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# UGANDA'S 2016 GENERAL ELECTIONS: PREPARATIONS AND IMPLICATIONS

Kasaija Apuuli*

**ABSTRACT**

*This article discusses the state of preparations of Uganda's 2016 general elections and their likely implications. The article analyses the social-political and economic factors affecting the holding of the elections and which will most likely influence the eventual outcome. Specifically, the article covers the following areas: the state of the economy; the actual management of the elections by the current EC; the state of the political parties and civil society; and electoral reforms, among others. Methodologically, the article is a product of desk research including a review of primary documents (government and civil society organization reports) and secondary sources (books, journal articles, newspapers).*

## I. INTRODUCTION

On 2 April 2015, the Independent Electoral Commission (IEC) of Uganda released a roadmap to guide political parties and voters ahead of the 2016 General Elections. The most prominent activities of the roadmap are that nominations of the presidential candidates would take place on 5-6 October 2015, with the actual presidential campaigns beginning on 12 October 2015 and ending on 15 February 2016.[1] According the IEC timetable, the actual polling day for the presidential and parliamentary elections would fall between 12 February 2016 and 12 March 2016. Earlier on, in early May 2013, the IEC had released a document titled "The Strategic Plan 2013-2017 of the Electoral Commission, Uganda" spelling out key activities with corresponding budgets that would make the 2016 general elections as free and fair as possible. These activities of the IEC set the stage for Uganda to hold its third election under the multi-party democratic dispensation since the opening up of political space for political parties in 2005. Nevertheless, not everybody is happy with the preparations for the

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1. The roadmap was later revised providing for the nomination of presidential candidates to 3-4 November 2015. The presidential campaigns began on 9 November 2015 and will end on 10 February 2015. See M. Mulondo, *EC postpones nominations*, SATURDAY VISION, 3 October 2015, at 4; I. Okuda, *Presidential campaigns to kick off in November*, SATURDAY MONITOR, 3 October 2015, at 4.

2016 elections. In particular, the management of the elections especially by the current IEC as constituted and the voter's register to be used in the elections are contested.

Whereas the IEC timetable had indicated the 5-6 October 2015 as the dates for nomination of presidential candidates, however, this exercise was postponed to the 3-4 November 2015 with the campaigns commencing on November 9, 2016 until February 16, 2015.

The political opposition and civil society proposed a number of electoral reforms which were aggregated into a Compact. The proposed electoral reforms included: the establishment of a new electoral commission; regulation of the role of the security services and militia groups in elections; the separation of the state from the ruling party; demarcation of electoral boundaries; selection of the presiding officers; representation of the special interest groups; the tenure of the president; and funding of local governments. A petition containing the Compact was submitted to the office of the Speaker of Parliament at the end of 2014. However, when the government unveiled its own electoral proposals, the Compact was largely ignored, which led the political opposition and civil society to cry foul.

Generally, ahead of the 2016 general elections, the government and political opposition remain wide apart. In this regard, there is absence of political will on the part of government to listen to the opposition proposals and vice versa. The mooted opposition coalition ahead of the elections fell apart. This article discusses the state of preparations and their likely implications. The article analyses the social-political and economic factors affecting the holding of the elections and which will most likely influence the eventual outcome. Specifically, the article covers the following areas: the state of the economy; the actual management of the elections by the current EC; the state of the political parties and civil society; and electoral reforms, among others.

Methodologically, the article is a product of desk research including a review of primary documents (government and civil society organization reports); and secondary sources (books, journal articles, newspapers).

## II. CONTEXT

The general theoretical assumption about elections in a democratic society is that they are an exercise in which the choice is made freely and fairly by the electorate.[2] The promulgation of the 1995 Uganda Constitution was supposed to herald a new dawn in the conduct and management of elections in Uganda. The Constitution, which was a

2. W. Muhumuza, *Money and Power in Uganda's 1996 Elections*, 2 AFRICAN JOURNAL OF POLITICAL SCIENCE (1997), at 170.

product of wide consultations and intense debate, was supposed to deliver the country from its political woes. The Constitution provides that the state of Uganda shall be based on democratic principles.[3] Article 1 (4) specifically provides that: "The people shall express their will and consent on who shall govern them and how they would be governed, through regular, free and fair elections of their representatives or through referenda". The Constitution, among other things, was designed to eliminate pitfalls, which were responsible for election rigging, cheating and violence that had characterized elections in Uganda since independence up to 1980.[4]

The 1995 Constitution set the stage for Uganda's first presidential election as well as for a fully-fledged parliamentary election, representing the return to a system of governance reflective of checks and balances than at any other point in Uganda's conflictual and turbulent history.[5] However, there is ample evidence to suggest that elections held under the new Constitution have not been entirely free or fair.[6] There have been reports of irregularities, rigging and violence in the conduct of those elections.

Uganda has held Presidential and Parliamentary elections (1996, 2001, 2006 and 2011) and Local Council elections (1998 and 2002) in accordance with the principles and provisions of the 1995 Constitution. However, it is only the 2006 and 2011 elections that were held under the multi-party system of governance which was only reintroduced after the 2005 referendum on political system. The 1996 and 2001 elections were held under the Movement system that did not allow other parties to participate. As it has been observed, "under one umbrella allegations of massive rigging, unlawful campaigning and other electoral malpractices could not be brushed aside".[7] Whilst President Museveni and the Movement easily won the 1996 elections with about 75% of the vote against the political parties candidate, Paul Semogerere with about 23%, the 2001 election was more competitive.

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3. The 1995 Constitution of Uganda, National Objectives and Directive Principles of State Policy, political objective II(i).

4. PARLIAMENT OF UGANDA, REPORT FOR THE PARLIAMENTARY COMMITTEE ON ELECTION VIOLENCE, KAMPALA, JULY 2002, at 7, retrieved from <http://www.cmi.no/pdf/?file=/uganda/doc/Uganda-Election-Violence-Report.pdf>, (accessed 30 April 2015).

5. J. Oloka-Onyango, From whence have we come, and where exactly are we going? The politics of electoral struggle and Constitutional (non) transition in Uganda, Rights and Democratic Governance Working Paper Series No. 1 2005, HURIPEC: Makerere University, retrieved from <http://huripec.mak.ac.ug/pdfs/Publication_series_1.pdf>, (accessed 1 October 2015).

6. REPORT FOR THE PARLIAMENTARY COMMITTEE ON ELECTION VIOLENCE, *supra* note 4, at 8.

7. F. Byarugaba, *Electoral systems: Problems and Prospects in Uganda*, in Research and Education for Democracy in Tanzania (REDET), DEMOCRACY AND POLITICAL COMPETITION IN EAST AFRICA (2010), at 49.

The 2001 election will go down in the history of Uganda as being the most intense and hotly contested. The election gripped the nation with anxiety and excitement. The reason for the excitement and anxiety was partly due to the two main presidential candidates: Yoweri Museveni and Kiiza Besigye. Both men had roots in the struggle that brought the Movement government to power in 1986. Dr. Besigye, a medical doctor, was Museveni's personal physician as he struggled against the government of Milton Obote. After capturing power in 1986, Besigye held high profile jobs in the government and rose to the rank of Colonel in the army.

Colonel Besigye's candidature for the 2001 presidential elections did not go down well with President Museveni. Museveni accused Besigye of declaring himself a candidate for the Movement without being endorsed by the necessary Movement structures.[8] Besigye counter-argued that his candidature was based on the principle of individual merit. The Museveni-Besigye exchanges characterized the presidential elections. The 2001 presidential election campaign was the most violent in the history of the country. For the first time, armed para-military militias emerged on the Uganda political scene with the most prominent being the Kalangala Action Plan (KAP) which terrorized anyone who was opposed to Museveni. The election violence prompted the Chairman of the IEC, Badru Kiggundu, to write to the President urging him to restrain state agents from perpetrating it. Kiggundu's letter and pleas were simply ignored.

The election violence did not go un-noticed by the international election observers. The Organization of African Unity (OAU) Observer Team observed in its report that "during the campaign period [we were] very much concerned about certain reported acts of violence and intimidation which led to the loss of lives".[9] The local observer team—the NGO Election Monitoring Group (NEM-GROUP)—concluded that "the campaign period was not free and fair, and featured cases of violence and intimidation. The IEC was inefficient and Museveni had an advantage in the use of state resources to campaign".[10] In the end, the election was won by Museveni with 69.3% of the vote with Besigye coming second with 27.8%.[11] The results were rejected by the latter and he petitioned the Supreme Court (SC). In his petition, Besigye argued that Museveni had not been validly elected and thus the election should be annulled.

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8. Yoweri Museveni, *Uganda: Museveni responds to Besigye*, DAILY MONITOR, 2 November 2000, retrieved from <http://allafrica.com/stories/200011020187.html>, (accessed 2 May 2015).

9. Cited in the Judgment of Supreme Court Justice Karokora in *Kiiza Besigye v. Yoweri Museveni and Electoral Commission,* Presidential Election Petition No. 1 of 2001, at 148.

10. A.P. Kasaija, *Review of Elections and Electoral Laws under the Movement Government in Uganda, 1986-2003*, in REDET, *supra* note 7, at 85.

11. The other candidates scored as follows: Aggrey Awori—.4%, Francis Bwengye—0.3%, Chaapa Karuhanga—0.1%, and Kibirige Mayanja—1.0%.

Besigye raised many complaints against Museveni and the IEC.

In its ruling delivered on 21 April 2001, the SC ruled that the IEC had not complied with the provisions of the Presidential Elections Act (2000). However, the majority of the justices ruled that the election malpractices had not substantially affected the outcome of the election, and thus Museveni had been validly elected. In the aftermath, the IEC came under heavy criticism on its handling of elections. In this regard, the Parliament established a Select Committee to inter alia inquire into how the 2001 elections had been conducted. The Select Committee's findings were damning in relation to the conduct of the elections by the IEC and the election violence.[12] The hope was that future elections would be conducted in compliance with the law.

The 2006 Presidential, Parliamentary, and Local Government Councils Elections were the first to be held under a Multiparty Political System since 1980. Ahead of those elections, a referendum on political system was held in July 2005. Whilst political parties shunned the exercise arguing that belonging to a political party was a human right, the results showed that people who participated in the referendum had voted to return the country to political party politics. Again the main candidates in the February 2006 elections were Museveni and Besigye, with the latter having just returned from exile in South Africa in October 2005. The other remarkable thing about the 2006 elections was the fact that Besigye spent the larger part of the campaign period in prison battling charges of rape and treason. In the end, Museveni was announced the winner with 59% of the vote while Besigye obtained 37%.[13]

In the wake of Museveni being announced the winner, Besigye again petitioned the SC alleging that the elections had not been conducted in compliance with the law in the following areas: disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote; irregularities in the counting and tallying of results; the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country; and the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting and vote stuffing in some areas.[14]

Nevertheless, by a majority of 4 to 3 votes, the court declined to annul the election even when they had concluded that the election had not been conducted in

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12. *See generally*, REPORT FOR THE PARLIAMENTARY COMMITTEE ON ELECTION VIOLENCE, *supra* note 4.

13. The other candidates scored as follows: Ssebaana J. Kizito (DP): 1.58%, Abed Bwanika (Independent): 0.95%, and Obote Kalule Miria (UPC) 0.82%.

14. See *Col (Rtd) Dr. Besigye Kizza v. The Electoral Commission and Another*, Presidential Election Petition No. 1 of 2006, retrieved from <http://www.ulii.org/ug/judgment/constitutional-law-election-petitions/2007/24>, (accessed 2 May 2015).

accordance with the law. This judgment left a bitter taste in the mouths of people who wanted to see free and fair elections in Uganda and it induced national and international demands for electoral reforms. In this regard, some reforms including restricting the role of the military in elections, removing polling stations from military barracks, requiring the Uganda People's Defence Forces (UPDF) officers who wished to stand for elective politics to retire from the army first, and restricting soldiers from taking part in partisan politics, were introduced. But fundamentally, the management of the electoral process by the IEC remained unreformed.

Whilst the February 2011 elections were relatively the most peaceful in Uganda, nevertheless, as it has been observed, "there was little improvement in the quality of electoral governance".[15] A level playing field for all parties remained elusive, with high benefits tilted in favor of the ruling party and its president.[16] The electoral reforms called for after the 2006 elections were not implemented, incumbency advantages remained in place, politics was widely monetized, state apparatus was used in favor of the ruling party, and the security apparatus was over-deployed. The regime did not resort to massive harassment but rather to selective, symbolic and low-intensity violence or intimidation. In the presidential election, Museveni standing on the NRM ticket was declared winner with 69% of the vote while his main challenger, Besigye, standing on Forum for Democratic Change (FDC) ticket, obtained 26%.[17]

As it has been observed, "none of the observers' reports declared the [2011] elections to be free and fair".[18] Ahead of the elections, candidate Kiiza Besigye had indicated that he would not petition the court again if the elections did not go in his favor. In fact, he indicated during the campaigns that he would appeal to the court of public opinion if he lost the election. Thus in the aftermath of the poll, Besigye orchestrated the "Walk to Work" campaign that eventually turned riotous with a number of people losing their lives and property, as security forces battled the rioters. The main reason for launching the walk to work campaign was the rising cost of living after the 2011 polls. There were allegations that the NRM party had raided the Bank of Uganda in order to buy the election.

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15. S. Perrot, S. Makara, J. Lafargue and M.A. Fouere,, *Looking back at the 2011 Multi-party elections in Uganda*, in ELECTIONS IN A HYBRID REGIME: REVISITING THE 2011 UGANDAN POLLS (S. Perrot et al eds., 2014), at 32.

16. *Id*.

17. Other candidates scored as follows: Nobert Mao of the Democratic Party (DP)—1.86%, Olara Otunnu of the Uganda People's Congress (UPC)—1.58%, Beti Kamya of Uganda Federal Alliance (UFA)—0.66%, Abed Bwanika of People's Development Party (PDP)—0.65%, Bidandi Ssali of Peoples Progressive Party (PPP)—0.44%, and Independent Candidate Samuel Walter Lubega—0.41%.

18. Perrot et al, *supra* note 15, at 5.

## III. ISSUES WITH POTENTIAL TO AFFECT THE OUTCOME OF THE 2016 ELECTIONS

This section identifies the crucial institutions and issues that have a propensity to affect the conduct and the final outcome of the 2016 general elections.

### *A. The Economy*

Uganda's annual economic growth rate has averaged 5.5% for the last four financial years (FY2010/11 -FY2013/14), well below the 7.2% average growth rate that was projected by the National Development Plan.[19] Growth is projected to be 5.8% this financial year (2015-2016). The lower than expected average growth is largely on account of external developments such as the global financial crisis and economic downturn, but also execution delays in some of the major transport and energy projects. The inflation rate has averaged 6.96% from 1998 but reached an all-time high of 30.48% in October of 2011.[20] This inflationary pressure was attributed to government's financial indiscipline during the 2011 general elections. As at the end of September 2015, inflation stood at 7.2% and it is rising.[21] Unemployment has been increasing, particularly among those with higher education. The depreciation of the Uganda shilling that started in December 2014 has continued despite Bank of Uganda's intervention to stabilize the currency. The depreciation has also had an effect on the country's balance of payments which continue to worsen.

As the country heads into the 2016 elections, the economic situation remains uncertain. The continued conflict in South Sudan, a main destination of Uganda's exports[22] and big contributor to the country's foreign exchange remittances,[23] has only

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19. MINISTRY OF FINANCE, PLANNING AND ECONOMIC DEVELOPMENT (MFPED), NATIONAL BUDGET FRAMEWORK PAPER FY 2015-2016, KAMPALA, MARCH 2015, at 7, retrieved from <http://parliamentwatch.ug/wp-content/plugins/pdfjs-viewer-shortcode/web/viewer.php?file=http://parliamentwatch.ug/wp-content/uploads/2015/04/National-Budget-Framework.pdf-LAYED.pdf&download=true&print=true&openfile=false>, (accessed 5 May 2015).

20. *See*, TRADING ECONOMICS, UGANDA INFLATION RATE 1998-2015, retrieved from <http://www.tradingeconomics.com/uganda/inflation-cpi>, (accessed 5 May 2015).

21. R. Nabisubi and F. Kulabako, *Inflation now at 7.2%, tough times ahead*, NEW VISION, 1 October 2015, at 5.

22. South Sudan has been the single largest destination of Uganda's exports since 2007. Whilst informal exports rose from US$7.84 million in 2006 to US$133.54 million in 2013, formal exports in the same period rose from US$52.47 million to US$360.55 million. The total earnings from both informal and formal exports of Uganda to South Sudan in 2013 were US$494.09 million. *See* Y. Yoshino, G. Ngungi and E. Asebe, Africa Trade Policy Notes: Enhancing the recent growth of Cross-border trade between

worsened the situation. There is fear that government will not exercise financial discipline during the coming elections and thus worsen the economic dire straits that the population finds itself in. In the end, as the economic situation deteriorates, unrest can only increase especially among the urban poor. Violence caused by economic hardships during and after the elections is therefore a real possibility.

### *B. Involvement of Security and other Forces (Vigilante Groups) in the Election Process*

Uganda's elections have generally been characterized by violence. Following the 2001 elections, the Parliamentary Committee set up to investigate the causes of the election violence found that it was perpetuated by state agents among others.[24] The Committee also observed that "whereas some of the State agents initiated and executed election violence themselves, many candidates and agents who opted for violence employed state agents, especially the UPDF, Local Defence Units (LDUs), Internal Security Organizations (ISOs), District Internal Security Organization (DISOs), Gombolola Internal Security Organization (GISOs), Resident District Commissioners (RDCs) and cadres in the Offices of RDCs to execute violence against their opponents".[25]

In the 2001 Presidential and Parliamentary elections, 17 people lost their lives in election violence.[26] The reported 17 deaths exclude cases of death not obviously directly related to election violence but which have a strong association to election events.[27] The Supreme Court in both presidential elections petitions of 2001 and 2006 decried the involvement of the security forces in the electoral process.[28] Whilst the

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South Sudan and Uganda, World Bank Policy Note No. 21, July 2011, retrieved from <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRREGTOPTRADE/0,,contentMDK:22946813~pagePK:34004173~piPK:34003707~theSitePK:502469~isCURL:Y,00.html>, (accessed 20 September 2015).

23. Between the years 2008 and 2013, the personal remittances received by Uganda from South Sudan amounted to US$626.85 million. The highest amount in form of personal remittances from South Sudan to Uganda was recorded in the year 2012 at US$210.14 million with the lowest recorded in the year 2010 at US$45.36 million. In the year 2013, the total personal remittances that came to Uganda from abroad was US$931.6 million, South Sudan contributed a significant US$104.34 million of this. *See* BANK OF UGANDA (BOU), INWARD PERSONAL TRANSFERS 2013, at ix. (On file with the author).

24. REPORT FOR THE PARLIAMENTARY COMMITTEE ON ELECTION VIOLENCE, *supra* note 4, at 141.

25. *Id*.

26. *Id*., at 144.

27. *Id*., at 145.

28. *See Col. (Rtd) Besigye Kizza v. Museveni Yoweri Kaguta & Electoral Commission*, Election Petition No. 1 of 2001, [2001] UGSC 3, 20 April 2001, retrieved from <http://www.ulii.org/ug/judgment/constitutional-law-election-petitions/2001/3>, (accessed 7 July 2015);

2011 elections were largely held under peaceful conditions, the pre-election period was characterized by the police, other security agencies and militias allied to the police harassing opposition politicians.[29] Women associated with the opposition demanding for electoral reforms "were routinely harassed and caned, and crudely bundled on police trucks as if they were common criminals".[30] The notorious *Kiboko Squad*,[31] a stick-wielding para-military outfit associated with the police, emerged ahead of the 2011 elections and was instrumental in harassing and beating up opposition politicians and their associates.

As the country prepares for the 2016 elections, militia groups are being trained by a number of political actors. It is alleged that Major Kakoza Mutale, a Presidential Political Assistant, has 'militarily' trained a vigilante youth group to support the NRM party,[32] while the Lord Mayor of Kampala, Erias Lukwago, has established the *TJ Solida* as a counter force.[33] Meanwhile, the police has been active in stopping the activities of the opposition using the Public Order Management Act (2013), under the guise of keeping law and order. The force has trained 'crime preventers' in various parts of the country whose role has been questioned. Ostensibly, the work of the crime preventers is to gather intelligence and maintain security among the local population but the opposition suspects that they will be deployed during the elections to promote

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*Rtd. Col. Dr. Kiiza Besigye v. Electoral Commission & Yoweri Kaguta Museveni*, Presidential Election Petition No. 1 of 2006, [2007] UGSC 24, 30 January 2007, retrieved from <http://www.ulii.org/ug/judgment/constitutional-law-election-petitions/2007/24>, (accessed 7 July 2015).

29. S. Makara, The management of the 2011 elections in Uganda (unpublished), retrieved from <http://www.cmi.no/file/?1376>, (accessed 7 July 2015).

30. *Id*.

31. The Inspector General of Police (IGP) denied that the police had links with the group. He is reported as saying "They are not part of the police force and I have set up a committee to investigate the squad and I ask the public to give evidence against the suspects who were arrested as part of the *Kiboko* squad". However, in one incident which was broadcast on one of Uganda's television stations, the *Kiboko* Squad members emerged from the back of the Central Police Station in Kampala and deployed on the streets with the regular police doing nothing to stop them.

32. See story 'Trouble on the horizon as Mutale trains youth to 'handle' Uganda's opposition', THE EAST AFRICAN, 15 August 2015, retrieved from <http://www.theeastafrican.co.ke/news/Signs-of-chaotic-poll-in-Uganda-as-Mutale-returns-/-/2558/2833720/-/mipn8oz/-/index.html>, (accessed 28 September 2015).

33. F. Kasule, *Lukwago insists on vigilante group*, NEW VISION, 5 September 2015, retrieved from <http://www.newvision.co.ug/news/673047-lukwago-insists-on-vigilante-group.html>, (accessed 1 October 2015).

the NRM party.[34] Whilst the President and his NRM party can organize public rallies and events, the police routinely breaks up or refuses to sanction the rallies and events organized by the opposition. The training of vigilantes by both the government and opposition elements is a recipe for violence as the country moves towards the 2016 elections.

### *C. Election Management*

The Constitution establishes the IEC as an independent commission, a body corporate, consisting of a chairperson, a deputy chairperson and five other members, appointed by the President with approval of Parliament.[35] The IEC is mandated to organize and supervise all elections and referenda in Uganda with its role spelled out as to: determine constituency delimitations, managing voter registration and determining, publishing and declaring election results, as well as hearing complaints. The Constitution provides for the independence of the Commission, stating that it will, 'in the performance of its functions, not be subject to the direction or control of any person or authority.'[36]

However, no other statutory commission in Uganda has come under criticism by both the ruling NRM party and opposition political parties more that the IEC. In both presidential election petitions of 2001 and 2006, the Supreme Court severely criticized the body's handling of the general elections in those years. The body has generally not enjoyed widespread confidence, with opposition parties in particular consistently expressing profound mistrust of it. But also, President Museveni has accused the body of conniving with the opposition to steal votes as was the case in the Luwero District by-election for the Woman representative in parliament in 2014.[37]

The political opposition's concern about the IEC has centered on a number of issues. First, is the way the body is appointed, which has been a perennial complaint of the political opposition. There is a wide held perception that the current IEC as constituted is a tool of the NRM in general and President Museveni in particular. Whilst the IEC is supposed to be independent and not subject to the direction or control of any person or authority in the performance of its functions, perception of bias in

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34. E. Biryabarema, *Opposition says Uganda government trains militias to harass them*, REUTERS, 8 September 2015, retrieved from <http://www.reuters.com/article/2015/09/08/us-uganda-politics-idUSKCN0R821K20150908>, (accessed 1 October 2015).

