior of adopting children let alone applying for legal guardianship, restricting them just continues to harm the children. This was testified by Peter Nyombi, a lawyer whose firm helps to process court orders for legal guardianships and intercountry adoptions and the former Attorney General of Uganda, he strongly challenged the new law and confessed that he has handled hundreds

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100 *Ibid.*, page, 386.
101 *Ibid.*, page 383.
102 *Ibid.*, page 388
103 *Ibid.*
104 *Ibid.*, page 389.

of applications for legal guardianship but none from an African, therefore the new law robs of the unprivileged children of an assured future that can be provided by foreign adoptive parents.[105]

I acknowledge that intercountry adoptions have been abused by dubious perpetrators to whom it is a lucrative business at the disadvantage of innocent children, parents and families at large as exemplified in Stewart's story, but to do away with intercountry adoptions or making them the last resort would be throwing the baby out with the bathwater- doing away with something good and while in an effort to get rid of the bad practices, which are avoidable.

International adoption has been blamed for reducing efforts to find Ugandan solutions,[106] to the contrary, in my opinion, the inadequacy or the lack thereof any efforts by the Government to look after these children and provide in-country solutions is what brought us to this place; the increase in number of children separated from their families.[107] Like most intercountry adoption systems, "the poorly supervised processes or procedures of adoption and improper financial arrangements involving destitute birth mothers and middlemen supplying babies to orphanages,"[108] characterize Uganda's protection system. To solve the problem therefore, it is not about making intercountry adoption a last resort, restricting the applicants eligible for legal guardianships or revoking adoption orders, the Government of

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[105] Agnes Nandutu, *Supra* n.81.

[106] *Alternative Care for Children in Uganda*, http://www.alternative-care-uganda.org/problem.html

[107] There are over 50,000 children already in institutions as stated by Alternative Care for Children in Uganda, *Domestic adoption: Alternative Care Framework*, Uganda, http://www.alternative-care-uganda.org/problem.html

[108] Bhabha, *Child Migration and Human Rights in the Global Age*, Supra n.55, page 101.

Uganda should address the failures of the system to sieve out the adoptable children from the an unadoptable ones, the loopholes that can be maneuvered by the dubious perpetrators to prosper in child laundering and/or trafficking.

VI. RECOMMENDATIONS AND CONCLUSION

While it has been recommended by a number of critics that Uganda should ratify the Hague Convention,[109] this is not the immediate step required to protect the vulnerable unparented children due to its numerous failures already witnessed as discussed by Bartholet.[110] I recommend that Uganda ratifies the Hague Convention after the expansion and strengthening of alternative care options. The Children (Amendment) Act 2016 is supposed to be a huge step towards the fulfillment of the requirements necessary for it to qualify to ratify the Hague Convention; it establishes the National Children Authority repealing the National Council for Children,[111] however, with its freshness, time will reveal whether this law is actually a step forward.

Like Bhabha suggests, Uganda should learn from the domestic adoption. Domestic moves towards open adoptions, greater access to birth records and easier communication between the adoptive and birth families are consistent with these insights.[112] Bhabha applauds domestic adoptions that they recognize the importance of the inevitable questions of origins, belonging and rejection. It is through this restoring connection to the past can adoptees

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[109] Cantwell, *The Best Interests of the Child in Intercountry Adoption,* Supra n.60, and *AFRICA: The 'new frontier' in international adoption*, http://www.adoptionhoksbergen.com/index.php/nl/2-algemeen/87-africa-the-new-frontier-in-international-adoption

[110] Bartholet, *The Hague Convention: Pros, Cons, and the Potential, Supra* n. 37.

[111] The Children (Amendment) Act 2016, Part IIA and Section 26

[112] Bhabha, *Supra* n.55, page 123.

move with dignity and hope into the future.[113] Therefore I do not agree with the Hodge family, discussed above, who changed Stewart Bukenya's name to Silas Hodge, this detaches him from his roots, background and past, which should not be the case; it comes with huge consequences of loss of self-identity, belonging and esteem.[114] Because you are taken into another family, I believe you should not lose your identity.

The above notwithstanding, inter-country adoption is a very sensitive phenomena that should be dealt with the utmost care that it deserves for it to achieve its benefits. In addition to the considerations in the law the aspiring foreign parents should carefully consider the reasons as to why these foreign parents are willing to raise a child of a different race. They should be able to give concrete answers to this question, and explain it to the children at all stages in their lives once they ask. They should be able to deal with the different biases and prejudices that they will face while raising these children. The foreign parents should commit to raising strong and proud individuals of color who are not detached from their roots but who take pride in them. This is not easy but it is achievable. Intercountry adoption is redefining race, culture and humanity. It is breaking the walls built between classes of people slowly but surely, the law should not stand in its way.

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[113] Betty Jean Lifton, *Journey of the Adopted Self: A Quest for Wholeness*, New York: Basic Books, 1994, page 68.

[114] Betty Jean Lifton, *Twice Born: Memoirs of an Adopted Daughter*, Other Press, New York, 1978; In this book Lifton tells a story which you can relate with about the hardships and the unanswered she had as an adopted.