35. Constitution of Uganda, 1995 (as Amended), Article 60(1).

36. *Id.,* Article 62.

37. See Yoweri Kaguta Museveni, Election Rigging in Uganda 1961-2014, 25 May 2014, retrieved from <http://www.monitor.co.ug/blob/view/-/2328248/data/753291/-/ou9jq0/-/PDF.pdf>, (accessed 5 May 2015).

favor of the ruling party persists. The prevailing context under which the IEC is appointed has not allowed for consultation with political parties or civil society members who are not aligned with the government. Ahead of the 2016 general elections, the political opposition has continued to demand for the disbandment of the current IEC as part of the electoral reforms they want to see introduced. The reconstituted IEC would include representatives of the political parties. This demand has largely been ignored with some government functionaries labeling the demand as "laughable".[38] The argument is that the opposition sits on the parliament's Appointment Committee that vets the nominees to the IEC. So, the political opposition should use this opportunity to reject nominees whom they do not want to be on the body.

Secondly, the IEC has been criticized on its management of the voter's register. One of the core functions of the body is "to compile, maintain, revise and update the voters register."[39] All the elections held under the NRM government, particularly those of 2001, 2006 and 2011, were characterized by dissatisfaction among the stakeholders in the way the IEC handled the registration of voters and how it updated it, among others.[40] In fact, for the 2011 general elections, "the voter's register was bloated'.[41]

The update of the voter's register that will be used in the 2016 general elections was launched on 7 April 2015 and was slated to end on 30 April 2015. The timeline was however pushed back first to 4 May 2014 and then 11 May 2014 for various reasons: first, that some eligible voters thought they had already registered under the 2010/2011 National Voters' Register (NVR) and so had not turned up to update their details. Secondly, others did not register for the National Identity Card. Suffice to note that the IEC is using the data that was captured during the registration for the National Identity Card to compile the NVR to be used in the 2016 general elections.

The IEC has come under criticism from the political opposition and the parliament for using the National Identity Card data to update the NVR.[42] The argument is that the National Identity Card registration captured data from two million

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38. *See*, Obed K. Katureebe, Calls to disband the Electoral Commission are misdirected, Uganda Media Centre, retrieved from <www.mediacentre.co.ug/opinion/calls-disband-electoral-commission-are-misdirected>, (accessed 5 May 2015).

39. Constitution of Uganda 1995 (as Amended), Article 61(1) (e).

40. S. Makara, *Managing elections in a multiparty dispensation: The role of the Electoral Commission in Uganda's 2011 elections*, in ELECTIONS IN A HYBRID REGIME: REVISITING THE 2011 UGANDAN POLLS (S. Perrot et al eds., 2014), at 116.

41. *Id*., at 115.

42. Y. Mugerwa, *2016 voters register draws ager in the House*, DAILY MONITOR, 1 May 2015, at 5.

persons below the age of 18 who are not eligible to vote. The use of the national identity card data is also being questioned because of the way the data was collected. The officers collecting the information never verified the information that was given to them, so non-Ugandans could have been registered. The conclusion therefore is that "the data captured for the national identity card will not produce a credible voter's register".[43] The EC has been advised to up-date its own register which it used in the 2011 election and which it has been updating during the many parliamentary bye-elections that it has conducted since then. Nevertheless, this may not be possible as the 2010/2011 NVR was de-gazetted at the end of March 2015. One of the political parties—the DP—announced that it would petition the Constitutional Court challenging the IEC's move to retire the old register.[44] In the end, the stage seems to have already been set to doubt the credibility of the 2016 general elections.

### *D. Creation of New Constituencies*

On 27 April 2015, the Minister of Local Government Adolf Mwesigye unveiled a plan to create 36 new constituencies ahead of the 2016 general elections.[45] In the end, 65 new constituencies were approved by Parliament.[46] Under the Constitution, the power to demarcate new constituencies lies with the EC.[47] According to Mwesigye, the creation of the new constituencies has been prompted by the numerous requests encountered by President Museveni for new constituencies because "some are too big and so some people feel they are under-represented".[48]

Some commentators have opined that the demarcation of the new constituencies is aimed largely at "accommodating some unsettled NRM-leaning candidates".[49] In the past, the NRM government has been accused of gerrymandering

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43. *See* V. Baryamureeba, *National IDs won't deliver credible 2016 election—Prof. Barya*", CHIMPREPORTS, 24 April 2015, retrieved from <www.chimpreports.com/national-ids-wont-deliver-credible-2016-election-prof-barya>, (accessed 6 May 2015).

44. *See* N. Segawa, *DP to sue EC over Voter's Register*, CHIMPREPORTS, 5 May 2015, retrieved from <www.chimpreports.com/dp-to-sue-ec-over-voters-register/>, (accessed 6 May 2015).

45. *See* E. Kiggunda and D. Walusimbi, *NRM plots 36 new MP seats*, THE OBSERVER, 29-30 April 2015, at 4; U. Kashaka, *36 new constituencies planned*, NEW VISION, 29 April 2015, at 7.

46. See 'MPs approve creation of 65 new constituencies', UTAMU NEWS, retrieved from <http://utamu.ac.ug/headlines/1810-mps-approve-creation-of-65-new-constituencies.html>, (accessed 15 October 2015).

47. Constitution of Uganda 1995 (as Amended), Article 63.

48. "New constituencies not really necessary", THE OBSERVER, 29-30 April 2015, at 5.

49. See E. Kiggunda and D. Walusimbi, *NRM plots 36 new MP seats*, THE OBSERVER, 29-30 April 2015, at 4.

ahead of elections especially in the creation of districts.[50] In an editorial, *The Observer* newspaper observed that "the real aim [for creating the new constituencies] is to expand or consolidate patronage for political gain"[51] on the part of the NRM party. It is too early to speculate on what impact the new constituencies will have on the 2016 elections.

### *E. State of political parties*

Uganda is a multi-party democracy currently having 29 registered political parties,[52] out of which only six are represented in parliament.[53] From 1986 to 2005, Uganda was under the Movement (No Party) political system. This system applied the principle of individual merit to those aspiring for political office. Every Ugandan was by law a member of the Movement and candidates stood on their own merit and campaigned as such. A referendum on change of political system was held in July 2005 and it returned a verdict in favor of the multi-party political system. This system was duly adopted.

All the political parties represented in parliament are facing challenges of internal democracy and factionalization. Attempts have been made to promote unity in all the parties but to no avail. In February 2014, the NRM Parliamentary Caucus met and endorsed a proposal to have President Museveni as its sole candidate for the 2016 presidential elections. The proposal was ostensibly introduced to curtail the ambitions of Amama Mbabazi who was then Prime Minister and Secretary General of the party and who many suspected of harboring ambitions to stand against the president. Since the passing of the sole candidate proposal, the NRM has not been the same again. Mbabazi was sacked as Prime Minister in September 2014 and stripped of his position as Secretary General of NRM in December 2014. On 15 June 2015, Mbabazi finally declared his candidature for the chairmanship of NRM and president of Uganda in the 2016 elections.[54] The Museveni-Mbabazi tussle has divided the party with members supporting either man.

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50. For more on this, see Golaz and Medard, Election results and Public contestation, at 64-67.

51. "New constituencies not really necessary", THE OBSERVER, 29-30 April 2015, at 5.

52. See The Electoral Commission, Registered Parties, retrieved from <www.ec.or.ug/regparty.php>, (accessed 6 May 2015).

53. These are: Conservative Party (CP), Democratic Party (DP), Forum for Democratic Change (FDC), Justice Forum (JEEMA), National Resistance Movement (NRM) and Uganda People's Congress (UPC).

54. See Amama Mbabazi, My declaration, 14 June 2015, retrieved from <www.youtube.com/watch?v=fN-T4Ud91IA>, (accessed 7 July 2015).

The divisions within the FDC party have been occasioned by the differences around the persons of the current President, Major General (Retired) Mugisha Muntu, and the former Leader of the Opposition (LoP) in Parliament, Nandala Mafabi. In 2012, then President of the party, Dr. Kiiza Besigye, opted to retire early from that position. Muntu and Mafabi contested for the post and the former won with a slim majority. The latter alleged that the election had been rigged. He petitioned the party's elders to find a solution, who advised that he should reconcile with Muntu. The divisions were further deepened by Muntu's decision to replace Mafabi as the LoP in parliament with Wafula Ogutu. Since then, supporters of Mafabi have not been comfortable with Muntu's leadership, accusing him of bringing down the party.[55]

The Democratic Party (DP), which was founded in 1954, is the oldest political party in Uganda. Ahead of the 2011 elections, the party elected Nobert Mao, an Acholi, to be its President General. All the previous Presidents-General of the party were Baganda. Mao's leadership has come under challenge from a number of quarters. Divisions between its Executive Committee and the Uganda Young Democrats (UYD) have characterized much of the time of his leadership.

Another schism within the party emerged ahead of the 2011 elections when some members such as Erias Lukwago (Kampala Lord Mayor), Betty Nambooze (MP Mukono Municipality), Muwanga Kivumbi (MP Butambala), Medard Sseggona (MP Busiro East) and Mathias Mpuuga (MP Masaka Municipality) joined a group called *Suubi* and openly showed their lukewarm appreciation of Mao's leadership and moved closer to Besigye.[56] In turn, Besigye contributed financially to the election campaigns of some of the DP candidates like Muwanga Kivumbi who was successful in Butambala, while Mao was accused of inefficiency in terms of fundraising.[57]

Attempts at reconciling the different factions of DP by the party's elders are yet to bear fruits if the recent clashes within the party are to go by.[58] Partly due to the challenges against his leadership, Mao took leave from the leadership of the party at the end of February 2015 for health reasons.[59] Mao's absence from the helm of the party did not translate into internal party cohesion. In fact, a new faction of the party called

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55. See N. Ngobi, *Muntu blasted for sidelining Mafabi*, RED PEPPER, 26 April 2015, at 7.

56. S. Perrot, *From the February 2011 Elections to the Walk to Work Protests. Did Ugandan's really want "Another Rap?*, in S. Perrot et al, *supra* note 40, at 432.

57. *Id*.

58. S. Nakirigya, *DP officials clash over unity in party*, DAILY MONITOR, 25 March 2015, at 7.

59. S. Nakirigya, *Mao goes on leave as Nsubuga takes over DP*, DAILY MONITOR, 25 February 2015, retrieved from <www.monitor.co.ug/News/National/Mao-goes-on-leave-Nsubuga-DP/-/688334/2634536/-/mgnpjo/-/index.html>, (accessed 7 May 2015).

the Truth and Justice Platform led by Erias Lukwago has emerged.[60]

The UPC is the second oldest political party in Uganda. For a long time, the leadership of the party was firmly in the control of Apollo Milton Obote. Following his death in October 2005, his wife Miria Obote took over the leadership of the party. Ahead of the 2011 general elections, the party elected Olara Otunnu, a former UN diplomat, as its head. However, since then, the party has experienced continuous and sour infighting.[61] Otunnu's leadership has repeatedly been contested by national party officials and the "UPC Pressure Group" linked to Jimmy Akena, who is the son of Obote.[62] Edward Rurangaranga (National Chairman), John Odit (Secretary General), David Pulkol (Secretary Policy and National Mobilization), Moses Nuwagaba (Deputy Spokesperson), and Robert Kanusu (Press Secretary) were fired by Otuunu for challenging his decisions.[63] Jimmy Akena then declared himself the President of UPC much to the chagrin of Otunnu. But a successful court appeal by Otunnu in December 2015 overturned Akena's self-proclaimed party presidency.

The Justice Forum (JEEMA) party has one Member of Parliament. Whilst for a long time the party was led by Kibirige Mayanja, the current President is Asuman Basalirwa. Like the other parties represented in parliament, Basalirwa's leadership was recently challenged by a group of youths led by a one Rebecca Achom, who attempted to take over the party headquarters.[64] They accused the party leadership of among others having failed the party.

Lastly, the Conservative Party (CP) also has one Member of Parliament, who also happens to be its leader, John Ken Lukyamuzi. Lukyamuzi's leadership has come under challenge with some members led by former Secretary General, Dan Walyemera, accusing him of neglecting the party and misappropriating funds.[65]

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60. See A. Ngomwoya, *Lukwago elected President General of DP splinter group*, DAILY MONITOR, 21 July 2015, retrieved from <http://mobile.monitor.co.ug/News/News/Lukwago-elected-president-general-of-DP-splinter-group/-/2466686/2800322/-/format/xhtml/-/uyhiddz/-/index.html>, (accessed 14 October 2015).

61. Perrot, *supra* note 56, at 432.

62. *Id*.

63. J.A. Lule, *Sacked UPC officials defy Otunnu*, NEW VISION, 24 December 2011, retrieved from <www.newvision.co.ug/news/315058-sacked-upc-officials-defy-otunnu.html>, (accessed 5 May 2015).

64. See B. Afunah, *JEEMA President speaks out on foiled party coup, Secretary links it to ruling party*, UGNEWS, 20 January 2015, retrieved from <http://news.ugo.co.ug/jeema-president-speaks-foiled-party-coup-secretary-links-ruling-party>, (accessed 7 May 2015).

65. See E. Ssejjoba, *Lukyamuzi ready to leave power in CP leadership*, NEW VISION, 18 August 2012, retrieved from <www.newvision.co.ug/news/634241-lukyamuzi-ready-to-leave-power-in-cp-leadership.html>, (accessed 6 May 2015).

Notwithstanding the state inside the political parties, all of them did come up with roadmaps for the 2016 elections. The grassroots registration of members and elections to fill vacant party posts did not go smoothly for some parties. For example, in many places, the DP grassroots polls were marred by "bribery, falsification of results and false voters".[66] It is reported that in some places like Masaka, the registration of members of DP was characterized by brawls and fist-fights among the party leaders.[67] The infighting especially within the opposition political parties is likely to make them unable to mount a serious challenge to the NRM in the 2016 general elections.

### *F. Funding political parties*

According to the Political Parties and Organization (Amendment) Act (2010), the government is supposed to "contribute funds or other public resources towards the activities of political parties or organizations represented in Parliament".[68] The benefitting parties are to be funded in respect of elections and their normal day-to-day activities. The amendment to the law was prompted by the feeling that there was no level playing field as opposition political parties are always short of money to mount effective campaigns during elections as compared to the ruling NRM party. Thus, in preparation for the 2016 elections, the government through the IEC released UGX 10 billion to political parties represented in parliament.[69] The release of the money was contested on two grounds.

First, is the fact that the money was paid only to political parties with representation in parliament, drawing the ire of those that have no representatives in parliament. Secondly, the formula that was used to distribute the money left a bitter taste in the mouths of some political parties. Under the adopted formula, the money was distributed according to the number of MPs each party has, with the NRM having 259 members receiving 80.2% (UGX 8.2 billion); FDC with 37 members 11.5% (UGX 1.14 billion); DP with 15 members 4.6% (UGX 464 million); UPC with 10 members 3.09% (UGX 309 million); CP with 1 member 0.3% (UGX 30.9 million) and JEEMA with 1 member 0.3% (UGX 30.9 million). The opposition parties preferred a distribution formula based on the number of votes each party received in the 2011

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66. S.K Kaaya and J. Mwesigwa, *Confusion, vote-rigging claims mar poll*, THE OBSERVER, 27-28 April 2015, at 2.

67. I. Aliga, *DP's Mbidde hit in scuffle*, DAILY MONITOR, 5 May 2015, at 5.

69. See E.M. Sserunjogi, *Why EC should give less money to NRM*, SUNDAY MONITOR, 3 May 2013, at 13-14.

elections which would see more parties getting a share of the money, even those that are currently not represented in parliament but which received votes in those elections. As a result of the perceived unfairness in the distribution, some parties like the DP have declared that it will "donate part of the money to child care homes".[70] Meanwhile, those parties that are not represented in parliament view the whole scheme of party financing as a sham.

### *G. Opposition Alliance*

Ahead of the 2011 general elections, opposition political parties came together in a loose coalition called the Inter-Party Cooperation (IPC) coalition to provide a common platform to fight the NRM government. The IPC idea was to front one presidential candidate against the incumbent President Museveni. However, only four political parties—the FDC, CP, JEEMA and UPC—finally bought into the IPC idea. Eventually, even the UPC and CP left the IPC as the two parties decided to front presidential candidates of their own in the 2011 elections. The DP was from the word go hostile to the whole IPC idea.

Now, ahead of the 2016 elections, the opposition political parties have established The Democratic Alliance (TDA) whose aim inter alia is to field a single presidential candidate.[71] The parties subscribing to the TDA idea include: DP, UPC, JEEMA, UFA, FDC, CP, Pressure for National Unity (PNU) and Peoples Progressive Party (PPP). On 12 September 2015, Amama Mbabazi's Go Forward pressure group also joined TDA.[72] The TDA was to arrive at its decision of a joint presidential candidate through consensus. Signs that all was not well in the TDA emerged after the deadline for announcing the joint presidential candidate passed several times. Initially, four people came forward to seek the TDA's joint presidential candidate endorsement namely: Besigye, former Vice President Gilbert Bukenya,[73] Mbabazi and Mao. Whilst Bukenya and Mao dropped out in favor of Mbabazi, Besigye refused to stand down in favor of the Go Forward candidate. According to Besigye, Mbabazi failed "to show

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70. *Id*., at 13.

71. See Uganda: The Democratic Alliance (TDA), Press Statement on the signing of the Protocol of the Democratic Alliance, Kampala, 10 June 2015, retrieved from <https://minbane.wordpress.com/2015/06/11/uganda-the-democratic-alliance-tda-press-statement-on-the-signing-of-the-protocol-of-the-democratic-alliance-10-06-2015/>, (accessed 7 July 2015).

72. N. Mukinga, Mbabazi finally joins TDA, retrieved from <http://www.elections.co.ug/new-vision/election/1000604/update-mbabazi-finally-joins-tda>, (accesses 3 October 2015).

73. After dropping out, he announced that he would support President Musevei in the 2016 elections, meaning that he is no longer part of TDA.

commitment to the central tenets of the opposition's cause namely: fight for a democratic Uganda, fight for the rule of law, fight for human rights and the fight against the terrible scourge of corruption".[74] In the opinion of Besigye, Mbabazi who had hitherto been a leading light in the NRM government before falling out with President Museveni failed to show that his joining the opposition was to advance its cause. On the other hand, Mbabazi argued that he was best placed to lead the transition from Museveni.

In the event, the TDA failed to reach a consensus on who, between Besigye and Mbabazi, should be the Opposition joint presidential flagbearer. The FDC and CP parties supported Besigye while DP, UPC, UFA, PNU, PPP and Go Forward supported Mbabazi. Whilst the former's contention is that Besigye is a 'tested' opposition activist, the latter inter alia argue that the opposition needs a new face to challenge the thirty-year-old NRM government.[75] Besigye's candidature may not have received endorsement partly because he has called for a boycott of the elections if the NRM government does not agree to genuine electoral reforms.[76]

Both Besigye and Mbabazi were eventually nominated as presidential candidates. Thus, the central plank of the TDA which was to-field a joint presidential candidate failed to materialize. It is not clear what implication this will have on the final outcome of the election. Whilst some have argued that the failure of the joint presidential candidate plays into the hands of the NRM, others like FDC President Mugisha Muntu think that the Besigye and Mbabazi candidatures will deny the NRM the 50 plus 1 threshold to win in the first round.[77] The latter position holds that were the election to go into the second round, the opposition would front a single candidate who would defeat the NRM candidate.

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74. S. Kafeero and N. Wesonga, *Mbabazi, Besigye explain TDA fall out*, SATURDAY MONITOR, 26 September 2015, at 4.

75. See F. Musisi, *Mao, Kamya defend love for Amama in TDA*, SUNDAY MONITOR, 27 September 2015, at 3.

76. See W. Tabitha and M. Kirunda, *Implement electoral reforms or we boycott 2016 elections, says FDC*, DAILY MONITOR, 19 March 2015, at 5.

77. See Y. Mugerwa, *Fallout from broken alliance haunts FDC*, DAILY MONITOR, 5 October 2015, at 19 (observing that Mugisha Muntu supported the fronting of two presidential candidates on the ground that it offered the Opposition 'the best chance' of denying Museveni the minimum requirement of a 50 plus one win for automatic victory).

*H. Civil Society*

In a 2012 report, Human Rights Watch (HRW) found that research and advocacy organizations in Uganda dealing with controversial topics were facing increasing harassment by Uganda's government.[78] Singled for attack were organizations whose focus includes oil revenue transparency, land acquisition compensation, legal and governance reform, and protection of human rights, particularly the rights of lesbian, gay, bisexual, and transgender (LGBT) people. These groups have faced forced closure of meetings, threats, harassment, arrest, and punitive bureaucratic interference.

The constitution contains strong provisions on freedom of expression and association, and further guarantees the "right to engage in peaceful activities to influence government policies through civic organizations".[79] NGOs are regulated under the Non-governmental Organizations Registration Act (NGO Act)1989 (as amended in 2006); the NGO Registration Regulations of 2009; and the 2010 National NGO Policy which was the product of long consultations between the Ministry of Internal Affairs and representatives of the NGO sector.

As the country prepares for the 2016 general elections, the government has become uncomfortable with NGOs that are engaged in advocacy work particularly with regard to governance issues. In this regard, the government has sought to amend the NGO Act (1989) to "whip into line civil society organizations critical of its actions or engaging in partisan politics".[80] The amended law now requires that "an organization allowed to operate in Uganda must be non-partisan, should not engage in fundraising or campaign to support or oppose any political party or candidate for an appointive or elective political office nor may not propose or register a candidate for elective political office."[81]

In supporting the draft bill, the then Minister of Internal Affairs, the late General Aronda Nyakairima, observed that the law aims at weeding out "subversive methods of work"[82] by the CSOs. The law provides that "an organization shall not carry out activities or extend operations to any are beyond that it is permitted to operate, unless it gets permission of the District NGO Monitoring Committee (DNMC) and local government of that area and has signed a memorandum of understanding with the local

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78. *See* HUMAN RIGHTS WATCH (HRW), CURTAILING CRITICISM: INTIMIDATION AND OBSTRUCTION OF CIVIL SOCIETY IN UGANDA (2012), retrieved from <http://www.hrw.org/sites/default/files/reports/uganda0812ForUpload.pdf>, (accessed 8 May 2015).

79. Uganda Constitution (as amended), Article 29(1) (e).

80. See S. Kakaire, *Aronda brings law to whip NGOs*, THE OBSERVER, 24-26 April 2015, at 6.

81. NGO Act (Amended), section 44(g).

82. Kakaire, *supra* note 80.

government to that effect".[83] The DNMC is chaired by the Resident District Commissioner (RDC) with the Chief Administration Officer (CAO), District Community Development Officer (DCDO), District Internal Security Officer (DISO), and a representative of the organizations being members. The fear of government interference in the activities of the CSOs is well founded considering that the DNMC is largely composed of government functionaries. The layers of monitoring of the activities of the NGOs from sub-counties, district and national levels smells of mischief by the government. The law empowers the NGO Board to "revoke the permit of an organization if the organization… contravenes any of the conditions or directions specified in its [operating] permit".[84] There is no judicial oversight of the NGO Board's decisions.

The government may have been prompted to amend the law due to the leading role that CSOs have played in calling for electoral reforms in Uganda. It should be noted that CSOs have teamed up with opposition activists and opposition political parties and drafted electoral reforms which were meant to be introduced before the 2016 elections. The CSOs initiative run parallel to that of the Inter-Party Organization for Dialogue (IPOD), a grouping of all political parties with representation in parliament. In the past, the government was critical of the NGOs for two main reasons:[85] first, that NGOs are not to be trusted because they are funded by "The West" and therefore represent the views of "foreign infiltration" seeking to tarnish the country's international standing, destroy its values, and/or plunder its resources. Second, NGOs are not to be trusted because they are really opposition political parties masquerading as NGOs bent on defaming the country. As the country heads into the 2016 elections, government seems determined to shackle the CSO movement.

### *I. The International Community*

The international community (also known as development partners) has been consistent in its call for electoral reforms in Uganda, with the European Union (EU) being at the forefront of making these calls.[86] It should be noted that the international community (especially aid donors) have been "a crucial source of support for the Museveni

83. NGO Act (Amended), section 44(a).

84. *Id.,* section 33 (1)(b).

85. HRW, *supra* note 78, at 20.

86. See J. Odyek, *EU envoys, Kadaga discuss electoral reform issues*, NEW VISION, 6 June 2015, retrieved from <http://www.newvision.co.ug/news/669437-eu-envoys-kadaga-discuss-electoral-reform-issues.html>, (accessed 27 June 2015).

government".[87] Aside from the World Bank, the USA and United Kingdom (UK) have constituted the largest and most consistently supportive donors to the country since 1987, providing an average of US$ 268 million and US$ 143 million per annum, respectively, between 2004 and 2008.[88] The European Commission (EC), Denmark, Canada, Ireland, Germany, Japan, the Netherlands, Norway and Sweden have also been major donors. Uganda's regional peacekeeping role, especially in Somali under the African Union Mission in Somalia (AMISOM) has become central in donor-Uganda relations. Other regional engagements that have placed donor-Uganda relations at the fore include: Uganda's intervention in South Sudan and Uganda's participation in the AU's Regional Task Force for the elimination of the LRA.

In the context of elections, since 1986, the donors have provided election assistance to Uganda via joint, structured basket funds.[89] The Deepening Democracy Programme (DPP) established in 2008 under the Danish International Development Agency (DANIDA) has been the main medium through which donors have provided electoral assistance in recent years. The DDP, which was replaced by the Democratic Governance Facility (DGF), has acted primarily in two capacities: first, as a grant-making body (to parties, Parliament, civil and the media), and second, as an organization hoping to foster inter-party dialogue.[90]

The provision of assistance notwithstanding, the donors joining the chorus for electoral reform ahead of the 2016 elections has not always been welcomed by the government. The current call by the donors for electoral reform has been met with a dismissive response from the Minister of Justice and Constitutional Affairs, Major General (Retired) Kahinda Otafiire, who is reported to have observed that "the government [of Uganda] is very sorry for the EU…"[91] Going from past experience, the donor demands for electoral reforms will largely be ignored with minimal or no consequences at all to the government. Ahead of the 2011 elections, the government largely ignored the political oppositions' and donors' demands for electoral reforms

87. J. Fisher, *The limits-and limiters-of external influence: the role of international donors in Uganda's 2011 elections*, in Perrot et al, *supra* note 40, at 266.

88. *Id*., at 268.

89. *Id*., at 273.

90. *Id*., at 274.

91. D. Walusimbi, *Otafiire warns EU on electoral reforms*, THE OBSERVER, 10 June 2015, retrieved from <http://www.observer.ug/news-headlines/38276-otafiire-warns-eu-on-electoral-reforms>, (accessed 6 July 2015).

with no consequences at all.[92] Equally, ahead of the 2016 elections, the government seems to have adopted the same stance.

### *J. Electoral reforms*

Calls for electoral reforms have come from different quarters in the country. Ahead of the 2011 general elections, the Inter-Party Organizations Dialogue (IPOD), an outfit established to promote dialogue amongst political parties, agreed on legislative electoral reforms which were sent to Parliament. The IPOD proposals were not discussed as the ruling NRM party disowned them.[93] Nevertheless, in the aftermath of the 2011 elections, calls for electoral reforms came from the following: Coordinating Team for Free and Fair Election Campaign, the Citizens Coalition on Electoral Democracy (CCEDU),[94] IPOD, the IEC, the National Consultative Forum and the Cabinet.

The most vocal campaign on electoral reforms was conducted by CSOs and the political Opposition who held consultative meetings throughout the regions of Uganda on how to have free and fair elections. The campaign climaxed at the end of November 2014 with a grand conference titled the National Consultation on Free and Fair Elections. The conference outcome document which contains concrete proposals on how to hold free and fair elections in Uganda is titled: Uganda Citizens' Compact on Free and Fair Elections (*hereinafter* The Compact). The significance of the Compact lies in the fact that it contains the most concrete and comprehensive proposals to reform election management. It identifies and prescribes solutions in a number of areas to improve the electoral process.

Inter alia, the Compact proposes the following: establishment of a new electoral commission; compilation of a new, clean and verifiable voter's register; regulation of the role of the security forces and militia groups in the electoral process; establishment of a mechanism to monitor and prevent [ruling party] raids for funds from the Central Bank, Ministries and international assistance accounts, in the period before and during the campaigns; address the system of patronage; separation of the state from the ruling

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92. Their demands included: The re-constitution of the electoral commission to reflect the spirit of multiparty political dispensation; Removal of the security forces from management of the electoral process; Removal of the army representatives from Parliament; Reinstating the term limits on the presidency; Removal of polling stations from army barracks; and the Electoral Commission Chairperson and Commissioners should serve not more than two terms of five years.

93. See 'Nobert Mao: IPOD dysfunctional', RED PEPPER, 3 June 2014, retrieved from <http://www.redpepper.co.ug/norbert-mao-ipod-dysfunctional/>, (accessed 29 April 2014).

94. This is a grouping of hundreds of NGOs and community based groups working on electoral issues.

party; the responsibility of creating new electoral constituencies should only be exercised by the EC applying a clear criteria; the repealing and amendment of the Public Order Management Act (2011) and the Police (Amendment) Act (2006) respectively, to be brought into full conformity with the Bill of Rights; and to follow the principles of transparent competition and merit in the recruitment of election presiding officers.

Other proposed reforms are: to ensure the integrity of the tallying process, polling committees must be set up comprising political parties, civil society and presiding/returning officers to monitor the voting, counting and tallying process, and deal with complaints and disputes in the voting and tallying process, including the determination of valid, invalid or spoilt ballots, and votes must be counted and tabulated accurately and transparently in the presence of stakeholders (political parties, civil society, observers, the media and the public); the processing (including procurement, designing, printing and distribution) of electoral materials at all levels and stages should involve all stakeholders including the political parties, civil society, election observers and the media to ensure participation, scrutiny and observation; and the tenure of office for the President should be two five-year terms, which must be entrenched in the Constitution.

The government's reaction to the Compact proposals was just to ignore them. In fact, it even refused to send a representative at the Compact signing ceremony, even when it had been invited. A petition containing the Compact was submitted to the Speaker of Parliament at the beginning of December 2014.[95] Meanwhile, the government promised to draft and present its own constitutional and electoral reforms in due course.[96] After a lot of procrastination, the government at the end of April 2015 finally unveiled the Constitutional (Amendment) Bill (2015). The Bill was presented to parliament against the backdrop of continued calls for electoral reforms by various entities including the Church[97] and development partners.[98]

The Constitutional (Amendment) Act (2015) was passed by Parliament in August 2015. The Act covers four aspects with regard to electoral reforms. First, it

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95. See D. Lumu, *Civil society submits constitutional reform to Speaker*, NEW VISION, 9 December 2014, retrieved from <http://www.newvision.co.ug/news/662687-civil-society-submits-constitutional-reforms-to-speaker.html>, (accessed 8 May 2015).

96. *Id*.

97. See I. Anguyo and N. Katende, *Clerics irked by delayed electoral reforms*, NEW VISION, 1 April 2015, retrieved from <http://www.newvision.co.ug/news/666565-clerics-irked-by-delayed-electoral-reforms.html>, (accessed 8 May 2015).

98. See M. Karugaba and J. Namutebi, *Act fast on electoral reforms-EU*, NEW VISION, 26 March 2015, at 7.

changes the name of the EC to the Independent Electoral Commission (IEC) in order to explicitly recognize its independence. Secondly, it prescribes the procedure to remove the members of the IEC, in a similar manner to the removal of judicial officers. Thirdly, it provides for Members of Parliament to cross the floor (moving from one political party or from being independent to join another political party) within twelve months before a general election. Lastly, it provides for the registrar of every court which declares a seat of an MP vacant to transmit a copy of the judgment of the court to the Clerk of Parliament within ten days after the declaration and to require that a by-election is held within sixty days after the IEC has received notification of the occurrence of a vacancy from the Clerk of Parliament. This is to give the IEC reasonable time within which to organize a by-election.

As can be seen, the amendments were very far from the proposals for electoral reforms as advanced in the Compact. Whilst some commentators view the amendments, for example re-naming the EC as IEC as a "mockery", others called them "an insult" to Ugandans[99] We can only speculate on what effects the failure of adopting electoral reforms as proposed in the Compact will be. What is clear though is that there is a feeling among Ugandans, especially those who participated in the process of drawing up the Compact, that the Constitutional (Amendment) Act (2015) does not go far enough to ensure the holding of free and fair elections.

## IV. CONCLUSION

Uganda is on course to hold the next general elections on 18February 2016. These will be the third elections held under the multiparty system since its re-introduction in 2005. The political opposition, donors and civil society groups have waged a concerted campaign for far-reaching electoral reforms but which campaign has largely been ignored by the government. The Constitutional (Amendment) Act 2015 which should have dealt with the opposition, donors and civil society's concerns instead introduced cosmetic electoral reforms. All indications are that the political opposition will cry foul once the ruling party is declared the winner in the coming poll.

Meanwhile, the economic situation remains uncertain as a result of the depreciation of the Uganda shilling and the worsening balance of payments. There have been attempts to establish militia groups by both sides on the political divide, which is most likely perpetrate violence during the poll. A law to curtail the activities

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99. See A. Atuhaire, *Proposed constitutional amendments and why they failed to impress*, THE INDEPENDENT, 10 May 2015, retrieved from <www.independent.co.ug/cover-story/10223-prposed-constitutional-amendments-and-why-they-failed-to-impress>, (accessed 10 October 2015).

of the NGOs was passed and generally opposition political parties remain fragmented, meaning that they cannot mount a serious challenge to the ruling party in the coming poll. In the end, all indications are that the ruling party—NRM—will win the poll, which win will be contested by the opposition as not having been achieved through a free and fair election process.

# A DEMOCRATIC POLITICAL ORDER AFTER VIOLENCE: LESSONS FROM ELECTIONEERING IN THE DEMOCRATIC REPUBLIC OF CONGO

David-Ngendo Tshimba*

**ABSTRACT**

*This article, by means of secondary data analysis, delves into the predicaments of elections after violent armed conflicts as a means to (re)build broken political structures and so restore a democratic political order. Although elections are a key component of liberal democratic governance, the article nevertheless acknowledges that resorting to the ballot and not to the gun is actually not a guarantee of order and stability in the aftermath of political violence. The article is in agreement with the fact that many scenarios of electoral engineering in post-Cold War Africa have been flawed as they have been fraudulent, violent, manipulated, or a combination thereof and thus fallen short of meaningful political reconstruction in the aftermath of political violence. On that basis, the article proceeds with a political stock-taking of the case of 'electocracy' (the quest for a democratic dispensation through the sole path of popular elections) in post-war Democratic Republic of the Congo (DRC) based on the two episodes of 2006 and 2011 general elections. The article ultimately suggests that the need to conduct general elections should not take pre-eminence on the political to-do list of priorities facing a post-violence country such as today's DRC. Instead, the article argues for political institutionalization through socially emancipating politics. This may be a less enviable yet more rewarding move in the quest for a viable democratic political order in the context of a previously war-ravaged country.*

## I. INTRODUCTION

Even after government is established it remains more the guarantor than the maker of the law. The structure of order in any society is a rather elaborate affair. It is the result of long-time adjustments between man and man and between man and environment.[1]

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1. R.M. MACIVER, THE WEB OF GOVERNMENT, REVISED EDITION. NEW YORK: THE FREE PRESS (1965).

In the aftermath of the Cold War—which was by no means any mild on the African continent—a vast majority of African states still struggle to overcome the challenges characteristic of a post-war context as they strive for political as well as socio-economic paradigms that would rid them of eventual institutional fragility. The Democratic Republic of the Congo (DRC) is no exception to this trend. This article—drawing from contemporary events and scholarly literature on scenarios of electoral engineering in post-Cold War Africa—seeks to illuminate the predicaments (structural, political, social and economic) pertaining to conducting elections after violent conflict as a means to (re)build broken political structures and to restore a democratic political order of the state.

Whereas, in essence, a theory and practice of civics in which sovereignty is lodged in the assembly of all citizens who choose to participate in the decision-making processes to shape their own destiny sound a good thing, Huntington convincingly cautions that premature increases in political participation—including events like early elections—have a great likelihood of destabilizing fragile political systems.[2] In lieu of a haste into a political order as prescribed in the dispensation of liberal democracy—key to which is civic participation through the holding of elections—Huntington hence argues for a political strategy which, in the words of Francis Fukuyama, came to be called "authoritarian transition,"[3] whereby a modernizing dictatorship provided political order, a rule of law, and the conditions for successful economic and social development.

Broadly in line with Huntington's analytical framework together with other critics of Western liberal democracy, the article deciphers the pitfalls of post-war DRC's electioneering in the two episodes of 2006 and 2011 general elections. Basing on these two sequential yet profoundly dissimilar electoral experiences in patterns (although prior to each of which armed conflict had weighed heavily on the country's agency and institutions), the article aims to corroborate that resorting to the ballot and not to the gun is no guarantee of restoration of firm political order in the aftermath of nation-wide devastating armed conflicts. Furthermore, against the backdrop that, twice after emerging as winner of the elections, President Joseph Kabila's government has thus far been incapacitated—albeit with a heavy international community's engagement—to consolidate its precariously fragile political, economic, social and security infrastructures, the article argues that the insistence on the organization of elections for purposes of legitimization of power may simply not be very meaningful in the first place. It could end up as a hollow ritual and more so one that does provide

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2. P.S. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES. NEW HAVEN: YALE UNIVERSITY PRESS (1968).

3. F. Fukuyama, "Preface", in Huntington, *id*.

an otherwise autocratic regime with a façade of legitimacy or, worse still, may lead to a renewal of violence only capable of worsening an already bad situation.

In final analysis, it is argued that whereas the desire for free and credible elections may constitute the hallmark of a democratic political order as per the tenets of liberal democracy, the context within which such democratic ideal is pursued serves as a caveat. For a previously war-ravaged state faced with political as well as socio-economic challenges such as those that the DRC faced after two episodes of armed conflict, elections—good intentions and unavoidable pressures notwithstanding—may not consist of the immediate vitally necessary steps along the road to a viable democratic political order. Rather, making the post-war state capable of governing (by rebuilding hitherto collapsed state institutions in charge of modulating all social forces, regulating the economy and ensure equitable redistribution of its dividends, and adjudicating all sorts of controversy and conflict) as well as the post-war society governable (by synchronizing all different as well as differing social forces for sound civic participation) constitute a proper sequencing essential to the eventual establishment of political institutionalization, which is in turn a crucial first step for a truly democratic political order after mass political violence.

## II. ON ELECTIONEERING IN POST-COLD WAR SUB-SAHARAN AFRICA

In the early 1990s, there was in sub-Saharan Africa a rapidly growing reliance on electoral processes as the principal way to legitimize governance at national, regional, and local levels. Coming from the context of a bipolar world from where the crisis and the collapse of one side (communism) seemed to have validated the victory and superiority of the other (capitalism), Wamba-dia-Wamba noted that the political death of bureaucratic socialism has propelled the parliamentarian mode of politics to a hegemonic position: supporters of capitalism in the West have seized "the occasion to intensify the propaganda for a free market economy and multi-party democracy."[4] Elections, Reilly hence notes, have been perceived as an inescapable means for jump-starting a new, post-conflict political order; for stimulating the development of democratic politics; for choosing representatives; for forming governments; and for

4. E. Wamba-dia-Wamba, *Africa in Search of a New Mode of Politics*, in AFRICAN PERSPECTIVES ON DEVELOPMENT: CONTROVERSIES, DILEMMAS AND OPENINGS (U. Himmelstrand, K. Kinyanjui & E. Mburugu eds., 1994) London: James Currey, at 256.

conferring legitimacy upon the new political order.[5] Furthermore, they could also provide a clear signal that legitimate domestic authority has been returned and therefore inferring that the role of the international community may be coming to an end.

Seen as the basis for both democratic governance and political (re)construction in post-conflict scenarios, these elections have become something of a growth industry in the post-Cold War world order. Emphatically, Article 21 of the United Nations Declaration of Human Rights had yet reiterated the stipulation of elections in the following terms: "The will of the people shall be the basis of the authority of government; this shall be expressed in *periodic* and genuine elections which shall be by universal and equal suffrage..." (italics added for emphasis). As the most visible feature of liberal democracy, universal suffrage in independent Africa has been treated as democracy's defining characteristic.

Oftentimes, the main answer of the international community to the problem of inertia or systemic dependency in the aftermath of severe conflict is the rapid organization of elections, which are expected to produce legitimate governments with mandates to shape new and better societies. The post-conflict democracy solution, however, contains major problems. Citing the work of Robert Bates, *When Things Fell Apart*, Straus and Taylor have reiterated that the early optimism about Africa's democratic transition has met with new skepticism to the extent that political liberalization (by way of a dispensation of liberal democracy) came to shorten the time horizons of African leaders during the past two decades, increasing the likelihood that state leaders would predate rather than develop institutions for the common good.[6] Furthermore, Uvin argued that, against a backdrop of extreme poverty due to dilapidated socio-economic infrastructures, disorganization of the then political scene, and the legacies of violence that continue to suffocate delivery of public goods, elections might simply not be very meaningful first and foremost.[7] In the same vein, Collier maintains that the organization of elections in poor countries simply increases the risk of political violence.[8]

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5. B. Reilly, *Elections in Post-Conflict Scenarios: Constraints and Dangers,* 9 INTERNATIONAL PEACEKEEPING (2002), London: Routledge.

6. S. Strauss & C. Taylor, *Democratization and Electoral Violence in Africa, 1990-2008,* in VOTING IN FEAR: ELECTORAL VIOLENCE IN SUB-SAHARAN AFRICA (A.D. Bekoe ed., 2012), Washington, DC: USIP Press, *cited from* R.H. BATES, WHEN THINGS FELL APART: STATE FAILURE IN LATE-CENTURY (2008).

7. P. Uvin, *The Development/Peacebuilding Nexus: A Typology and History of Changing Paradigms,* 1 JOURNAL OF PEACEBUILDING AND DEVELOPMENT (2002).

8. P. COLLIER, WARS, GUNS AND VOTES: DEMOCRACY IN DANGEROUS PLACES (2010). LONDON: VINTAGE BOOKS.

In Reilly's opinion, there are three main areas of variation that are of crucial influences on the shape of post-conflict politics in most countries.[9] First is the question of timing: should post-conflict elections be held as early as possible so as to fast-track the process of establishing a new regime, or should they be postponed until peaceful political routines and issues have been able to come to prominence? Second, there is the mechanics of elections themselves: who runs the elections; how are voters registered; what electoral formula is used? Third, there is the often-underestimated issue of the effects of elections on the political parties. Are political parties—weak civil societies notwithstanding—contesting in a parochial manner or are they broad, programmatic organizations with real links to the grassroots? Thus, electoral processes—most especially in the aftermath of violent conflict—may contribute to the (re)building of broken/inexistent political structures and ensure durable peace or they can be catalysts of conflict and violence, and further break down the already broken structures dilapidated by violent conflict.

For Bekoe, new democracies (of which most of post-Cold War sub-Saharan Africa became characteristic) face a particularly high risk of political violence in general and electoral violence in particular. This is especially true for "poorer, ethnically diverse, and post-conflict countries."[10] Hence, as the tendency for many peace agreements to proclaim the formal end of a conflict consists of the organization of elections, post-war states become more prone to electoral violence in the short-term and political violence in the long run.

The debate on electoral systems in post-Cold War Africa has often presupposed that the key institutional players in this process—most notable of which are political parties—do represent the aspirations of the electorate and that the general elections merely come into play to arbitrate over which of the contesting parties is deemed by the voting majority as best capturing their issues and concerns. Yet, in a post-war setting where violence-ridden states are apt to have stronger patronage networks in comparison to others, the demands of loyalty supersede efficiency, inclusivity, and the rule of law; hence, electoral violence is likely because power is sought by any means necessary.[11] Little wonder that the predominant route to state power in most parts of Africa today has been through the orchestration of political violence of which electoral violence remains a central part.

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9. Reilly, *supra* note 5.

10. A.D. Bekoe, *Introduction: The Scope, Nature, and Pattern of Electoral Violence in Sub-Saharan Africa*," in Bekoe, *supra* note 6, at 5.

11. *Id.*

Assessing Africa's new governance models, Olukoshi noted that where citizen pressure became an exercise in futility under political regimes that were supposed to have derived their mandate from the populace through elections, the essence of governance had not really changed in spite of the framework of electoral pluralism that had been introduced.[12] Furthermore, the cost of getting the elected government to pay attention to domestic concerns has actually been high, involving the organization of domestic protests, the deployment of a brutal state apparatus, the routine abuse of power in order to undermine domestic political opposition, and the continued rigging of votes to foil the popular will and block the extension of the frontiers of democracy.[13] To add to such gloomy stories of suffocated democratic dispensation, Oloka-Onyango too realised that only six of Africa's independence leaders were replaced in free and fair elections; the rest were either overthrown, forced to resign, died in office, or were stopped by an assassin's bullet.[14] That a sheer lack of genuine political pluralism has been conspicuous in post-Cold War Africa is an indisputable fact, the facade of 'multi-partyism' notwithstanding.

Berhanu underscored that the tide of democratisation that swept Africa in the aftermath of the Cold War brought to the fore a category of elites whom Gros has labeled "opportunistic democratisers."[15] As Berhanu further noted, constitutional reforms and the conduct of pluralistic periodic elections alone are not sufficient for effecting transformation with a positive bearing on the socio-economic and political life of the citizenry and the good of society (including non-citizens) at large.[16] Hence, to replace authoritarian regimes by seemingly democratic ones rather than making new arrangements in the realm of political governance, which can practically benefit society in socio-economic terms, may turn out to be futile. Despite the fact that elections remain a prerequisite for broader democratic practices, electoral exercises and democratic political order are certainly not synonymous.

Undoubtedly, electioneering in post-Cold War sub-Saharan Africa has essentially consisted of a business of politico-military elites (in some contexts also known as warlords) who are prompt to take up elections as a safe haven that legitimizes their aspirations and perpetuates their privileged positions. What is actually needed in

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12. A. Olukoshi, *Assessing Africa's New Governance Models,* in AFRICA'S NEW GOVERNANCE MODELS: DEBATING FORM AND SUBSTANCE (J. Oloka-Onyango & N.K. Muwanga eds., 2007).

13. *Id.*

14. J. Oloka-Onyango, *Not Yet Democracy, Not Yet Peace! Assessing Rhetoric and Reality in Contemporary Africa*, in Oloka-Onyango & Muwanga *id.*

15. K. Berhanu, *Constitutional Engineering and Elections as Sources of Legitimacy in Post-Cold War Africa*, in Oloka-Onyango & Muwanga *id.*

16. *Id.*

such scenarios, Berhanu emphasized, is to perfect the formal facades of electoral organs, procedures, and processes in a manner that is commensurate with presentable and standard norms acceptable to domestic constituencies as well as interested external actors such as bilateral donors, international electoral observers, and multilateral institutions.[17] In response to some political scientists who claim, by way of hypothesis, that three or four electoral experiences are needed to make things go in the right direction, Van Reybrouck stated the following: "One does not start cultivating the desert by first sowing the best of seed. The same goes for introducing a democracy."[18] Unless the contest of multi-party elections in the aftermath of violent conflict is *a priori* planned in tandem with approaches that are built on a solid analysis of the conflict and the cleavages that created it, so as to bridge these cleavages and thereby create trust in a level playing field and an outcome that is integrative and which does not lead to further exclusion, the conduct of post-violence elections, Bøås argues, is bound to create winners and losers, and hence cement cleavages and perceptions from the violent past.[19]

## III. THE CASE OF 'ELECTOCRACY' IN THE DRC

Since the fifteenth century, recorded history has it that the Congolese people have waged a series of major struggles for freedom, development and other democratic rights, with the hope of improving their lot and ensuring a better future for their children. The struggle had gone through various episodes. These include: the repudiation of slave trade (1400-1870); the protest against social violence and mass killing (1885-1809) under the Leopoldian rule; the revolt against colonialism and fight for independence (1944-1960); the revolution against the failure of the post-colonial state to fulfill the expectations of independence (1963-1968); the opposition to one-party dictatorship and support for multiparty democracy (1969-1996); and resistance against external aggression and new forms of dictatorship internally (1997- to date).

Reportedly, the two successive wars, the first from October 1996 to May 1997 commonly referred to as 'the war of liberation' and the second from August 1998 to July 1999 commonly referred to as 'the war of occupation', arguably constitute the worst humanitarian crisis the country has ever had since independence in 1960. According to Turner, the war that unfolded in the DRC—the former Zaire—in the mid-

17. *Id.*

18. D. VAN REYBROUCK, CONGO: THE EPIC HISTORY OF A PEOPLE (2014), at 512 [translated from the Dutch by Sam Garrett]. London: Fourth Estate.

19. M. Bøås, *Liberia: Elections—no quick fix for peacebuilding,* 17 NEW ROUTES (2012).

1990s was the bloodiest since the Second World War.[20] The thrust of the argument advanced in this article, however, does not entail a full treatment of these episodes of war which bloodily devastated the entire body politic of post-Mobutu DRC. Nonetheless, a succinct presentation of the happenings that preceded the conduct of the 2006 elections is in order.

Unlike the military energies invested in the first insurgent war (1996-7), the international community—spearheaded by the United Nations and African Union—quickly agreed to ways of bringing the second war (1998-9) to an end by all diplomatic means possible. First was the Southern Africa Development Community (SADC)—a regional integration of which the DRC was and still is a member-state—that took interest in the Congolese armed conflict, framed as a war of aggression. South Africa had always been interested in pursuing a negotiated political settlement in the DRC.

In late 1996, while Laurent Kabila's AFDL was fighting their way to Kinshasa, President Nelson Mandela unsuccessfully tried to broker a peace deal between then President Mobutu and Kabila.[21] Discussions concerning whether a military intervention or diplomatic ways ought to be sought initially set SADC member-states apart. The 14-member SADC did not agree with the South African emphasis on negotiations rather than force as a way of settling the dispute. While South Africa—supported by Botswana, Lesotho, Mozambique and Swaziland—pushed for a diplomatic solution, Angola, Namibia and Zimbabwe deployed troops to Kinshasa "to help prevent the regime of Laurent Kabila from being overthrown."[22] Successive summits to devise ways forward for the Congolese crisis ended in adopting the diplomatic solution (negotiated political settlement) proposed by Zambian President Frederic Chiluba, which culminated into the signing of the Lusaka Agreement for Ceasefire by all belligerents.

With much unfinished business, all the state parties to the conflict, namely Angola, DRC, Namibia, Rwanda, and Uganda, signed the Lusaka Agreement for Ceasefire on 10 July 1999. Three weeks later, the two main Congolese rebel movements, namely the RCD and the MLC, endorsed the agreement on 31 July and 01 August 1999 respectively. This agreement underscored the ceasefire and other pacifist provisions including the withdrawal of all foreign armed forces from the DRC, the

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20. T. TURNER, THE CONGO WARS: CONFLICT, MYTH AND REALITY (2007). LONDON: ZED BOOKS.

21. D. Curtis, South Africa: Exporting Peace to the Great Lakes Region? (2007), retrieved from <https://www.nottingham.ac.uk/shared/shared_icmcr/Docs/curtis.pdf>, (accessed on 17 July 2015).

22. *Id.,* at 8.

deployment of a UN peacekeeping force, and the Inter-Congolese political negotiations to lead to an all-inclusive transitional government that was expected to come to an end with the conduct of free and fair general elections.

Already, by 16 September, Mbavu notes, accusations of violation of the ceasefire by parties to conflict abounded, especially between RCD's Rwandan-backed forces and the national DRC army, *Forces Armées Congolaises* (FAC).[23] Protagonists, most especially those behind the war (RCD and its regional backers, which included Burundi, Rwanda and Uganda) started to suffer from the counter-offensive of Kinshasa's allies (Angola, Chad, Namibia and Zimbabwe) as so much capital was being invested in the war.

In a bid to follow through the aborted Lusaka Agreement in the aftermath of the assassination of President Laurent-Desire Kabila on 16 January 2001, the envisaged Inter-Congolese Dialogue (ICD) ensued. Former President of Botswana, Ketumile Masire, had been appointed Chief Facilitator of the process since 1999 at the consternation of Laurent Kabila.[24] Unlike the peace talks that culminated into the Lusaka Agreement, the ICD brought together not only the direct belligerent parties (the Kinshasa government now under the leadership of President Joseph Kabila, the RCD-G, the RCD–K/LM, and the MLC) but also other local militias of the troubled eastern DRC (the Mai-Mai) as well as representatives from the political opposition and the civil society (religious and traditional leaders). The ICD, Curtis further notes, gathered together 360 delegates from eight components and entities; the delegates split into five technical commissions dealing with (a) political and legal issues, (b) security and defence, (c) social, cultural and humanitarian affairs, (d) finance and economy, and (e) peace and reconciliation.[25]

Following the initial meetings in Gaborone, Botswana, and in Addis Ababa, Ethiopia, in August and October 2011 respectively, South Africa became increasingly involved in the process in 2002. Thereafter, the ICD culminated into the signing of the Pretoria Global and Inclusive Agreement on Transition in the DRC on 17 December 2002 under the auspices of President Thabo Mbeki. Then Deputy President of South Africa, Jacob Zuma, echoed to the Congolese signatories to this agreement that "persistent pressure got the ANC to the negotiating table… and kept both sides there through the convoluted CODESA [Convention for a Democratic South Africa]

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23. V.M. MBAVU, LE CONGO-ZAIRE: D'UNE GUERRE À L'AUTRE, DE LIBÉRATION EN OCCUPATION (CHRONIQUE 1996-LUSAKA 1999) (2003).

24. Curtis, *supra* note 21.

25. *Id.*

process."[26] Three months later, the Pretoria Global and Inclusive Agreement was adopted by all parties to the dialogue on 01 April 2003, still under the facilitation of President Ketumile Masire in South Africa under the auspices of President Mbeki. While it took a year to reach a ceasefire, only one other year lapsed to create a transitional government to lead the country to elections. Yet, among the many explanations which caused the war in the first place was the collapse of the Zairian/Congolese state. Supposedly, Turner notes that the insurgency of Laurent Kabila and his Rwandan and Ugandan backers was sucked into a vacuum, caused by the disappearance of the Mobutist state.[27]

This Global and Inclusive Peace Accord did usher in the three-year national transitional government headed by one President (Joseph Kabila heading the *Parti du Peuple pour la Reconstruction and le Développement*, PPRD) and four Vice Presidents (Jean-Pierre Bemba of the MLC, Azarias Ruberwa of the RCD-G, Abdulaye Ndomabsi of the PPRD, and Arthur Z'Ahidi-Ngoma of the civil opposition). The leadership comprised representatives of the MLC, RCD, Kinshasa government and the political opposition. Not only did the Pretoria Global and Inclusive Agreement consist of a sophisticated power-sharing deal for a transitional government led by former direct belligerents, but also, and more important, all transitional government positions besides the executive, the Legislative, the Judiciary, and Defence and Security, were proportionally shared among all the parties to the agreement. This transitional government was sworn-in on 30 June 2003 (Independence Day) and in May 2005 the transitional National Assembly (Parliament) adopted a draft new constitution. The constitution was subjected to a referendum in December 2005 and approved with an overwhelming majority vote cast in its favour.

Approval of the 2005 constitution, it is reported, would usher in the Third Republic, starting with the elections of 'new' leaders with political legitimacy and so end the otherwise democratic transition which begun in the early 1990s and interrupted by the two wars. Whereas the West, spearheaded by the United States of America applauded the new DRC constitution as establishing "a balance of power between the branches of government, ensuring protection and development of minorities, and providing for a limit of two presidential terms" critics, Turner writes, gave no praise for it; they judged it "vague both as regards the form of state (unitary or federal) and the form of governing regime (presidential and parliamentary)."[28]

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26. *Id.,* at 10.
27. Turner, *supra* note 20.
28. *Id.,* at 183-4.

Wamba-dia-Wamba pointed out that two dominant historical modes of politics have been specified: the parliamentarian mode of politics—which includes liberal democracy—and the Stalinian or Third International mode of politics.[29] For Wamba-dia-Wamba, however, neither the parliamentarian mode nor the Stalinian mode (which is not the same thing as the Soviet Union under Stalin, i.e. Stalinism) "support a process of human and social emancipation today."[30] It was against this backdrop and within the contours of this newly promulgated constitution that the general elections of 2006 took place.

### *A. The 2006 Election Experience*

The conduct of the 2006 general elections (both presidential and legislative)—a democratic experiment the country must have enjoyed for the very first time ever since its accession to national sovereignty in 1960—followed a decade of one of the deadliest internationalised conflicts that made the DRC the theatre of what was called Africa's Great War.[31] Many Congolese, Turner writes, voted for peace, but their votes paradoxically led to a second round choice between the two leading warlords: Joseph Kabila and Jean-Pierre Bemba.[32] Furthermore, the elections were supposed "to put an end to 'partition and pillage' but territorial reunification was far from complete when the elections were held and pillage continued."[33]

These elections, Prunier acknowledges, followed the promulgation of the new constitution, which had been submitted to popular referendum at the end of 2005 and approved by 84.3 percent of the voters who signified a resounding triumph for the two-year long transition process.[34] Almost as soon as the electoral process began to acquire greater credibility, the conduct of elections was called into question. Because the civilian population concurred with the argument of Apollinaire Malu Malu (who by then headed the Independent Electoral Commission) about the politicians' delaying tactics, anti-postponement riots spread very quickly across the major cities of the country. Beyond the vagaries of individual politicians, the main national problem the Congolese state faced during the entire transition period was—and still remains long after the constitutional referendum—security. In the words of Prunier, the bigger

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29. Wamba-dia-Wamba, *supra* note 4.

30. *Id.,* at 249.

31. G. PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE. (2009). OXFORD: OXFORD UNIVERSITY PRESS.

32. Turner, *supra* note 20.

33. *Id.,* at 166.

34. Prunier, *supra* note 31.

problem was how to reintegrate structures of often anomic destruction into new structures of controlled violence—at least in accordance with the classical definition of the state which is an entity having the monopoly of legitimate violence over a certain territory.[35]

By 2006, election fever had started to grip the country; the looming future was filled with both hope and threats—the elections having turned into a "Holy Grail."[36] At that time of elections, the then *Mission d'Organisation des Nations Unies au Congo* (MONUC)—the United Nations peacekeeping forces already deployed in the country half a decade ago—together with the set *Comité International d'Accompagnement de la Transition* (CIAT) [International Committee in Support of the Transition] which included the five permanent members of the UN Security Council in addition to Belgium and Canada as well as four SADC member-states (Angola, Mozambique, South Africa, and Zambia), struggled against many odds to ensure that the determinant elections were held with the standard norms of free, fair, transparent and non-violent electoral processes accepted by the international community. In April, the European Union contributed a USD 21 million auxiliary military force of 2,000 troops under a Franco-German coordinated command.

If the DRC could not have completed the transition from open warfare to the elections of 2006 without substantial support from the so-called international community, this strong support paradoxically became a political problem. A number of opposing candidates, and people associated with the major non-candidate Etienne Tshisekedi, "claimed that the international community was imposing its choice, Kabila."[37] Already in the first round of these elections, a post-war DRC "deeply divided between east [Swahili-speaking] and west [Lingala-speaking]" was brought to the fore.[38] Horowitz convincingly argued that the common tendency of different ethnic groups to support opposing political parties provides a situation conducive to the mingling of ethnic and partisan violence.[39]

Upon collecting candidacy declaration forms and electoral deposit fee (USD 50,000 per candidate), the Independent Electoral Commission published a list of 33 presidential candidates.[40] A dozen of 'new political parties' sprang up—these were, according to Prunier, parties 'in name only' since they were mostly tribal or regional

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35. *Id.*
36. *Id.,* at 309.
37. Turner, *supra* note 20, at 165.
38. *Id.,* at 166.
39. D.L. HOROWITZ, THE DEADLY ETHNIC RIOT (2001). BERKELEY: UNIVERSITY OF CALIFORNIA PRESS.
40. Turner, *supra* note 20.

gatherings around the name of one or two well-known local politicians.[41] On 20 August, given the stiff competition during the campaign period, none of the contenders had won an absolute majority in the first round; Joseph Kabila (then transitional President) had 44.81 percent of the vote to Jean-Pierre Bemba's 20.03 percent.

As per the then promulgated Constitution of the Third Republic, for a presidential contender to be declared a winner one must have got an absolute majority win, that is, 50 percent plus one vote. Subsequently, in the second round for presidential race, the densely populated Swahili-speaking eastern and southern region granted victory to Joseph Kabila who had consolidated his electorate base through a robust political alliance known as the *Alliance pour la Majorité Présidentielle* (AMP) [Alliance for Presidential Majority] against the Lingala-speaking north-western and western region which consisted of a solid support for Jean-Pierre Bemba. Kabila was declared winner in the second round of voting which took place on 29 October, with 58 percent of the vote to Bemba's 42 percent; the turnout had been 65.4 percent of the registered voters.[42] By and large, these elections were said to be free and fair.

The massive clamour that accompanied the conduct of the 2006 general elections was soon interrupted by a severe military activism, which terrorized the grassroots both in rural settings of eastern provinces and urban centers of western provinces. Undoubtedly, this widened the schism between the impatient populace and an incapable elected government on the one hand, and the weak United Nations peacekeeping forces, on the other. In the year following the general elections, the frustrated government called for the withdrawal of these blue helmets, notwithstanding a seriously fragile state security infrastructure, most especially in the east of the country.[43] Little wonder that Tordoff and Ralph convincingly argued that the holding of multi-party elections is not by itself enough to secure the firm establishment of a democratic political order.[44]

### *B. The 2011 Election Experience*

2011 could have been the year for the Congolese people to undergo a democratic experiment of free, fair and transparent elections for the second time. Compared to the

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41. Prunier, *supra* note 31.

42. *Id.*

43. V.M. MBAVU, REVITALISER UN CONGO EN PANNE: UN BILAN 50 ANS APRÈS L'INDEPENDENCE (2011). GENEVA: GLOBALETHICS.NET.

44. W. Tordoff and Y. Ralph, *Electoral Politics in Africa: The Experience of Zambia and Zimbabwe*, in GOVERNMENT AND OPPOSITION (W. Tordoff & Y. Ralph eds., 2005).

previous experience, the 2011 presidential and legislative elections were conducted in an even much tenser socio-political atmosphere. Willame reported that more than 18,000 candidates registered for parliamentary positions as opposed to 10,000 in the previous elections.[45] Equally shocking, of the 450 political parties from which these legislative candidates ensued only 417 were acknowledged by the Ministry of Internal Affairs in August 2011, in contrast to 203 political parties then acknowledged in 2006. Peculiarly, independent candidates outnumbered candidates claiming adherence to either the ruling party/coalition or to opposition parties. Even the incumbent, President Joseph Kabila did present himself as an independent candidate.

Nonetheless, contrary to the 2006 presidential vote, there were only ii presidential candidates compared to 33 in 2006; one of the reasons for this cutback could be the fact that the electoral deposit fee, which is non-refundable, for presidential candidature doubled from USD 50,000 to USD 100,000.[46] Of all the 11 candidates, four sprung from an almost politics-free background as their personalities had previously never had much impact on the national political scene; three had previously stood in the 2006 presidential race while two among the 11 were fresh contenders for the presidency though their personalities commanded some degree of influence on the national political scene. Unsurprisingly, the incumbent (Joseph Kabila) could only worry much about the latter two, namely, Vital Kamerhe—previously chief campaigner of Kabila in the 2006 race and subsequently President [Speaker] of the National Assembly [Parliament]—and Etienne Tshisekedi, an old emblematic figure of the opposition ever since the Mobutu regime, and who polarised the presidential race pretty much the same way Jean-Pierre Bemba did in 2006.

In the end, the 2011 presidential race almost turned into a two-men-show: Joseph Kabila versus Etienne Tshisekedi. The former certainly enjoyed incumbency privileges and took advantage of the state's four estates (the executive, the legislature, the judiciary, and the media) as well as the security apparatus over the latter. While Kabila's move in campaign times easily connected with those who had recently shifted to a privileged side of society and thus with a strong hold onto key instruments of power, Tshisekedi took on a grassroots approach and directed his political discourses to the have-nots, those under-privileged by hegemonic structures of the state and whom his populist excitements enticed. According to Willame, DRC's godfathers including the United States of America, the United Nations Security Council, Belgium, China, the

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45. J.C. Willame, Ébullitions électorales au Congo : de Charybde en Scylla (2011), retrieved from <https://sites.google.com/site/chronologiesafriquecentrale/home/annee-2011>, (Posted on December 09th, 2011).

46. *Id.*

World Bank, and the International Monetary Fund, among others, did not seem to empathize with the many frustrations elaborated during Tshisekedi's campaigns.[47]

In the midst of much pressure and tension both from within and the diaspora, the *Commission Electorale Nationale Indépendente* (CENI) released on December 9th, 2011, the final detailed results announcing Joseph Kabila the winner of the presidential vote with 49 per cent against 32 per cent for his main challenger, Etienne Tshisekedi.[48] This was taken to be a constitutional win as both the senate and the parliament had already passed in January 2011 an amendment of the 2005 constitution including (i) one-round plural majority win and (ii) presidential powers to dissolve provincial assemblies, revoke governors, and call referenda. Critical analysts of DRC's political governance system had underscored that the revision of the constitution should have been much more thoughtful and should have taken into consideration the spirit of the law, not just the letter. This has essentially made the presidency much more powerful while it has caused reluctance to press for an effective decentralisation project as required by the constitution.[49]

Marred by significant irregularities and malpractices compromising the agreeable standards (both at national and international levels), the 2011 elections could not have brought any significant contribution toward a radical transformation of the nation in view of an already existent shaky status quo pointing to a failed state. The otherwise hard-won precedence of the 2006 elections was simply erased by the 2011 elections. One is left to question pessimistically DRC's capacity to address its shortcomings of governance and consolidate structures for a democratic political order with such (i) a political elite deeply involved in cancerous deals of corruption which rob its citizenry of the basic expectations and the subsequent sheer lack of interest in fighting against it; (ii) a quasi-absence of state institutions (more so security and judicial apparatuses) to protect the inalienable freedoms of the citizenry; (iii) a continuous tendency by the so-called international community to unquestionably embark on massive support for periodical general elections in the midst of sheer manifestation of abject poverty and human insecurity devouring the citizenry at the expense of state inertia/indifference.

After all, for more than 30 years, Mobutu monopolised political space in Zaire/DRC such that the renewed multi-party competition in the 1990s led to the

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47. *Id.*

48. *Id.* See also, K.J. Stearns, As criticism of election proliferates, time runs out for opposition (2011), retrieved from <http://congosiasa.blogspot.com/search?updated-max=2011-12-13T04:18:00-08:00&max-results=7>, (Posted on December 12, 2011).

49. *Id.*

emergence of two vast, ill-defined political tendencies: "the presidential tendency and the 'sacred union' of the opposition."[50] It was, Van Reybrouck painstakingly argues, an illusion to hope that proper elections would immediately lead to a proper democracy; "the West has been experimenting with forms of democratic administration for the last two and a half millennia, but it has been less than a century since it has started putting its faith in universal suffrage through free elections."[51]

### *C. Lessons from the two Congolese Electoral Performances*

Mbavu notes that if the DRC could afford to provide an answer to the long overdue question of legitimacy of its political leaders through the holding of the 2006 general elections, the state was, however, still unable to overcome its existential managerial pitfalls and so failed to reaffirm genuine (re)building of broken political as well as socio-economic structures in the post-war context.[52] More than ever before, human insecurity in the east of the country following the 2006 elections became conspicuous as though nothing historically momentous had taken place. Stearns wrote that three years following the 2006 elections, Kabila's government struggled to articulate a vision for the country; civil populations in the east were particularly repeatedly denied enjoying the dividends of democratic elections following a myriad of rebel activism and brutal military operations in a bid to secure stability with neighboring Rwanda and Uganda.[53] Meanwhile, in the Bas-Congo Province (in the far west of the country), Kabila's government faced another set of governance challenges whereby the mystical *Bundu dia Kongo* sect was "protesting abuses by the regime and demanding—sometimes violently—the right of self-determination."[54] The prospect of exclusion from power, contemplated by the supporters of the rival political bases, raises the stakes of an electoral performance and "so renders the election—or its aftermath, the foreshadowing of the next—a fitting occasion to resort to violence."[55]

Like in the 2006 electoral experience in which hundreds of armed agents loyal to Jean-Pierre Bemba had refused to disarm and integrate in the national army following their leader's narrow defeat in the presidential elections, Etienne Tshisekedi together with unarmed masses who had been loyal to his candidature during the electoral

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50. Turner, *supra* note 20, at 170.

51. Van Reybrouck, *supra* note 18, at 512.

52. Mbavu, *supra* note 43.

53. K.J. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA (2011). NEW YORK: PUBLIC AFFAIRS.

54. *Id.,* at 323.

55. Horowitz, *supra* note 39, at 300.

campaigns vehemently refused to recognize the authority of the incumbent's government resulting from a highly contested poll. Not only that electoral laws might have remained inadequate to address the rampant cases of election malpractices, it also appears that the conspicuous privileges of incumbency in such a post-war context coupled with administrative as well as logistical shortfalls that the organizing electoral body (CENI) should have addressed prior to the actual polls, did compromise the holding of free, fair, secure, and democratic elections to begin with. These two experiences of both presidential and legislative elections have come to expose not only the extent to which Congolese state institutions are feeble, but also the utter lack of political will (nationally and internationally) to restructure and reaffirm these state institutions already submerged by both *agentification* (proliferation of non-state agencies in the delivery of public goods) and *donorisation* (excessive flow of foreign aid to government).

With these two periodic experiences of 'electocracy' the result seems to be the same: elections in the post-war context of the DRC are but a political tendency to deal with structural issues pertaining to the country's governance through the use of unbalanced procedures administered in a confused and unprofessional manner. In an analogy to Collier's analysis of the practice of democracy in low-income countries, it also seems that the prediction of the accountability-and-legitimacy view of how democracy should make a society more tranquil is surely unborn in the DRC. As though an indecent standard of living was not enough misery for the Congolese citizenry, the effect of electioneering in post-war DRC has added insult to this injury. The conduct of free general elections, Van Reybrouck posits, should not be the kickoff to a process of national democratization, but the crowning glory to that process—or at least one of the final steps.[56] Yet in today's DRC, those in charge of the country's governance (the emerging winners of the general elections) seem to have craftily learnt the rule of the new game (democratisation) to maintain themselves in power and as Collier put it, this is "their profession, and they do not want to be unemployed!"[57] Whether or not leadership accountability is felt at the grassroots level becomes a peripheral concern for those in power.

President Kabila's arranged special commission—already set in motion since September 2009—to determine whether the presidential term of office should not be extended from five to seven years and whether the constitutional limit of two mandates should not be scrapped, making him permanently eligible for re-election, should be seen along the crafty mastery of this democratization game. In fact, citing Tshiyembe,

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56. Van Reybrouck, *supra* note 18.
57. Collier, *supra* note 8, at 25.

Turner reiterated that the internationally sponsored Inter-Congolese Dialogue—which eventually sketched the contours of the newly adopted constitution and which in turn stipulated the terms under which post-transition general elections of 2006 took place—had been "a battle of men and not a battle of ideas. The questions of what kind of republic and what kind of democracy the Congo needed were not addressed."[58]

But even in the exceptional wish that fundamental values of political legitimacy and accountability could have been attained through the holding of democratic elections, a crucially important yet taken-for-granted question still lingers: Should the holding of democratic elections actually be at the pinnacle of a post-war political agenda? Put differently, what pertinent priority is being realized by the *raison d'être* for elections in a post-war scenario? Equally important is the concern for grassroots' substantial civic education prior, during and even after the holding of these elections. According to Van Reybrouck, peace, (human) security, and education should be the priorities followed by local (grassroots-based) elections that can stimulate the formation of a grassroots culture of political accountability.[59] The case of electioneering in post-war DRC reveals that the holding of universal suffrage for presidency and the legislature was a wrong prioritization of items on the political to-do list of a country in a severely fragile state of affairs following devastating armed conflicts. Will a continued conduct of such periodic general elections bring about a truly democratic political order in the body politic of an ill-governed citizenry still grappling with socio-economic woes at the expense of state absenteeism?

## IV. 'NOT FIRST THINGS LAST': RE-CALIBRATING THE QUEST FOR DEMOCRATIC POLITICAL ORDER

In his recent report dated 07 August 2015, titled "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization," the UN Secretary-General Ban Ki-Moon echoed some common challenges regarding the credibility of elections faced by Member States and United Nations entities that assist them, including "electoral malfeasance committed for political ends, and instances in which contestants refused to accept outcomes that were generally considered to be legitimate."[60] While the UN

58. Turner, *supra* note 20, at 185.

59. Van Reybrouck, *supra* note 18.

60. United Nations Secretary-General, "Strengthening the role of the United Nations in enhancing the effectiveness of the principles of periodic and genuine elections and the promotion of democratization", at 2 [Report of 07August 2015], United Nations General Assembly: A/70/306.

Secretary-General does acknowledge, on the one hand, the difficulty, in a post-conflict context, to construct a general template for determining when the circumstances are right for holding a first election, his report draws much attention to the fact that the level of international financial support for electoral assistance has not kept pace with the number of assistance projects, noting that some projects face significant budget gaps.

To the full extent that the connection between the technical quality of an election and the legitimacy of its outcomes is complex as the UN Secretary-General's report rightly puts it, the question regarding how the legitimacy needed to govern could be established other than through an election constitutes the key point of preoccupation of this essay. That a post-war country has resorted to the ballot and not to the gun is actually no guarantee for peace and stability thereafter. The case of electioneering in post-war DRC loudly echoes this disillusionment. Western political experts, Van Reybrouck notes, often suffer from what he termed 'electoral fundamentalism' in the same way macroeconomists from the International Monetary Fund and the World Bank not so long ago suffered collectively from market fundamentalism: "They believe that meeting the formal requirements of a system is enough to let a thousand flowers bloom in even the most barren desert."[61]

So long as public policy will continue to be an elitist affair—characterized by factions, fractions, corruption, and incapable of constructing a viable national political project even in their own narrow interests—politics in Africa, Ihonvbere muses, will still have very little to do with the people but so much to do to the people who are still seen as objects of manipulation and exploitation rather than objects of mobilization and participation.[62] Political institutionalization in terms of organization and procedures of political action encompassing not particular but all social forces across the governed territory is "the foundation of political stability and thus the precondition of political liberty."[63] Holding free elections, an exercise that falls within the purview of political liberty, should logically never precede the realization of political institutionalization—the bedrock for any political order, democratic or otherwise. This less trotted road (political institutionalization and political consciousness-raising) is yet all the more much crucial than the quick fixes of electoral engineering in the quest for democratic political order in the aftermath of mass political violence.

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61. Van Reybrouck, *supra* note 18.

62. O.J. Ihonvbere, *Military Disengagement from Politics and Constitutionalism in Africa: Challenges and Opportunities*, in THE CAUSES OF WAR AND THE CONSEQUENCES OF PEACEKEEPING IN AFRICA (R.R. Laremont ed., 2002).

63. Huntington, *supra* note 2.

It is striking, Turner painstakingly notes, that the DRC arrived at the conduct of the elections in 2006—the supposed end of the transition—without having resolved the problems that were duly identified back in 1999 (the Lusaka Ceasefire Agreement) and reiterated in 2002 (the Pretoria Global and Inclusive Peace Agreement).[64] Three interrelated problems which came to haunt post-transition DRC were (i) the creation of an integrated army, (ii) ending impunity for warlordism most especially in the country's eastern provinces, and (iii) the long-standing issue of nationality and citizenship in the Kivus. No doubt, the Congolese state collapse—midwifed in the two successive bloodiest wars—could not be completely reversed by the two episodic performances of general elections in-between five years after the wars. Against this backdrop, Turner argues that the quest for a democratic political order in post-war DRC was and still is dependent upon successfully addressing the above three problems in the following manner: (i) a more equitable distribution of political and economic power throughout the country, (ii) a more effective counterinsurgency campaign against non-state actors that continue to feed off the Congolese vacuum, and (iii) a more coherent strategy for addressing the boiling cauldron called the Kivus.[65]

When an American, Huntington echoed, is asked to design a government, he comes up with a written constitution, bill of rights, separation of powers, checks and balances, federalism, regular elections, competitive parties—all excellent devices for limiting government.[66] The Lockean American, Huntington further posited, is so fundamentally anti-government that he identifies government with restrictions on government: "His general formula is that governments should be based on free and fair elections."[67] This formula, Huntington strongly argued, is irrelevant in many not-yet-fully Westernised (modernizing) societies.[68] For Huntington, elections to be meaningful presuppose a certain level of political organization. Hence, the problem is not to hold elections per se, but to create political institutions commensurate with the required attributes to govern. In Turner's assessment, post-transition DRC—albeit the conduct of general elections—proposed no durable solution to the crisis of state legitimacy or to the crisis of representation and of redistribution of responsibilities.[69] In many regards, instead, the conduct of these elections in the aftermath of political violence essentially served to enhance the power of disruptive as well as reactionary social forces

64. Turner, *supra* note 20.
65. *Id.*
66. Huntington, *supra* note 2.
67. *Id.,* at 7.
68. *Id.*
69. Turner, *supra* note 20.

(against the state power) and to tear down further the politico-social fabric. The fundamental problem is "not liberty but the creation of a legitimate public order."[70]

The various predicaments of social existence in today's Africa—most of its nation-states emerging from bloody conflicts—including striking poverty, systemic corruption, and political violence by the militarization of society, and almost non-existent legitimate as well as accountable state structures, are not just incidental problems which the conduct of elections can easily fix. These structural pitfalls are sustained by a kind of imagination so much entrenched in a seemingly pre-ordained mode of politics for social and economic governance. This is why, unless another sort of political imagination is envisioned and deployed, and then institutionalized by way of organization and procedures of both state and society, post-war democratic political order would remain elusive. Such imagination hereby called for is in exercise of setting up the right priorities (a society previously devastated by political violence should become a political community first and foremost by applying political arrangements and rules of governance in accordance with the consensus of members of this political community).

Politics per se, more so in contemporary Africa and even more especially in a post-violence setting, is a social equation with too many unknowns. It can be argued that the disintegration or destruction of a society by way of political violence comes as a result of the inability of all social forces to hold together in balance. Logically, therefore, in the aftermath of political violence, the daunting task of re-wiring the politics—admittedly the glue that brings together all social forces in balance—is what is needed to bring about order in a previously broken society. In this scheme of dispensing dependable political order, the conduct of general elections cannot be conceived of as priority. The pursuit of democracy through popular elections in a multi-party electoral system—for which the term 'electocracy' sounds appropriate—simply tends to reduce politics to a matter of numbers.

Yet, politics and more so in the aftermath of political violence as in the case of DRC must be acknowledged as too serious a matter to be circumscribed by the counting of votes alone. In fact, Gyimah-Boadi has persuasively argued that many political parties in post-Cold War Africa are largely conceived and organized as vehicles for capturing the state; they are hardly conceived and developed as institutions for representation, conflict resolution, political opposition and accountability, or institutionalization of democratic behaviour and attitudes in the first place. Little

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70. Huntington, *supra* note 2, at 7.

wonder that "there tends to be very little party activity between elections."[71] At any rate, the organization of elections under a multi-party system would not suffice to enhance the emergence of political consciousness capable of socially emancipatory politics and thus a truly democratic political order.

In the aftermath of mass political violence as has been the case of the DRC, the organization of general elections per se in the quest for a democratic political order ironically suffocates all opportunities for a 'democracy-from-below'. To stretch further Amin's argument to a critique of Western liberal democracy,[72] one could argue that the practice of Western liberal democracy with all its insights and tenets is insufficient for a comprehensive treatment of African conditions, present and future. Hence, while contemporary African political theorists can certainly learn a great deal from the manner in which Western liberal democracy is practiced, a broader and much more complex set of objects of knowledge—structural elements of politics as well as processes of political consciousness—must be studied by African political theorists of democracy to supplement whatever Western liberal democracy can offer. For the revolutionary rhetoric, Mehler further posits, may have lost a lot of its appeal in the aftermath of the Cold War.[73] In the face of the balance sheet of former revolutionaries in power (Angola, Zimbabwe etc.), emancipatory politics by way of continuous mass participation ought to be privileged in the re-building of a post-war country such as today's DRC. Such emancipatory politics should entail not just the holding of once-in-the-long-while general elections but rather through constant demand of state accountability by the society. The latter in turn should be defined not simply as a technical matter pertaining to performance, but rather as a democratic issue.

Important to note in the political developments of the DRC following the two successive wars is that in spite of the peace brokering and national dialogues which ushered in a political transition in hope for a new political order, no comprehensive assessment of the past failures of the experiences of party-state absolutism was done: How and why did party-state absolutism emerge in the first place? What accounted for its sustenance for such long a period? Will multi-partyism as an alternative to party-state absolutism suffice to bring about emancipatory politics? In lieu of a thorough treatment of these questions in order to inform the next course of action in search for

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71. E. Gyimah-Boadi, *Political Parties, Elections and Patronage: Random Thoughts on Neo-Patrimonialism and African Democratization,* in VOTES, MONEY AND VIOLENCE: POLITICAL PARTIES AND ELECTIONS IN SUB-SAHARAN AFRICA (M. Basedau, G. Erdmann & A. Mehler eds., 2007), at 25.

72. S. Amin, *The Issue of Democracy in the Contemporary Third World*, in Himmelstrand *et al*., *supra* note 4.

73. A. Mehler, *Political Parties and Violence in Africa: Systematic Reflections against Empirical Background*, in Basedau *et al*., *supra* note 71, at 204.

a democratic political order, the holding of general elections—still within the contours of a constitutional framework not far distant from a parliamentarian mode of politics—was simply heralded not as one of the many steps but indeed as the only step away from a democratic political order.

Yet, within a multi-party dispensation, Mehler has raised an even more thought-provoking question: to the extent that parties are generally seen as more state-centred than any other social organization, what does it mean when the state is weak?[74] Worth noting here is the penetrating insight by Huntington according to which the most important political distinction among countries concerns not their form of government but their degree of government: The differences between democracy and dictatorship "are less than the differences between those countries whose politics embodies consensus, community, legitimacy, organization, effectiveness, stability, and those countries whose politics is deficient in these qualities."[75]

The most challenging yet far rewarding task in the quest for a democratic political order therefore is to specify the needed steps (of which the conduct of general elections is one of them—and certainly neither the first nor the only one) and determine the process and operation of their realization. Good intentions of or pressures both from within and outside a post-violence country such as the DRC should not have shied away from this hard task; in this respect, the pursuit of electoral engineering sponsored by the so-called international community ought to have reconciled to the pragmatic necessities of a previously war-ravaged state and society. Yet, taking his readers through the story of origin of Western democracy as practiced by classical Athenians, Ake reiterates that ancient Athens was just as precise about the rule of the people as it was about who the people are:

> It stuck uncompromisingly to direct rule by the people and shunned notions of consultation, consent and representation… All citizens formed the sovereign Assembly whose quorum was put at 6,000. Meeting over 40 times a year, it debated and took decisions on all important issues of public policy including war and peace, foreign relations, public order, law making, finance and taxation. The Assembly was regarded as the incarnation of Athenian political identity and collective will. To underline this, it preferred to take decisions by consensus rather than votes. The business of the Assembly was prepared by a council of 500 which had a steering

74. *Id.*
75. Huntington, *supra* note 2, at 1.

> committee of 50 headed by a President who held office for only one day. The executive function of the polis was carried out by magistrates who were invariable a committee of 10 usually elected for a non-renewable term of one year.[76]

As Ake (2000) convincingly argues that humanity today cannot complain of not knowing what the meaning of democracy was to those who invented it and to the only people who have tried to practice it without trivializing it, Lumumba-Kasongo (2005) emphatically demonstrates that the political system of governance that has been adopted in most parts of Africa since the early 1990s is that fragment of liberal democracy known as multi-partyism. Anchoring his critique of liberal democracy on a paradox between what is expected of liberal democracy and its implications for social and economic development in Africa, Lumumba-Kasongo (2005) posits that while post-Cold War Africa is adopting liberal democracy as the most promising formula for unleashing individual energy and generating political participation, the very post-Cold War African social and economic conditions are worsening. This paradox seems to suggest a crucial invitation to post-Cold War Africa to pursue another kind of democracy in theory and practice.

## V. CONCLUSION

I do know that there is no greater necessity for men who live in communities than that they be governed, self-governed if possible, well-governed if they are fortunate, but in any event, governed.[77] It continues to appear that the key question of the post-war political reconstruction agenda will remain how to define and design an approach that minimizes the reach of the international community by elevating the role of local actors, while being principled and providing a value-added fundamental difference. That the international community intervening in post-war scenarios should learn to do less rather than more, to minimize its reach while maximizing its impact is a rather timely lesson. Borrowing Mazrui's view, Francis too reiterated that it is important to understand the factors that contribute to what Mazrui has called the "retreat from modernity" or "dis-modernisation" and the potential for re-building of new institutions and political communities from the ashes of either a colonial domination or a post-independence

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76. C. AKE, THE FEASIBILITY OF DEMOCRACY IN AFRICA (2000). DAKAR: CODESRIA BOOKS, at 8. (italics added for emphasis).

77. W. Lippmann (1963) *cited in* Huntington, *supra* note 2, at 6.

war.[78] One is left to imagine that perhaps the difficult processes of state (re)formation and nation (re)building—an often violent and bloody development—are the management of the recalibration of experiences borne out of state collapse triggered by devastating political violence.

Whether or not the conduct of democratic elections in post-war scenarios in Africa can help rebuild previously broken political structures remains a serious point of contention. Collier rightly pointed out that a proper democracy does not merely have competitive elections; it also has "rules for the conduct of those elections…checks and balances that limit the power of a government once elected."[79] The winner-takes-it-all kind of elections often contribute towards worsening an already bad post-war situation; the pursuit of democracy (reduced to *electrocracy*) becomes a matter of life and death whereby the elected government sees nothing else other than a systemic crush of the defeated elite together with their supportive (real or perceived) constituencies.

In a yet fragile context of the aftermath of political violence as was the case of post-war DRC, the overarching preoccupation should not have been narrowed to the holding of general elections in the quest for political legitimacy of the country's leaders in a so-called new democratic dispensation. Rather, political institutionalization in Huntingtonian sense—the development of political organizations and procedures that are not simply expressions of the interests of particular social groups—ought to have superseded the travails of the seemingly concerned international community for political order in post-war DRC. Suffice is to say that such development of political organizations should be conceived of as endogenous, in that, the so-called international community can lend support in strengthening home-grown and context-specific capacities of post-war local civil society organizations and the media in the (re-)building of steady and socially accountable political structures.

Likewise, if not all the more important, a solemn acknowledgment that the Congolese people are capable thinkers and that this very acknowledgment constitutes the sole material basis of politics must therefore be the starting point for emancipatory politics—the surest way to a truly democratic political order. Therefore, to begin with investigating the internal content of what these post-war surviving Congolese actually think, instead of jumping into international community-sponsored electoral engineering in the aftermath of political violence, ought to have been the first step in the quest for a democratic political order in post-war DRC. Posing to think through what the Congolese people do think about what their political destiny (as state and as society)

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78. J.D. FRANCIS, UNITING AFRICA: BUILDING REGIONAL PEACE AND SECURITY SYSTEMS (2006). ALDERSHOT: ASHGATE PUBLISHING.

79. Collier, *supra* note 8, at 15.

should look like is in itself a worthwhile endeavor, far much more rewarding than stopping at the organization of general elections for the legitimization of a 'new' political elite to be in charge of society. This pertinent endeavour privileges people's political consciousness, which in Wamba-dia-Wambia's terms entails an active prescriptive relationship to their reality (political, economic, socio-cultural) and so furnish a firm base for a truly democratic political order capable of mitigating conditions that give rise to shattering political violence.

# THE ROLE OF SECURITY AGENCIES IN THE ELECTORAL PROCESS IN NIGERIA

J.O. Odion*

**ABSTRACT**

*This article examines the role of the Nigerian armed forces in the conduct of elections. There has been a lot of controversy as to what should be the proper role of the military in the conduct of elections in Nigeria. Whilst some believe that the military should not be involved at all in the conduct of elections, others argue that they could play a limited role in ensuring the safety and sanctity of elections. We have in this article examined these various arguments and tried to balance the views of the competing schools of thought. This article concludes by suggesting that whilst the armed forces should be confined to their traditional role of defending the territorial integrity of the country, it has become imperative that they be involved in ensuring the security of voters and election materials in view of the increasing volatile nature of elections in some parts of the country.*

## I. INTRODUCTION

Nigeria held presidential and national elections on the 28th of March 2015 and the election for governorship and state houses of assembly on the 11th of April 2015. The Independent National Electoral Commission (INEC), which is the country's electoral body, had initially scheduled these elections much earlier but because of the inability of the country's security agencies to guarantee security for the conduct of the elections they were postponed. This has ignited the debate on the role of security agencies in the electoral process.

No doubt, elections and the electioneering process have increasingly become a volatile and nerve breaking process not only in Nigeria but in Africa. The electoral process is usually laden with octane emotions and sentiments which, when mishandled, usually precipitate violence with its attendant consequences of loss of lives and properties Electoral violence in Nigeria predates independence. The 1957 general election, for example, was replete with incidents of electoral violence.[1] In the early 1960s, *operation wetie* was introduced at the time electoral violence was at its peak in

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1. *See*, B.O NWABUEZE, A CONSTITUTIONAL HISTORY OF NIGERIA (1982).

the first republic. In the same vein, in the second republic, electoral violence reached its climax especially during the disputed governorship election in the then Ondo State.[2] In the present fourth republic, whereas there have been pockets of violence witnessed before, during and after the 1999, 2003 and 2007 elections, none was of the magnitude and as horrible as the disputed 2011 elections in northern Nigeria.[3]

The tragic effects of the loss of lives and properties in these elections brings to fore the question of whether it is not possible for cases of electoral violence to be nipped in the bud and what role the security agencies in Nigeria could play in preventing or at least reducing the incidence of electoral violence. In answering these questions, it is important that the statutory and constitutional roles of the various security agencies are circumscribed in the context of this article.

## II. RELEVANT SECURITY AGENCIES INVOLVED IN ELECTIONS

There are a number of security agencies involved in the conduct of elections in Nigeria. These include: the army, navy and air force, the police, the Directorate of State Security and the Nigerian Civil Defence Corps, amongst others. These agencies and institutions have collaborated in most elections in Nigeria especially the 2011 general elections.[4]

However, in spite of the perceived transparent nature of the 2011 general elections, there was spirited violence and wanton destruction of lives and properties in the northern part of the country.[5] Although the Federal Government responded by instituting an Administrative Commission of Enquiry to unravel the cause of the incidence, the report was never made public. Towards the 2015 general elections, there was tension in the air, the stakes were high and this was exacerbated by the use of strong and in some cases uncouth language by political parties and their candidates during the electioneering campaigns. This certainly placed more responsibility on the shoulders of security agents not only to work assiduously towards dousing the pervasive tension but to ensure that there was relative peace before, during and after the 2015 general elections.

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2. The election which produced Chief Akin Omoboriowo of the National Party of Nigeria (NPN) as Governor over Chief Adekunle Ajasin of the Unity Party of Nigeria (UPN) was shrouded in dispute and immense violence never witnessed in Nigeria at the time.

3. The killing and maiming of Youth Coppers and other electoral officers in the aftermath of the result of the 2011 presidential elections is a reference point.

4. The 2011 elections were adjudged to be relatively peaceful due to the involvement of the Nigerian Army.

5. See "How over 500 Lives were lost to 2011 Election Violence in Nigeria", THIS DAY NEWSPAPER, 21 April 2011.

### *A. Whither the Role of Security Agencies?*

It is important at this stage to identify the powers and functions of the security agencies that are relevant to the peaceful conduct of elections in Nigeria as well as their expected role in that regard.

*1. The Nigerian Armed Forces*—Constitutionally, the Nigeria armed forces ordinarily do not have any role to play in the exercise of the civic responsibilities of citizens in elections. This body is entrusted with enormous powers and is heavily trained and empowered to protect the sovereignty and territorial integrity of the country on land, air and the seas.[6] Thus, a combination of the powers of the Nigerian army, navy and air force are ordinarily limited to the protection of the country from internal as well as external aggressors.

However, the spate of security challenges in country as well as the nagging throwback to years of military rule have meant that the armed forces have become increasingly involved in the maintenance of civil law and order in conjunction with the other security agencies.[7] Whereas it has become an accepted practice for the armed forces to be involved in the conduct of elections, what is not yet settled is the extent of their powers and functions in that regard. The attendant violence that characterized the 2003 general elections in the now infamous "*do or die"* cliché resulted in the high incidence of violence at that election.

Accordingly, sundry electoral violence like thuggery, ballot snatching and stuffing, voter intimidation, assassination of political opponents, amongst others, characterized that election.[8] In addition, there were telltale signs of the compromise of the other security agencies like the police by political parties and their candidates, thus robbing them of the needed neutrality and respect needed to enforce law and order during elections. The election petitions that were litigated upon after that election were inundated with grounds bordering on corrupt practices of the violent genre.[9] This informed the rethink towards a more direct involvement of the armed forces in the conduct of subsequent elections especially the 2011 general elections.

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6. See Constitution of the Federal Republic of Nigeria, 1999 (As Amended), sections 217-218.

7. Lately, the Armed Forces especially the Army has been involved in joint operations against criminals like armed robbers, kidnappers, oil bunkers, amongst others.

8. These were the grounds in most of these election petitions*: See also, Agagu v. Mimiko* (2009) 7NWLR(PT.1140) 342 *Aregbesola v. Oyinyola* (2011) 9 NWLR (PT.1253) 458 C.A, *Fayemi v. Oni* (2009)9 NWLR(PT.1140) 223 C.A.

9. *See also, Agagu v. Mimiko* (2009) 7NWLR (PT.1140) 342 C.A.

The armed forces became necessary in view of their enormous powers which could be harnessed for the protection of the candidates contesting the election, the voters and the electoral officers. Without adequate security measures, there cannot be a free and fair election. The protection of the electoral materials especially the sensitive ones like the ballot papers and the result sheets are paramount for a free and fair election. In the time past, these sensitive materials were easily hijacked or stolen by political thugs even under the watchful eyes of the police. This makes the presence of armed forces especially the army imperative in this regard.

In the 2011 elections, there was a heavy military presence and involvement. It is on record that soldiers escorted electoral materials from the various local government INEC offices to the various polling units. At each polling unit, there was a heavy military presence. This contributed in no small measure to restoring the confidence of voters who in the past elections stayed away from voting on account of the fear of violence at the polling units. Also, this heavy military presence encouraged the INEC officials to work assiduously without fear or favour. Conversely, political thugs who are wont to foment trouble at polling units by both destroying ballot boxes and papers, snatching ballots and intimidating voters were checked by this heavy military presence.[10]

Admittedly, there have been questions on the propriety of the militarization of elections in Nigeria. At times their role in the conduct of elections has been shrouded in controversy and suspicion. They have in some cases been accused of partisanship especially in favour of the incumbent party and/or candidate. Hence, in the 2007 governorship elections in Ondo State, the army and other services were accused of aiding and rigging the election in favour of the then incumbent PDP governor of the state. They were therefore unpleasantly made respondents in the petition filed by the Labour Party (LP) candidate who eventually succeeded in his legal tussle and became the governor of the state.[11]

Incidentally, the same accusation has trailed the military in the aftermath of the governorship election in Ekiti State in 2014 that saw the defeat of the incumbent governor, Dr. Kayode Fayemi, and the election of Chief Ayo Fayose. The disaffection caused by the role of the military was so strong that even after the defeated governor initially accepted defeat and congratulated the People's Democratic Party (PDP) candidate, he later beat a retreat and challenged the election basically on the basis of the

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10. The writer was a Supervisory Presiding Officer at the 2011 Elections in Edo State and had a first- hand experience of the role the soldiers on duty at the elections played in ensuring a smooth and violent free election.

11. See the case of *Olusegun Mimiko and Ors v. Olusegun Agagu and Ors*.

over-militarization of the election.[12] Although his petition at the Election Petition Tribunal was dismissed, he proceeded to the Court of Appeal and judgment is being awaited in that petition.[13] The appeal was eventually dismissed both at the Court of Appeal and the Supreme Court. Incidentally, it was the same allegations that trailed the military in the Osun governorship election where the incumbent governor, Chief Rauf Aregbesola, won the election in spite of the initial complaint, amongst others, of the heavy military involvement in the election.[14]

Most fundamentally, the role of the armed forces in the botched February 14th 2015 presidential and National Assembly elections and the 28th February 2015 governorship and state legislature elections created an avoidable air of suspicion and mistrust amongst all stakeholders as to the "actual" role of the military. Whilst some political parties and other stakeholders support the involvement of the armed forces in the conduct of the 2015 general elections, others were vehemently against their involvement.[15] Whilst the proponents of military involvement in the elections hinge their arguments on the need for adequate security at the polling stations to ensure free, peaceful and fair elections, those against it argue that the presence of the military at election venues, apart from being unconstitutional, also creates unnecessary fear and tension in prospective voters. This is coupled with their supporting argument that the ruling party could use these military personnel as instruments of intimidation and suppression of the voters. However, before delving into the dialectics of these arguments, it is necessary to examine the precise nature and scope of the constitutional powers of the armed forces in Nigeria.

*(i) The Constitutional Role of the Armed Forces*—By virtue of section 217(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the armed forces of Nigeria were established comprising of the army, navy and air force. However, it is section 217(2) thereof that specifically addresses the issue of the powers and functions of the armed forces. It provides inter alia in sub-section 2:

"The Federation shall, subject to an Act of the National Assembly made in that behalf, equip and maintain the Armed Forces as may be considered adequate and effective for the purpose of——

(a) Defending Nigeria from external aggression;

(b) Maintaining its territorial integrity and securing its borders from violation on land,

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12. See *A.P.C v. P.D.P and Others* (Unreported) CA/EK/EPT/GOV/1/2015.
13. See the Vanguard Newspapers, 10th February 2015.
14. See "Osun Votes", available at <www.naijanews.com>, (accessed on 14/04/2015).
15. The All Progressive Party (APC) was at the forefront of this opposition.

sea and air;
(c) Suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly; and
(d) Performing such other functions as may be prescribed by an Act of the National Assembly.

In furtherance of these powers of the armed forces, the President as the Commander in Chief of the Armed Forces is empowered to determine the operational use of the armed forces.[16] In addition, the President as the Commander in Chief is allowed to delegate any of his functions to any member of the armed forces of the Federation in a manner he deems fit.[17] In confirming that the powers of the president in the regulation of the powers and functions of the armed forces are shared with the National Assembly, section 218 (4) of the constitution provides as follows in sub-section 4:

> The National Assembly shall have powers to make laws for the regulation of:
> (a) The powers exercisable by the President as Commander in Chief of the Armed Forces of the Federation and
> (b) The appointment, promotion and disciplinary control of members of the Armed Forces of the Federation.

Clearly, from these constitutional provisions, the powers and functions of the armed forces are clearly defined and streamlined. They can only function to defend the territorial integrity of the country especially in war times. They could in special circumstances be deployed to assist in the quelling of riots or insurrection save that in this case, their role in that regard must be clearly defined and prescribed by an Act of the National Assembly.

Therefore, even on a literal construction of the above constitutional provisions, there is nothing that permits the President to order and deploy members of the armed forces strictly for election duties in whatever form or guise. Section 217 (2) (c) of the constitution is couched in specific terms, the armed forces could only be invited to assist in quelling or suppressing "insurrection." In its plain meaning, Insurrection has to do with any civil upheaval that threatens the unity and corporate existence of the country. Can it be said that the conduct of elections in Nigeria has become such a

16. See Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 218(1).
17. See *id.*, section 218(3).

frightful exercise that it now threatens the peace, unity and corporate existence of Nigeria. Perhaps, this is a convenient juncture to examine the political undercurrents and antecedents that have made it necessary for members of the armed forces to be considered in previous elections and most recently the 2015 general elections.

### *B. Rationale for Deploying the Armed Forces for the 2015 Elections*

As stated earlier, elections in Nigeria have become so intense and full of tension that politicians and even their supporters freely resort to underhand tactics to ensure that they win elections at all cost. The fall out of this desperation is that elections have increasingly become a do or die affair with the attendant consequences of violence often unleashed by politicians and their supporters including their thugs on fellow politicians and innocent voters alike. This is where some have argued that the armed forces could intervene. However, before the clamour for the deployment of the armed forces, it may be asked what happened to the Nigerian police and other security agencies that could have assisted in controlling or reducing the incidence of violence associated with elections.

After the governorship election in Ekiti State, it was revealed through the confession of a captain in the Nigerian army that the military and other security agencies were compromised and used to rig the said election which saw the defeat of the then incumbent governor, Dr. Kayode Fayemi. This detailed confessional statement by this officer brought into perspective the relevance of forensic science in elections. This is because the officer alleged that he secretly recorded the conversations between the persons allegedly involved in the plot to rig the said election and how this plan was executed.[18]

Although this confession came belatedly as the defeated governor, Dr. Kayode Kayemi, had already filed his petition and the trial was almost at its conclusive stage, it nevertheless raised serious issues about the credibility of the said election. This piece of evidence though unavailable to the petitioner, was nevertheless subjected to forensic analysis by experts commissioned by the All Progressives Congress (APC), a party to which the petitioner subscribed. The report of the forensic analysis on the voice recordings of the suspected conspirator and co-conspirators in the rigging plan and execution is instructive.

In the report, Guardian Consulting, the London-based firm, explained how it carried out the voice analysis through the aid of a former detective with the New York

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18. *See generally,* "How Ekiti Election was Rigged by the Military", available at <www.naijanews.com>, (accessed on 14 April 2015).

Police Detective (NYPD) and the Federal Bureau of Investigation (FBI).[19] It explained that the first stage of their assignment was to conduct analysis to identify the voices on the recording by comparing them to public record of samples of known individuals. The second stage was to assess the veracity of the selected parts of the conversation to a degree of certainty and accuracy.

According to the report, these analyses revealed clearly that the voices of the persons in the recorded tape matched those of the persons named and indicted by the army officer. These persons were known public officers and it was their recorded public speeches that made it possible for the analysis to be carried out. Thus, the report confirmed an 80% accuracy of the voices of the public figures named and fingered by the army officer in the Ekiti rigging incident.

## III. THE ELECTORAL ACT 2010 AND MILITARY INVOLVEMENT IN ELECTIONS

The Electoral Act 2010 makes elaborate provisions for the smooth and fair conduct of elections by INEC. One way of ensuring this, is the provision for security before, during and after the conduct of any election. Security at elections benefits the voter who is assured of safety at the polls and therefore is encouraged to come out and cast his vote. It also benefits political parties and their candidates as they are able to campaign freely and mobilize their supporters for elections. On the part of the electoral officers, they are encouraged and emboldened to carry out their duties without fear or favour.[20]

Lofty as this may seem, the Electoral Act makes no specific provisions for the involvement of the military in the conduct of any election. By the provisions of the act, police officers or other security agencies are not allowed to carry arms at the polling stations or units they are assigned to work. Although sections 118-124 of the act make provisions for sundry electoral offences and the procedure for the punishment of offenders, there is nothing in these sections that touches on the procedure for the prevention of these offences or the mode of apprehension of offenders.

In response to this apparent confusion as to the constitutionality of deploying the army to supervise elections, some notable commentators have suggested that the issue be viewed from the perspective of exigencies on ground and the need to ensure

19. *Id.*
20. See Electoral Act 2010 (As Amended), Sections 117-132.

the safety of lives and property during the election.[21] They harp on the fact that undue insistence on constitutionality may be counter-productive because a liberal interpretation of the powers of the President to deploy members of the armed forces to provide security at elections is preferable in the circumstance.

Specifically, Ozekhome argues that even the recent decision of the Court of Appeal, Abuja Division, that is touted by the opponents of military involvement in elections did not specifically prohibit the president from deploying the army for election assignment in the country. In his view, the issue of whether or not the president had powers to deploy the army for electoral functions was not a live issue before the Court of Appeal, and therefore not one of the issues resolved by the court. Therefore, in his view, the statement condemning the deployment of the military for elections in Ekiti State (the subject matter state in the appeal) was an *obiter dictum* which was not binding on the president. In his words:

> We state with the greatest humility and respect to the learned justices of the Court of Appeal that the above pronouncement by the Court of Appeal in ALL PROGRESSIVE CONGRESS v. PEOPLES DEMOCRATIC PARTY & ORS CA/EK/EPT/GOV/1/2015, is not in law a binding ratio decidendi of the Court, but a mere obiter dictum. It is a principle of pedestrian legal knowledge that a judgment of the Court encompasses both the ratio and the obiter dictum.[22]

The learned luminary then proceeded to argue that in view of the non-binding nature of this judgment, the president was right in his decision to deploy soldiers for the said elections. He fortified his submission on this issue by insisting that even the court did not specifically give a prohibitive order of the nature bandied around by the opponents of the deployment of the army for elections. In his words:

> A further scrutiny of the judgment of the Court of Appeal in ALL PROGRESSIVE CONGRESS v. PEOPLES DEMOCRATIC PARTY & ORS CA/EK/EPT/GOV/1/2015 will reveal that the justices of the Court of themselves never gave decision or issued any order against

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21. See Mike Ozekhome (SAN), Can the President Deploy Military Personnel during Elections?, available at <www.naijanews.com>, (accessed on 12 April 2015). See also, Ayodele Amen, Military Involvement and the Right to Vote in Nigeria, available at <www.premiumnews.com>, (accessed on 12 April 2015).

22. *Id.*, at 65.

> the president not to deploy the military during elections, but merely gave an honest opinion as to how to strictly protect the tenets of democracy in its purest form.....[23]

This is no doubt an incisive argument, but we beg to differ on the points raised by the learned Senior Advocate of Nigeria. Firstly, we do not agree that the pronouncement by the court was a mere side comment - *obiter dictum*. Indeed, the propriety or otherwise of deploying soldiers to provide security on election date was a core and live issue in the petition filed by the All Progressive Party against the election and return of Mr. Ayo Fayose as the governor of Ekiti State. It was one of the grounds upon which the petitioners (APC) sought to nullify the election of Mr. Ayo Fayose at the Tribunal (the lower court). It was the case of the petitioner that the involvement of the soldiers was contrary to the provisions of sections 217 and 218 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) and the extant Electoral Act of 2010.

The petitioners equally made sundry allegations against the soldiers ranging from the indiscriminate arrest and intimidation of its members, intimidation of voters, and prevention of its party loyalists especially some serving governors from entering Ekiti State to campaign, amongst other complaints. It was the contention of the petitioner that these unlawful acts by the soldiers arising from their unlawful deployment by the president amounted to irregularities which tainted the election, thus rendering it not free and fair.

This issue was embedded amongst other grounds of the petition, which included specific allegations of electoral malpractice, rigging and the non-qualification of the said Mr. Ayo Fayose to contest the said election arising from his impeachment as governor in his first stint in office between 2003 and 2006. Certainly, whether or not the ground alleging the wrongful involvement of the army in the conduct of the election is a cognizable and valid ground for annulling the election is a moot point. In the same vein, the issue of whether the allegations of the unlawful and or unconstitutional acts/omissions of the army in the conduct of the said election is a substantial ground for annulling the said election was equally debatable at the lower court. But what was not in doubt was that the petitioner had put the involvement of the army in the conduct of the said election at the front burners. Therefore, any decision reached by a court of competent jurisdiction on this issue cannot be a side comment or *obiter dictum.*

Interestingly, the petitioner apart from failing to prove all the material allegations of electoral malpractices and irregularities tainting the said election also

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23. *Id.*

failed to convince the lower court that the deployment of the soldiers in the manner done in Ekiti State was *ab initio* unlawful and unconstitutional. This was what prompted the appeal. At the Court of Appeal, one of the grounds of appeal was the constitutionality and/or propriety of deploying the army to "supervise" the elections in Ekiti State. In the same vein, one of the issues put before the court for determination revolved around the constitutionality or otherwise of deploying soldiers for the said election.

In its resolution of this ground of appeal and the issue formulated therefrom, the court found as a fact that the deployment and involvement of the army in the conduct of the said election did not affect the free and fair nature of the election. The Court of Appeal found as a fact that there was substantial compliance with the provisions of the Electoral Act in the conduct of the said election, thus it was not necessary to nullify the election.[24] However, the court did find as a fact arising from its interpretation of the constitution and other enabling laws that the president lacked the powers to deploy soldiers for the conduct of elections in the state. The court went further to condemn the act of deploying the soldiers in the manner done in Ekiti State and warned the government to desist from such acts in the future. This position was aptly captured in the words of the court in the following terms:

> The time has come in our learning process to establish the culture of democratic rule in the country and to strive to do the right thing, particularly when it comes to dealing with the electoral process which is one pillars of democracy. In spite of the non-tolerant nature and behavior of the political class in this country, we should by all means, try to keep armed personnel of whatever status and nature, from being a part and parcel of election processes. The state is obliged to confine the Military to their very demanding assignments especially in these times of insurgencies and encroachment into the country's territories by keeping them out of elections.[25] The civilian authorities should be left to conduct and fully carry out the electoral processes at all levels. Thus, the state is obligated to ensure that citizens who are sovereign, can exercise their franchise freely, un-molested and un-disturbed.[26]

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24. All Progessives Congress v Peoples Democratic Party and Others (Supra)

25. The events in the aftermath of the Presidential elections in Kenya in 2007 are still the subject-matter of trials by the International Criminal Court (ICC) at The Hague.

26. All Progessives Congress v Peoples Democratic Party and Others (Supra)

Certainly, this poignant and direct statement of the Court of Appeal on this fundamental issue cannot be denigrated as a side comment devoid of any legal force as suggested by the Senior Advocate. We submit that this statement by the Court of Appeal is best classified as a declarative order and not a prohibitive one. Though there was no specific order prohibiting the president from deploying soldiers for elections in the country, the court did declare that the deployment of soldiers for election assignments was unconstitutional. What then is expected of a president who is under oath to defend, protect and enforce the provisions of the *grund norm* of the country? The natural thing expected is to obey this declarative order of the court.

Therefore, it is on this score that we argue that any attempt to rationalize the deployment of the military for election duties on the basis of the constitution or that there is no court order pronouncing on its unconstitutionality is a futile one. Rather, we can resonate with the arguments that the exigencies on the ground and the need to protect lives and property could necessitate the deployment of soldiers for election purposes. It is in this regard that we prefer the argument of Mr. Ayodele, who supports the deployment of soldiers for election duty, solely on the basis of their utilitarian values than the constitutionality of so doing. He captures this point succinctly as follows:

> If we continue to address the issue only from the perspective of the electoral process, we will persistently miss the crucial point. Yes, the military should have no role to play in the electoral process, but the military has an obligation to protect the lives of Nigerians from both external and internal aggression. If the elections provide such threats, the military should help to mitigate these, which is what has been evident in several parts of the world, where military forces are drafted in to assist citizens before disagreements descend into conflicts and humanitarian crisis...[27]

Although Mr. Ayodele supports the deployment of soldiers for election duty on this humanitarian ground, he nevertheless supports the prevailing view that the military should not be deployed for any unconstitutional acts or duties. In his words, he states as follows:

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27. Ayodele Amen, Military Involvement and the Right to Vote in Nigeria, available at <www.premiumnews.com>, (accessed on 12 April 2015).

> Even though the president has the power to deploy the military for electoral operations, it will be unconstitutional to deploy the military for criminal activities, including playing direct or complicit roles in election rigging. The military should be protected from unconstitutional assignments.[28]

## IV. CONCLUSION

This article has examined the rationale for the deployment of the army for the conduct of the general elections in Nigeria. It was revealed that there are contending forces for and against the deployment of the military for elections in Nigeria. Whereas those who support their deployment hinge in on the exigencies prevailing in the country, those opposed to it insist that it is unlawful and unconstitutional to do so.

On our part, we have critically analyzed these arguments and have juxtaposed them with the provisions of the constitution. We have found out that on strict legal and constitutional basis, it is wrong to deploy members of the armed forces to man elections. It is our humble view, therefore, that those who seek to rationalize this act on strict constitutional grounds have missed the point. We also believe that those who rely on the provisions of the constitution as a basis for opposing the deployment of the military for elections are equally economical with the truth. It is our view that the prevailing security threats in some parts of the country, especially the north-east and the tension and violence that have characterized previous elections have made the deployment of the military for elections an inevitable option.

However, what needs to be done is to streamline and regulate the activities of the military during such elections in a manner that will not run counter to the express provisions of the constitution. Accordingly, the deployment of soldiers in elections in unstable states is not arguable. The presence of the military on the streets even on election days could be defended on the basis that they are performing the constitutional role in defending the country from terrorist groups such as Boko Haram.

In the case of stable states where there are no visible signs of the breakdown of law and order and no threat to the sovereignty of the country, it is suggested that the police, the Department of State Security Services (DSS), the mobile police and other para-military institutions can be deployed whilst excluding the army. In these states, the army could be placed on the red alert to assist in the case of extreme violence or a breakdown of law and order.

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28. *Id.*

This organizational arrangement if implemented will assuage the fears of those who believe that only military presence can guarantee violent-free elections as well as the fears of those who believe that direct and active participation of the military in elections is aimed at making them partisan and conferring undue advantage on the party in power.

# IN SEARCH OF A CREDIBLE AND INDEPENDENT REFEREE: REFLECTIONS ON THE EFFECTIVENESS OF THE ELECTORAL COMMISSION IN MANAGING ELECTIONS IN UGANDA

Sabiti Makara*

**ABSTRACT**

*Uganda is gearing up for yet another general election slated for 18th February 2016. This will be the third election to be held under a multiparty political dispensation. The Independent Electoral Commission (IEC), a body charged with the management of elections in the country, has been at the centre of attention from all stakeholders in as far as the handling of the electoral processes is concerned. This article reviews past experiences of election administration, with specific focus on one of the major challenges of Uganda's democratisation dilemmas relating to the way elections are managed. It questions whether the EC could produce credible, transparent and legitimate results that qualify as acceptable by all the contending political forces as free and fair.*

## I. INTRODUCTION

Uganda is gearing up for yet another general election slated for 18th February 2016. It would be foolhardy to imagine they would be free of controversy. This article reviews past experiences of election administration, and highlights the problems thereto in Uganda. It focuses on one of the major challenges of Uganda's democratisation dilemmas relating to the way elections are managed. It questions whether the Independent Electoral Commission (IEC)—the institution charged with managing elections in the country—could produce credible, transparent and legitimate results that qualify as acceptable by all the contending political forces as free and fair.

In this context, it has been observed that the main problem is that the IEC interprets its constitutional role in a narrow manner, leaving out issues that make elections free and fair.[1] This has created a strong perception within the public and

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1. Citizens' Coalition for Electoral Democracy in Uganda (CCEDU), Towards Reforming Uganda's Electoral Commission, CCEDU Working Paper, December 2013.

among the stakeholders that the IEC is not an independent entity from government. Whereas the IEC under Article 61 of the 1995 Constitution of Uganda is mandated to manage elections, oversee political parties, ensure equal access to public media, voter education, demarcate constituencies, oversee party financing, hear and determine complaints and related activities, it has largely focused its energies to the processes of polling.

Sekagya points out that the IEC of Uganda "is perceived negatively and does not enjoy great trust amongst stakeholders, including opposition parties and civil society organisations."[2] The lack of trust is due to its composition, the manner of its appointment and the way it executes its mandate in conducting elections. The IEC is not generally perceived as an independent entity outside the control of the government of the day. The trust deficit also arises from the way it executes its mandate in conducting elections. It has failed to control election-related violence, bribery of voters, misuse of incumbency advantages, abusive language, intimidation of voters, and other outright electoral malpractices. Besides, the armed and security forces have been at the centre of elections with little control of the IEC.

In the context of the country's democratic credentials, scholars have classified the Ugandan regime as a semi-authoritarian or "hybrid" regime.[3] Such regimes allow little real competition for power and reduce government accountability by resisting full-scale democratic reforms. As such, elections do take place but are institutionally crafted in ways that are unlikely to change the top leadership especially the presidency. In early 2015, civil society groups once again presented a compact of reforms to Parliament of Uganda seeking, among other proposals, to have the IEC reconstituted and its mandate reviewed.[4] However, the proposals were simply ignored by the government.[5]

Similarly in the run-up to the 2011 elections, concerns had been expressed by civil society groups and political parties about the reappointment of the same IEC,

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2. M. Sekagya, *Uganda*, in ELECTION MANAGEMENT BODIES IN EAST AFRICA: A COMPARATIVE STUDY OF THE CONTRIBUTION OF ELECTORAL COMMISSIONS TO THE STRENGTHENING OF DEMOCRACY ( OSIEA and AfriMap, 2015), at 2.

3. A.M Tripp, *The Changing Face of Authoritarianism in Africa: The Case of Uganda*, 50 AFRICA TODAY (2004), at 3–26; A.M. TRIPP, MUSEVENI'S UGANDA: PARADOXES OF POWER IN A HYBRID REGIME. CHALLANGE AND CHANGE IN AFRICAN POLITICS (2010). More recently, S. PERROT, S. MAKARA, J. LAFARGUE AND M.A. FOUERE, ELECTIONS IN A HYBRID REGIME: REFLECTIONS ON THE 2011 UGANDAN POLLS (2014).

4. *See*, UGANDA CITIZENS COMPACT ON FREE AND FAIR ELECTIONS, ADOPTED ON 24 NOVEMBER 2014.

5. The government only effected change of name from EC to "Independent EC".

perceived as partisan and sympathetic to the ruling party. These groups questioned the electoral rules, processes of voter registration, display of registers, constitution of tribunals, actual conduct of elections, tallying and announcement of results. In 2010, opposition women activists demonstrated in front of parliament to demand an overhaul of the IEC. These protests, repressed by the police, went on throughout the 2011 election campaign.

Concerns were equally expressed by the Uganda People's Congress (UPC) candidate, Olara Otunnu, who had in the past made it known that chairman Badru Kiggundu's IEC was a discredited body. Otunnu even decided to withdraw from the Inter-Party Cooperation (IPC), a coalition of opposition parties, accusing the partners of being reluctant to push hard for the disbandment of the IEC.[6] The opposition in general anticipated flawed elections and vowed not to go to courts of law to contest the electoral results but called on its supporters to be ready to take to the streets, thereby creating fear of post-electoral violence.[7]

Against this backdrop, this article aims to assess the performance of the IEC during the last electoral polls. It reflects on issues that affected the electoral process directly, such as composition of the IEC, nomination of candidates, freedom to campaign and management of results. The article attempts to understand the role of the IEC in past elections, as well as the demands for reforms and pressures exerted on government in the aftermath of the 2006 elections.

## II. BACKGROUND

Good election practices can reduce cases of political violence and instability. Flawed elections, on the other hand, can be a recipe for disaster. Good election management creates an opportunity for yesterday's losers to be potential winners at the next polls. However, some scholars remain skeptical about the efficacy of election bodies in Africa. Jinadu has emphasized that the key problem of election administration in Africa stems from the colonial legacy. He posits thus: "The inherited electoral administration was in effect easy prey to manipulation and, in many cases, to outright control by the

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6. Otunnu's accusation of IPC members was unfair because almost everyone in the leadership of IPC engaged the EC on several issues. Female IPC members, in particular, conducted street battles with police demanding change in the EC.

7. In the aftermath of the elections, the opposition resorted to civil protests or disobedience code-named "Walk-to-Work." This attracted police brutality, with Kizza Besigye, the leader of the Forum for Democratic Change (FDC), being the main target. In May 2011, Besigye's car windows were smashed with a hammer by a police operative and a chemical was sprayed in his eyes, necessitating medical attention at a Nairobi hospital.

successor regimes to colonial rule, who, in their bid to retain power by all means and to monopolize the political market-place, saw no reason to develop strong, independent electoral administrations that would only serve to undermine or subvert their hegemonic rule. In this way electoral administration was politicized."[8] In many places, this was followed by the politicization of the civil service and judiciary which are complementary institutions to the electoral bodies in management of elections.

The above perspective is not far-fetched in Uganda's political history. From a historical perspective, management of elections in Uganda has not been exemplary; elections have not only (until recently) taken place irregularly, they have also been mismanaged.[9] According to some observers, the elections held in 1958, 1961 and 1962 were all disputed by sections of voters.[10] No elections were held between 1962 and 1980. The only post-independence (pre-Museveni-era) elections took place in 1980. Although the Commonwealth observers said the elections were fair under the circumstances, others claimed that they were a sham.[11]

At the centre of the electoral fraud of the 1980 elections was the discredited Kikira Commission, whose chairperson was a diehard member of Uganda Peoples' Congress party (UPC).[12] The Kikira Commission was by and large neither free nor independent. This commission received directives from the ruling Military Commission headed by Paul Muwanga, who was bent on returning Milton Obote and his UPC party to power. In the middle of the elections, Muwanga usurped the powers of the Electoral Commission of the time by decree and took over the responsibility of announcing the results when it became apparent that the Democratic Party (DP), the main challenger of UPC, was on the verge of winning the majority of seats in parliament and forming a government. The DP's apparent victory was reversed by the Military Commission.[13] As a result, UPC's win was highly contested, leading to the violent civil war that followed in the period 1981-1985.

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8. A. Jinadu, *Matters Arising: African Elections and the Problem of Electoral Administration,* 2 AFRICAN JOURNAL OF POLITICAL SCIENCE (1997), at 3.

9. *See* N. Kasfir, *The Uganda Elections of 1989: Power, Populism and Democratisation*, in CHANGING UGANDA: THE DILEMMAS OF STRUCTURAL ADJUSTMENT AND REVOLUTIONARY CHANGE (H. Hansen & M. Twaddle eds., 1991).

10. *Id*.

11. T. AVIGAN AND M. HONEY, WAR IN UGANDA: THE LEGACY OF IDI AMIN (1982).

12. For details, see John Kabairebo, *How UPC 'Rigged' the 1980 Elections*, THE OBSERVER, 10 December 2008, retrieved from <www.Observer.ug/index.php?options=com-content&view=1855:how-upc-rigged-the-1980-elections>.

13. *See,* FRANCIS W. BWENGYE, THE AGONY OF UGANDA: FROM AMIN TO OBOTE (1985).

The current regime of the National Resistance Movement (NRM) and its military wing, the National Resistance Army (NRA)—now Uganda People's Defence Forces (UPDF)—went to the bush precisely to wage a guerrilla war in the aftermath of the disputed UPC victory during the 1980 elections.[14] The main reason given in 1981 by Museveni for forming his NRA rebel army was that the UPC had connived with the ruling Military Commission to manipulate the process of the December 1980 elections. This historical context continues to raise moral questions about how elections have been managed under the NRM government ever since it took power. Following its military success and ascendancy to power, the NRM regime began by electing local councils (LCs) as the basis of legitimizing its rule.[15] These elections were followed by Constituent Assembly elections in 1994. The first presidential elections in 1996 were remarkable because they were held under the new constitution of 1995.[16]

Initially, the LCs were directly elected by voters queuing behind their preferred candidates. Critics of these elections queried the manner in which they were manipulated by the political elites.[17] While these elections created optimism that electoral politics in Uganda was back as a *modus operandi* of democratic change of power at the grassroots, they did little to change politics at the national level.

The legal framework for election management is provided by the constitution, the Electoral Commission Act 1997 as amended (2010) and by specific laws: the Presidential Elections Act 2005, the Parliamentary Elections Act 2005, the Political Parties and Organizations Act, 2005, and the Local Government Act 1997 (amended). The IEC is in charge of voter registration, poll conduct, regulation of political parties and candidates as well as final declaration of results. The query that is constantly raised is that although the commissioners are appointed by the president, just as he appoints judges, IEC commissioners have no security of tenure. Opposition political parties contend that Museveni uses this weakness to manipulate the functioning of the IEC.

Since the NRM's seizure of power in 1986, observers have noted that Uganda has moved from an unenviable history of political and economic decline to social reconstruction.[18] When Museveni came to power, he promised a "fundamental change"

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14. *Id.*

15 Local councils (LCs) as they are known today, were initially known as Resistance Councils (RCs).

16. S. MAKARA, G.B. TUKAHEBWA AND F. BYARUGABA(EDS.), VOTING FOR DEMOCRACY IN UGANDA: ISSUES IN RECENT ELECTIONS (2003).

17. *See*, Kasfir, *supra* note 9; S. Makara, The Role of Resistance Councils and Committees in Promoting Democracy in Uganda (1992) (unpublished Research Report, Makerere University).

18. P. COLLIER, THE CHALLENGE OF UGANDA'S RECONSTRUCTION IN ENTERING THE 21ST CENTURY, WORLD DEVELOPMENT REPORT 1999/2000 (WORLD BANK, 1999).

in the politics of Uganda.[19] The Ten Point Programme of the NRM posits democracy as the number one key priority in reforming the country. The question that arises then is: Has that happened? Under the NRM regime, the management of elections has been a mixed bag.[20] First, there was a period when the elections were held without an established electoral commission. The elections for the predecessors of the LCs, the Resistance Councils, would be conducted by the NRM Secretariat. These were direct elections where voters queued behind their preferred candidates, and the candidate with majority votes was declared there and then.

In 1996, the interim EC headed by Steven Akabway (the Akabway Commission) managed the presidential and parliamentary elections. The interim EC was credited for announcing results as they came in and exhibiting a reasonable degree of transparency in the management of those elections. One could argue that, during these elections, the NRM and its presidential candidate were almost certain of victory. At the time, the ruling system was a "no-party democracy" where political contest was on the basis of "individual merit" rather than political parties. There was no official opposition, hence no apparent threat to the NRM's hold on power. Moreover, at that time Museveni still benefitted from popularity due to his role in the political and economic rebuilding of the country. On the other side, Paul Ssemogerere, the leader of the Inter-Party Cooperation (IPC), a loose coalition of political forces opposed to the Movement, had lost some support by participating in the Movement government, resigning just before the electoral campaign.

The management of the 2001 elections proved controversial. This was the first time that the NRM experienced competition from within its ranks. Col. Kizza Besigye, a former minister and political commissar of the NRM, stood against Museveni. The National Executive Committee (NEC) of the Movement found itself facing a dilemma regarding whether to endorse Museveni as sole candidate. The rules of the Movement system stated that anyone was free to stand for any position of leadership, yet Besigye would not be allowed to officially stand against Museveni as a Movement candidate. In the final resolution, the NEC "urged Museveni to stand"[21] as the candidate of the Movement.

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19. Y. MUSEVENI, WHAT IS AFRICA'S PROBLEM? (2000).
20. *See*, O. KOBUSINGYE, THE CORRECT LINE?: UGANDA UNDER MUSEVENI (2010).
21. NEC resolution, 20 November 2000.

The management of the 2001 elections was far from being free and fair. The voters' register was bloated,[22] electoral procedures were not followed and state-orchestrated violence took centre stage. This prompted parliament to set up a select committee to investigate the causes of violence.[23] The findings of the committee pointed to state security officials, especially the Presidential Guard Brigade (PGB), as key actors in political violence, but the report was never tabled for debate in parliament. The Electoral Commission headed then by Aziz Kasujja was itself discredited and disbanded in the aftermath of the elections.[24] This was followed by the appointment in 2002 of most of the members of the current IEC. One of the most frequently raised points of contention is that most members, including its chair, were Movement political activists, raising the issue of their lack of independence and partisanship.

The 2006 elections were the first multiparty elections under the NRM government. Amendments were made to the Political Parties and Organizations Act (PPOA) to allow the freedom of parties to operate freely and to compete for all offices. Before that, the Kiyonga Commission had been appointed by the president to find out people's views about the nature of the political system. The commission recommended that the Movement system continue running the country. However, this position was made irrelevant at Kyankwanzi Leadership Institute, the ideological school of the NRM, in March 2003. At that meeting, the Movement's NEC resolved that political parties would be allowed to operate. This was followed by a referendum on the political systems in which the voters overwhelmingly supported the return to the multiparty political system. In 2005, the Constitution and the PPOA were amended to allow multiparty politics. In 2006, the first multiparty elections in decades took place under a changed constitution. This took place in the context of President Museveni's decision to change the constitution, scrapping the two-term limit for president, hence allowing indefinite eligibility for him to stand for office.

Observers of the 2006 elections noted that, compared to the elections of 2001, the 2006 elections were less violent and were reasonably well organized.[25] Despite the level of improvement in election management, the elections ended in courts of law that ruled that the IEC had failed in several aspects of its constitutional responsibilities, and

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22. The current EC promised to improve the register. *See,* J. KIIZA, S. MAKARA AND L. RAKNER, ELECTORAL DEMOCRACY: UNDERSTANDING THE INSTITUTIONAL PROCESSES AND OUTCOMES OF THE 2006 MULTIPARTY ELECTIONS (2008).

23. The Parliamentary Select Committee found more than 2,000 cases of election violence, mainly committed by government security agencies. *See,* PARLIAMENT OF THE REPUBLIC OF UGANDA, REPORT OF THE SELECT COMMITTEE ON ELECTION VIOLENCE DURING THE 2001 ELECTIONS (2002).

24. Azizi Kasujja was then appointed to an ambassadorial position in Libya.

25. KIIZA ET AL, *supra* note 22.

that the elections fell short of passing as free and fair. Stakeholders in the election were dissatisfied with the way the IEC handled registration of voters, update of the register, deletion of voters from the register, and the counting, transmission and tallying of results. The Opposition candidate, Besigye, contested the elections in the Supreme Court. As was the case in 2001, the final verdict of the court, however, was that the anomalies did not warrant overturning Museveni's victory. Nevertheless, the Supreme Court recommended that several electoral reforms be undertaken to improve the management of elections in the country.

## III. THE DEMAND FOR ELECTORAL REFORMS

In the aftermath of the 2006 elections, there was a strong convergence between civil society organizations and opposition parties to demand electoral and constitutional reforms. The European Union Election Observer Mission (EUOM) report noted that, although the IEC had attempted to demonstrate its independence from the executive, it did not win the confidence of all parties in the game. Many civil society groups contended that since the country was moving towards pluralism, there was a need to change the EC composition to reflect and include all stakeholders in the political process.[26] The demands for reforms arose directly from the Supreme Court ruling in Besigye's election petition against Museveni and the IEC. The electoral reforms included the reconstitution of the commission to reflect the spirit of multiparty political dispensation; the removal of the security forces from management of the electoral process; the removal of the army representatives from parliament; the removal of polling stations from army barracks; the reinstatement of presidential term limits; a seven-year term for the IEC chairperson and commissioners; and elections based on proportional representation.

It was further demanded that ministers or public officials use facilities of their political parties rather than those attached to their government offices; elections be managed at constituency level rather than at the district level; that the IEC sets a limit to the sum of money a candidate may spend on election expenses; and that the names of all officials involved in elections be published in a gazette one month before the election day.

It is noteworthy that few of the amendments were considered for plenary debate in parliament even after they were tabled before the Committee on Legal and

26. M. SEKAGGYA, UGANDA: MANAGEMENT OF ELECTIONS (2010).

Parliamentary Affairs.[27] The official argument was that most of the proposed reforms required amendment of the constitution, which, it was claimed, was not possible at the time. The government was particularly uneasy with the proposal to restore presidential term limits. It was argued that the IEC lacked the necessary autonomy from the incumbent president.[28] Some argued that the president should not have sole power to nominate IEC members; rather, other stakeholders such as political parties and civil society should also nominate and submit their candidates for IEC positions to be considered by parliament.

Some of the key reforms were adopted. The IEC made proposals for improvement of election management and other related matters. The administrative reforms made in the 2010 amendment of the Electoral Commission Act include: (i) restricting the term of office of the secretary to five years, renewable once; (ii) provision of an electronic copy of the voters' register to every organisation taking part in elections before polling day and a hard copy of the register, with photographs, two weeks before polling day, (iii) publication in the Gazette and print media all places at which a voter's register is required to be displayed 60 days before the date of display or polling day.

These amendments were put into effect by the IEC. They prepared a voters' register (without photos) for all parties and presidential candidates. Party or candidates' agents at each polling station were free to cross-check the voters as they came to cast their ballots. This improved the confidence of stakeholders in the electoral process. Moreover, the IEC had published a list of all polling stations in the media. All the political parties participating in the election received soft copies of the voters' registers (without photos). Each of the eight presidential candidates received a printed copy of the 800,000-page voters' register. The law provides that this had to be done two weeks before polling day, and this timeline was followed. However, the failure of the IEC to carry out general voter education despite a USh 9 billion aid budget for "voter education" contributed significantly to the confusion and voter frustration on voting day.

In 2007, the IEC informed parliament that it needed enabling electoral laws by January 2010, but the main laws were only passed in June 2010. The reasons for the delay of the electoral laws were not clear but it affected the IEC's ability to plan

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27. IPC, Proposed Electoral Reforms. A Joint Document of Inter-Party Cooperation to Parliament of Uganda (May 2009). Also see IPC, Private Members Bill (September 2009).

28. See IPC, *Proposed Electoral Reforms, id.* Reference was made to Sierra Leone, Malawi, Kenya, and Zimbabwe, where appointments to the EC are done in consultation either with political parties or the Judicial Service Commission.

effectively. The IEC depends on government for financial subventions and it is supposed to be an autonomous body under Section 13 of the Electoral Commission Act.[29] The Act states that the commission shall not be under direction of any person or control of any authority. In institutional terms, the IEC is under the Ministry of Justice and Constitutional Affairs, though the minister does not have direct control over it. Significantly, it is the Minister of Finance, under section 12 of the Act, who determines the finances of the IEC. The Minister of Finance also approves any donations to the IEC.

In the 2011 elections, most of the IEC budget was funded by the government of Uganda. In the previous elections, donors contributed a great deal. However, only a few donors contributed to the 2011 IEC budget, among which were Deepening Democracy Project (DDP) and United States Agency for International Development (USAID). As a result of budget constraints, some activities, such as voter education, were not funded effectively and no serious voter education took place.

The election of the lower LCs had not taken place since 2002 largely due to lack of money. The Local Council Election Law followed a constitutional ruling on a petition that was lodged by Beti Kamya, the president of the Uganda Federal Alliance (UFA), challenging the old law that governed LCs under the Movement system. The government had originally wanted the elections of lower LCs to be held on a "non-partisan" basis. Political parties perceived this as intended to undermine multiparty politics at the local level, and giving the ruling party free reign at that level. The LC elections have since not taken place.

The late passing of laws affected the IEC's plans and securing the needed finances; it also affected the mapping of the country into electoral areas. This was particularly challenging in the context of rapid growth of districts created by the executive branch of government. Most new districts were created or promised by the president in the light of an impending election.[30] Most of the new districts were created in the election year. Although it is the work of the IEC under the law to carve out constituencies,[31] the EC found its role being subverted or performed by the executive.

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29. Section 2 of the Act designates the EC as a corporate body with perpetual succession. Section 9 refers to funds and expenses of the Commission. All monies for the EC shall be charged on the Consolidated Fund after approval of the minister of Finance. Section 13 of the Act on the Independence of the Commission states as follows*:* "Subject to the Constitution, the Commission shall be independent and shall, in performance of its functions, not be subject to the direction or control of any person or authority."

30. Districts increased from 78 in 2006 to 111 in 2010. These were rapidly created by Museveni to give his NRM party electoral advantage.

31. Constitution of Uganda (1995), Article 61 (c).

In addition to new districts, the government created eight new municipalities. Adjusting the voters' register was a problem in the new districts especially where new sub-counties were created. These posed challenges to the IEC. It had to recruit new staff for the new districts, that is, a minimum of three employees, acquire offices, transport, logistics and equipment, which required additional funding that had not been planned for. The IEC advertised 74 new positions in 2010; most of them were deployed in the new districts as assistant registrars. This required a new budgetary line. There were concerns that most of the new recruits were NRM cadres. Besides, it was also noted that the majority of new recruits were from western Uganda, implying there were ethnic and political considerations in the recruitment process.[32]

On the donors' side, the main stakeholders put pressure on Museveni's government to implement further electoral reforms. The United States government sent its highest-ranking diplomat on Africa to Uganda a month after a report highly critical of Museveni's failure to move on electoral reforms was submitted to the US Congress. Media reports indicated that the then visiting US Assistant Secretary of State for African Affairs, Johnnie Carson, visited Kampala for an official visit in May 2010 to address a broad range of issues relating to Museveni's commitment to democracy, a free and independent media, good governance as well as regional security issues. Opposition politicians suggested that Carson's visit was connected to Hillary Clinton's report issued to congress in April 2010. The Clinton report had observed that the Ugandan government had done nothing to further the independence of the IEC, to guarantee the sanctity of the voter's register or ensure free movement of opposition politicians, and that the government continued to impose restrictions on local media.[33] According to media reports, Carson met opposition leaders.

The opposition leaders welcomed this external support. Robert Kanusu, the then press secretary of the UPC leader, Olara Otunu, was of the following view: "I am sure they will discuss the disbanding of the current EC and how the new EC can be constituted. No amount of intervention by president Museveni can stop the momentum now."[34] The DP leader, Norbert Mao, confirmed meeting with Carson at the American Embassy, and stated: "We, the opposition leaders, will amplify the Clinton report since we know the US state department is interested in the road to 2011 as a key partner of

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32. The complaint was informally raised by the opposition, which believed the government was staffing the EC with its cadres. Interview with Robert Italo and Raymond Kweterezo, FDC mobilisers, IPC office Kampala, 17 January 2011.

33. Henry Ochieng and Isaac Khisa, Obama's Man Flies Over Polls, THE DAILY MONITOR, 20 May 2010.

34. *Id*.

Uganda. We shall put several footnotes to that report where we shall show how the current voter registration exercise is proving to be a sham."[35]

Indeed, the IEC did not enjoy the confidence of all actors; for example, Norbert Mao, DP president and a presidential candidate then, quoted the IEC chairperson to have said: *Banange muve ku kalulu komusajja*, that is, "leave the man's vote", literally saying other candidates should leave Museveni alone to win.[36] Another MP, Hussein Kyanjo, wondered why complaints raised by the opposition were rarely attended to by the IEC.[37]

The April 2010 report of the then US Secretary of State, Hillary Clinton, to congress raised concerns about police harassment of opposition politicians and heightened stifling of the media. Her report also stated that the exclusion of key stakeholders from the appointment process compromised the IEC's independence and would damage the credibility of 2011 electoral processes. The report stated: "The Government of Uganda took no action to further the independence of the EC because president Museveni unilaterally replaced one retiring Commissioner and reappointed six others to a new seven year term."[38] Other key highlights of the report claimed that the government had compromised the IEC. The police were partisan and harassed the opposition, and there was a media blockade targeting opposition politicians. The report also pointed out that the accuracy of the voter register was in question.

Three of Uganda's development partners had warned that the 2011 elections ran the risk of being discredited unless the IEC urgently cleaned a cluttered voters' register and engaged political parties without bias. The then UK High Commissioner, Martin Shearman, US ambassador, Jerry Lanier, and their Dutch counterpart, Jeroen Verhaul, wrote to the IEC chairman, informing him that the commission's questionable credibility was eroding public confidence in the democratic process. In their letter, they stated: "Restoring the confidence of the electorates, political parties and civil society in the EC will be key to Uganda holding free, fair and peaceful presidential and parliamentary elections in 2011."[39]

The *Daily Monitor* newspaper noted that whereas donors had previously argued for free and fair electoral processes, their latest call was the strongest signal to the IEC

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35. *Id.*

36. Personal communication with DP President, Norbert Mao, Golf Course Hotel, Kampala, 3 January 2011.

37. Interview with Hussein Kyanjo at Pariament of Uganda, Kampala, 6 January 2011.

38. The Hillary Clinton Report to US congress, issued in April 2010, emphasized that Museveni was undermining the opposition and there was no level playing field.

39. Tabu Butagira, *Donors warn EC over vote rigging,* THE DAILY MONITOR, Friday, 12 March 2010.

on the need to conduct flawless polls. The Commonwealth Election Observers Group noted in their 2011 report that, "the EC needs to be independent and must enjoy the confidence of all stakeholders. To help achieve this, the appointment mechanism of EC members needs to be changed, ensuring a more inclusive, broad-based process and the dismissal process needs to protect members from any vested interest."[40] Disputes over the alleged inflated number of registered voters and delayed electoral reforms and the quest by the opposition for representation on the IEC, which heightened political mistrust, raised concern that the poll could lead to hostilities. Through the International Republican Institute and the National Democratic Institute, the US embassy in Kampala was working with political parties in Uganda. In addition, the US government contributed about USD 2.5 million (USh 4.7 billion) to have the EC's electoral processes updated and strengthened.

The donor community, through their diplomats, chronicled several anomalies they observed in Uganda's electoral system and called for regular dialogues as means of reforming the system. Their efforts, however, fell short. Museveni is reported to have told Carson that he would not reform the IEC, and the former defended the chairman, Badru Kiggundu, and the other six commissioners as professionals, properly vetted by parliament's appointments committee comprising both the NRM and opposition MPs. It was reported that, during the closed-door meeting at State House in Entebbe, Carson stated: "Some groups in Uganda raised concern over membership of the EC. We feel that there should be more representation to the electoral body."[41] But at that meeting, Museveni remained unfazed, insisting that "development partners should not allow opposition politicians to confuse them with lies because what they are complaining about can be discussed in the Inter-Party Forum."[42]

Museveni argued that the opposition demand that the IEC be composed of members nominated by all political parties would mean that such a commission could not be neutral and would be a centre for partisan interests. He noted: "It's like saying all parties propose names of lawyers to be appointed to the judiciary and that principle is very dangerous as it will paralyse and undermine the adjudication centre. These should not be coalitions but neutral centres."[43] President Museveni's resistance to electoral reforms fuelled fears that there would be massive rigging during the 2011

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40. REPORT OF THE COMMONWEALTH OBSERVER GROUP, UGANDA PRESIDENTIAL AND PARLIAMENTARY ELECTIONS, 18 FEBRUARY 2011.

41. Tabu Butagira, *Museveni tells US he will not fire EC*, THE DAILY MONITOR, Friday, 21 May 2010.

42. *Id.*

43. *Id.*

polls. Opposition leaders strongly believed that Museveni was bent on rigging elections.[44]

## IV. KEY ISSUES OBSERVED IN THE 2011 ELECTIONS

Some of the key issues that took centre stage during the process need to be analysed. This section focuses on the performance of the IEC, the electoral process and the results and the political ramifications of the 2011 elections.

### *A. Registration of Voters*

The registration of voters, which was the central activity of the electoral process, took place between 3 May and 18 June 2010. Registration had been a point of contention in 2001 and 2006 elections, and expectations were high that, this time, there would be significant improvements. With new German technology having been imported for registration purposes, a biometric registration of voters was supposed to be efficient and effective. Some of the data was supposed to be used by the Ministry of Internal Affairs to produce national identity cards. However, it proved otherwise. Prospective voters complained that the process of registration was very slow. Many of the operators appeared to have inadequate knowledge of computer technology especially in the rural areas. The batteries of the computers ran down, and in rural areas without sources of power it took days before the problem was fixed.

The main issue with the registration of voters was that it relied on almost ten-year old population census data.[45] The unreliable population data raised fears among the opposition that the register could be manipulated easily.[46] In the end, the voters on the final register numbered 13,954,129 people. Local residents were to ascertain that someone was registered only once through the use of local tribunals. Voters without photos in the register had to prove that they were residents before they were allowed to vote. The IEC asserted that since polling officials were recruited from the same area, they were supposed to know that a voter (without a photo in the register) was a resident. The IEC's assumption could probably work in rural villages, but it showed how

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44. John Njoroge, *Museveni Will Rig, Opposition Tell US Officials*, THE DAILY MONITOR, 6 February 2011.

45. At the time, the last population census had been held in 2002. The EC used population data estimates.

46. This feeling was expressed by some of the opposition officials I interviewed. Such strong sentiments were expressed by Margaret Wokuli, the then Director of Communication at the IPC (interviewed on 22 November 2010 in Kampala).

rudimentary the IEC was in handling such an important exercise. This was particularly precarious for voters in the urban areas where people do not know one another. Although opposition parties contested the number of registered voters as far more than expected of the national population of 32 million,[47] the IEC reported that registration was a "self reporting" exercise, hence confirming its numbers.

The IEC also claimed to have used duplicate analysis technology, which identified people who registered more than once.[48] Nonetheless, there was no way of ascertaining whether some entries on the register had been cleaned. There was also a tendency by the IEC to split polling stations without informing the voters. As a result, on polling day several voters travelled from one station to another but failed to find their names on the register. The IEC did all it could to prove it was competent. It received aid from USAID to clean the voter register and to install an SMS system. This system was meant to help voters check their registration details via their phones. It worked well until it was overloaded on election day and could not respond: that day, 150,000 people per hour were making requests to the IEC electronic system. It was so jammed that some requests only received replies up to 72 hours after voting day.[49]

The IEC failed to issue new voters cards despite persistent demands by opposition parties. It argued that, according to the law, what was crucial for voting was that a person's name appeared on the voters' register. It gave two reasons for not issuing voters cards; first, that the procedure was an expensive undertaking requiring an extra Ushs 7 billion to issue four million new cards; and second, that the internal affairs ministry was in the process of issuing national identity cards using the same data. The IEC argued that the issuance of voters cards would be a double expense on the government. Section 26 of the Electoral Commission Act says that the EC may design, print and control the use of voters cards. It may even recall the cards. According to the IEC, the voter's card is simply an additional identification. But the absence of this document raised additional concerns and complaints about the possible manipulation

47. DEMGroup, a civil society group involved in election monitoring, supported this view. Interview with John Mary Odoi, DEMGroup Director on 17 December 2010 at his Bukoto office in Kampala.

48. The technology removes names from the register if they appear on it more than once.

49. According to opposition leaders, some party or candidate agents who turned up with copies of the register were either arrested or turned away in areas where the opposition had significant support. Over 40 agents of Augustine Ruzindana, the FDC candidate for Ruhaama county, were rounded up and remanded in police cells and only released after the elections. Interview with Mr. Ruzindana at FDC offices in Kampala on 5 January 2011.

of registers, and suspicions about voting by foreigners.[50]

The IPC argued that, in some areas, a different register from the one given to them two weeks previously was in use. They said that the IEC carefully manipulated the register in a way that disadvantaged the opposition, largely by placing particulars of voters under different polling stations from their usual ones, with the intention of frustrating them.[51] It was also reported that the commission used what one respondent termed as "parking and cracking," an American term for manipulation of voters. According to him, the EC shifted several polling areas from Kashari county (7 polling areas) to Mbarara Municipality polling area to boost NRM rural area support of their candidate in town—bringing in about 4,000 voters in this way. It was claimed that the IEC tried to do the same in Budadiri West, the stronghold of the then Leader of Opposition (LoP) in Parliament, Nandala Mafabi, but they were unsuccessful.[52]

The IEC conceded that even a clean register could be manipulated by polling officials. As the EU Election Observer report notes: "The selection of presiding officers as well as certain aspects of polling and counting was governed by ad hoc guidelines or rudimentary manuals, both of which are legally unenforceable."[53] In its defence, the IEC argued that even with the right structure, the whole process was still in the hands of the polling officials. It required the integrity and vigilance of the presiding officers on the polling day. There were 23,968 polling stations countrywide. As was observed during the polling, the process appeared to proceed calmly, however, in Kampala, the police was heavily deployed, and police presence kept way many voters. In Mukono Municipality area, several voters were unable to vote due to absence of their names on the register.[54]

### *B. Nomination of Candidates*

The nomination of candidates was also controversial. The 2011 elections were contested by eight presidential candidates, 1,270 parliamentary candidates, and 443

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50. Personal communication with Ken Lukyamuzi, President of the Conservative Party (CP), who made the allegation at CP headquarters on 7 August 2010. At the time of interview, he was the chairman of the IPC.

51. Interview with Margaret Wokuri, *supra* note 46.

52. Interview with a respondent who did not want to be named, Kampala, 16 June 2010.

53. EU Election Observation Mission Uganda, Uganda 2011 Elections Improvements Marred by Avoidable Failures, Kampala, 20 February 2011, at 4. Retrieved from <www.eueom.eu/files/pressrelease/english/[pressre;ease-prehiminary-uganda_20february>.

54. Some of the frustrated voters approached us (election observers) believing we were election officials, and were disappointed that we could not help them vote.

female candidates for district women seats. Competition was stiff at all levels. The requirements for one to be nominated as a presidential candidate during the 2011 elections were that, one had to be a citizen of Uganda aged 35 or above, but not beyond 75 years of age. Candidates were required to have attained at least an A-level certificate of education or its equivalent and be able to pay USh 8 million nomination fee. A candidate was also required to collect 100 signatures of voters supporting his/her nomination from 75 districts of Uganda. Initially over 50 people indicated that they intended to stand for the post of president, but many of them failed to get the required signatures to support their nominations. Nominations for the position of president took place on 25 and 26 October 2010.

The nominations raised some controversy about issues such as the convoy of President Museveni, accused of going beyond the numbers allowed by the law. No candidate was allowed to travel with more than 20 supporters for his/her nomination.[55] While other candidates were restricted to that number and their processions were disallowed by the police, there was evidence of bias towards Museveni's convoy, which comprised a bus full of supporters and several escort cars.[56] This appeared to be a case of double standards on the part of the IEC. The explanation given was that that though Museveni was a candidate, he was also the president of the country and consequently needed security. On the other hand, the restrictive hand of the police on other candidates was overbearing, and the IEC did nothing to intervene.

### *C. "False" Polling Stations*

Opposition MPs exposed a list of new polling stations in Uganda that they said were part of a concealed government rigging strategy ahead of the 2011 general election.[57] Opposition MPs Hussein Kyanjo and Michael Mabikke accused the government of crafting a rigging strategy by creating "ghost" polling stations and zones, which

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55. The EC chairman explained that although Museveni came to Namboole Stadium with a bus full of his supporters, at the actual venue of nomination, he had less than 20 people accompanying him. He also explained that there were security concerns. Interview with the EC Chairperson, Badru Kiggundu, at his office in Kampala on 7 January 2011.

56. In fact, there was a problem when Besigye's convoy to the nomination venue in Namboole was followed by a young girl who appeared a minor, carrying a defaced poster of President Museveni. The girl was arrested, taken to the Central Police Station pending prosecution. Some journalists in Namboole pleaded with the police to forgive the girl with a caution, but the police did not yield. This was reported on NTV.

57. Yasiin Mugerwa and Sheila Naturinda MPs Expose List of New 'Ghost' Polling Stations, THE DAILY MONITOR, 1 September 2009.

included Katoogo, St. Mbagga, Sendaula and Nsubuga zones, all in Ggaba parish, Makindye division in Kampala. Other "ghost" stations were reportedly in Kabalagala parish in the same division, namely, Muzungu, Meya, Okologo and Kyeyune zones. In denouncing these "ghost" polling zones, the chairman of the IEC wrote to the area MP on 4 September 2010 disowning all 78 new zones and polling stations allegedly created in Makindye Division in Kampala District. In his letter, he stated that the process of creating such zones was a work of forgery.[58] In light of this, the opposition MPs expressed concern that what was happening in Makindye Division could have been a pervasive trend elsewhere, with new and illegal administrative units being created without the knowledge of neither of the people nor the EC so as to facilitate rigging of the 2011 polls. While claims of "ghost" polling stations could not be verified countrywide, there were unexplained and puzzling incidents in the electoral process.

It was reported that in some areas in Kiruhura District (Museveni's home area), there were more votes than the registered voters.[59] This happened at the four polling stations of Kanoni Playground, Sanga, Akayanja and Burunga. Although the returning officer cancelled the results of these polling areas, it was an indication of the extent of ballot stuffing that went on in several other places. An independent parliamentary candidate for Nyabushozi County reported intimidation and harassment of his agents by security forces.[60]

### *D. Campaign Management*

Campaign management raised contentious issues. These included night campaigning by all candidates, the excessive use of money in the campaign,[61] intimidation of voters and opposition members, and the introduction of "yellow books" registering NRM members a few months before the elections. Some of these issues disadvantaged the situation for opposition players, especially given that the opposition was not allowed to campaign freely before their candidates had been nominated. The NRM party, on

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58. In the letter, he notes: "I would like you to know that the document did not originate and could not have originated from the Commission since the Commission does not initiate the creation of administrative units. Further analysis and consultations showed that the headed papers used are forged, lack authentication and formal communication." see *The New Vision Newspaper*, 14 September 2009.

59. Andrew Mwenda, *The Election: Was it Bought or Stolen*, THE INDEPENDENT, 4-10 March 2011.

60. The independent candidate for Nyabushozi was Genensio Tumuramye, who stood against Fred Mwesigye of the NRM. Alfred Tumushabe, *Results from Kiruhura Polling Stations Cancelled*, THE DAILY MONITOR, 21 February 2011.

61. *Id*.

its part, had engaged in pre-election activities that appeared prejudicial to the work of the IEC. In 2009, NRM cadres and government officials, mainly Resident District Commissioners (RDCs) and local security officials, went around the country registering almost all adults in a "yellow book" as its members. Local people feared that if they did not register in the book, they would be targeted and denied services. In this context, the NRM boasted of 10 million members. In other words, almost all voters belonged to the NRM! At the time of registration of voters by the IEC, ordinary people were confused and believed that since they had registered in the "yellow book", they were only waiting to vote for the president.[62]

The presence of army or security representatives on the NRM's side during the campaigns was also noted. For instance, top security officials attended the launch of Museveni's manifesto, contrary to the electoral law.[63] The police chief, Kale Kayihura, defended himself to journalists, saying when state protocol invites him to a function also attended by the president, he has to attend.[64] On his part, the IEC chairman said he had written to the concerned officers seeking an explanation. The outcome of his intervention has never been known.

The IEC is supposed to hear and determine complaints related to elections.[65] It heard campaign-related and nomination-related complaints. In many cases, when opposition supporters complained they were ignored by the IEC. In the case of Kampala mayoral elections on 23 February 2011, for instance, the election officials opened the ballots and allowed voting to start at 5 a.m. instead of 7 a.m, which is the legally prescribed time. This facilitated ballot stuffing. The election was cancelled by the IEC on account of fraudulent action by the polling officials. However, in the case of Rubaga North constituency in Kampala, where Singh Katongole of the NRM tussled with Moses Kasibante of the DP for the parliamentary seat, the IEC was accused of being biased towards the former.[66]

Electoral regulations were breached through carelessness. The MP for Makindye West constituency, Hussein Kyanjo, gave an example, telling how opposition parties were prevented by security officials from displaying their candidates' posters

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62. This was told to this author by an old woman in Kabujogera, Kamwenge District, 27 November 2010.

63. THE DAILY MONITOR, 6 September 2010.

64. *Opposition Accuses Security Chiefs of Political Bias*, THE DAILY MONITOR, 3 November 2010, at 1-2.

65. Section 15 of the Electoral Commission Act.

66. This bias was shown when the EC went ahead to recount of ballots that gave Katongole victory, even when the court had issued an order stopping the exercise. Following an appeal in the Court of Appeal, Kasibante prevailed.

at Entebbe International Airport; this while the whole place was decorated with Museveni's election posters. Kyanjo received no reply from the IEC about this complaint.[67]

In Kotido town, Norbert Mao's campaign posters were pulled down by the army and replaced with Museveni's posters. Mao lodged a complaint with the IEC but no action was taken.[68] The Electoral Offences Unit of the police was informed to follow up cases of monetisation of the campaign and report its findings to the IEC. There was no report to this effect. Parties did not disclose their campaign sources. The ruling party is reported to have used government funds for its campaigns. The IEC did not follow up on how candidates and parties obtained their funding or spent their campaign money. In December 2010, the government sought a high supplementary funding of USh 604 billion from parliament (about USD 200 million). With the request coming so close to the date of elections, many speculated it was to be used by the ruling parity for its campaign expenditures. The speculation was fuelled by the fact that so much money was spent on MPs, supposedly to help them "monitor government programmes."[69]

### *E. Rejection of the Results by Opposition Leaders and Threat of Violence*

When Besigye was interviewed on his options after losing the 2011 elections, he said that he had not ruled out war as an option.[70] Museveni had warned Besigye that if he disturbed the peace he would eat him like *sambusa* [cake]. This was after most of the opposition parties had rejected the outcome of the election and at the same time refused to approach the courts with their complaints. Museveni later told ambassadors accredited to Uganda that he would deal decisively with Besigye, whom he described as "an undisciplined politician."[71]

The failure to implement electoral reforms and continuous reports of electoral malpractices were arguments used by the IPC to justify its creation of a parallel tally centre for incoming election results. According to the IPC officials, the tally centre was

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67. Personal communication with Hussein Kyanjo, MP Makindye West, at Parliamentary Building, 15 January 2011.

68. Personal communication with Norbert Mao, Kampala, 3 January 2011.

69. Each Member of Parliament received USh 20 million, purportedly to monitor implementation of agricultural project known as NAADS. Because the donations coincided with the campaign, its purpose was suspect.

70. Tabu Butagira, *Besigye: I Can't Rule Out War*, THE DAILY MONITOR, 28 February 2011.

71. Hussein Bogere, *I Will Deal with Besigye, Museveni Tells Envoys*, THE OBSERVER, 19-22 May 2011.

to receive results per polling station through an electronic SMS system.[72] This did not go down well with President Museveni. Annoyed by this development, Museveni said "Uganda is not like Ivory Coast, it is not Kenya. Don't expect what is happening or happened in those countries to happen here. Uganda is led by people who have fought wars. You can't play those games here. He (Besigye) may have his computers but the only institution charged with announcing results is the national Electoral Commission."[73] President Museveni had declared on 21 December 2010 that he would arrest Besigye if he dared announce presidential elections results. When the president was asked to comment on the opposition calls for people to take up arms and fight the government, he stated that Ugandans are enjoying good governance and would not be lured into war. He asserted the opposition should not deceive themselves that "conditions were ripe for war in Uganda. Talking of the bush now is like planting in July because the seeds would dry."[74] He concluded by stating that the NRM was ready for dialogue with other political parties but violence of any kind would not be tolerated.

The intervention of security operatives in the public media and the deployment of security forces during the campaign and on election day left no doubt about Museveni's intentions. The cream of the police and army appeared to be on the same side as President Museveni. Army and police bosses made statements to the effect that they were ready to intervene if the opposition disputed the elections on the streets by inciting demonstrations. On 7 September 2010 the Inspector General of Police, Major General Kale Kayihura, assured Ugandans that the police force would provide the necessary security to ensure that the 2011 elections were held in a free environment. He noted that the police had recruited more officers and equipped them with the necessary skills to ensure that there was law and order during the elections.

In all the villages of Uganda, the police recruited "crime preventers." Kayihura, however, condemned the militia groups recruited by political parties, including the NRM, and distanced the police from the actions of the *kiboko* squad, a notorious stick-wielding paramilitary group known for harassing and beating opposition leaders and their supporters. The *kiboko* squad is one of the informal security squads trained and mobilized to do "dirty" work for the NRM party and government. The Black Mamba of the Chieftaincy of Military Intelligence (CMI) was in charge of

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72. The IPC tally centre was unable to work efficiently. It was alleged that security officers penetrated the system and jammed it. At the end of the electoral process, the IPC had no alternative results to contest the official results.

73. THE DAILY MONITOR, 24 December 2010, at 2.

74. Museveni was speaking to a cross-section of people who attended a Christmas party at State House in Entebbe. The function was covered by NTV.

organising the *kiboko* squad. It is reported to have been formed in 2007 during the anti-Mabira Forest "giveaway" demonstration. The *kiboko* squad is visible during elections, but also active during demonstrations. Its membership comprises security operatives, members of the police and paramilitary groups, as well as members who are army veterans, reserve force elements, taxi touts, vendors, taxi drivers, *boda-boda* cyclists, and vigilante groups.[75]

Despite the heinous crimes committed by the *kiboko* squad, their leader was arrested, briefly detained and released without charge. The head of the IEC stated that there would be no violence during the 2011 elections, and vowed to disqualify candidates who orchestrated it. The then Chief of the Defence Forces, General Aronda Nyakairima, also warned opposition politicians about resorting to violence to settle political differences. He pointed out that the army would step in when called upon to quell such violence because the country is on the path towards development and has no time for violence. The army commander advised the opposition to use courts or parliament to solve political issues.

In the 2011 elections, incumbent President Museveni secured another term in office with a commanding victory, to extend his rule to 30 years. The EC declared Museveni the winner of the presidential polls with 68.38 percent of 8,272,760 total votes cast. The FDC opposition leader, Besigye, obtained 2,064,963 (representing 26%) votes. Other candidates fared miserably in terms of percentage of the vote gained: Norbert Mao 1.9%, Olara Otunu 1.6%, Beti Kamya 0.7%, Abed Bwanika 0.6%, Bidandi Ssali 0.4%, and Sam Lubega 0.4%. On the day of the elections, the electoral results lacked transparency because alternative means of checking the results by the IPC tally centre were blocked by the government security agencies.[76] Despite this overwhelming victory, all other candidates with the exception of Beti Kamya of UFA rejected the results declared by the IEC. The opposition grounds for disputing Museveni's win revolved around the manner in which the IEC had been appointed, dissatisfaction with the conduct of the electoral process, harassment endured during the campaigns, and the management of the election results.

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75. Editor, *Kiboko Squad revealed*, THE INDEPENDENT, 15 September 2009.

76. Telecommunication companies suffered sharp criticism from opposition groups. The FDC singled out Uganda Telecom for sabotage, but the latter denied the accusations. Besigye also accused the Uganda Broadcasting Corporation (UBC)—astate-owned radio—for taking his money for advertising his campaign messages, but refusing to so. Section 21 (i) of the Presidential Elections Act 2005 states that "all presidential candidates shall be given equal treatment on the state-owned media to present programmes to the people." Section 22(1) further states that "a candidate in an election shall not be denied reasonable access to use of state-owned communication media."

## V. ANALYSIS OF THE POST-ELECTION SITUATION

The process and the results of the 18 February 2011 elections produced a scenario that conforms to what may be termed as "electoralism",[77]that is, an electoral exercise that simply legitimizes the regime in power. Such an exercise aims to delegitimise the opposition and the activities of civil society, and narrows the space for civil and human rights of the people. In the 2011 election, choices were limited by the way the IEC was constituted, the failure of the government to amend the electoral rules so as to allow sufficient space for all contending parties to participate equally, and generally, allowing the security officials to take over management of the electoral exercise. In effect, the military and the police subtly portrayed themselves as holding the keys to the agenda of democratisation in the country.

The violence that characterised the post-election period was not initially anticipated by election observers. Still, the signs were glaringly abundant. These included violent acts during the primaries of the ruling party, various protests staged by the IPC activists, a number of statements made by the leaders of the opposition to the effect that if the elections were rigged they would not call on the courts but would refer to the "courts of public opinion,"[78] pronouncements of army chiefs that violence would not be tolerated, and the pronouncement by the IPC that they would produce an alternative set of results from their own tally centre—all these pointed to the possibility of clashes. The police anticipated violence. On 18 January 2011, they imported heavy anti-riot equipment into the country.[79]

Compared to the past, state-orchestrated violence had declined during the 2011 elections. In the past, most of the violence happened during elections; this time, it took place mainly after the elections. A group of opposition activists, mainly from the FDC and DP staged what came to be known as Walk-to-Work (W2W) demonstrations. These demonstrations crystallized around the personality of Kizza Besigye, the leader of the main opposition party—FDC.

In the wake of strong perceptions held by the opposition parties that the elections were not free and fair, the declaration by the IPC that it would not contest the election outcome in courts of law, accompanied by their failure to provide authentic alternative results at their tally centre, resulted in a series of street demonstrations, mainly in Kampala and few major towns. The W2W demonstrations that began on 11

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77. J. Elklit, *Democracy and Elections in Africa*, in CHALLENGES OF CONFLICT, DEMOCRACY AND DEVELOPMENT IN AFRICA (K. Matlosa, J. Elklit and B. Chiroro eds., 2007).

78. See Besigye's statement to this effect in *The Daily Monitor*, 6 February 2011.

79. Most of the anti-riot equipment was imported from China.

April 2011 became attractive to unemployed youth, who followed Besigye with zeal in the hope that it would change their hopeless situation. The immediate catalysts for W2W were price increases for fuel and food in the markets following the rise in inflation from 11% percent in March to 39.9% in April. The public perception was that rampant inflation was driven by the amount of money that had been used mainly by the ruling party to buy votes.

The organizers of the W2W demonstrations proved to pose a real threat to government, leading to the police using excessive brutality and extra-judicial means to curb the rising anti-government sentiments triggered by the riots. Besigye was surrounded and incarcerated, both in jail and at his home. His lawyers argued that there was no law prohibiting Besigye from walking wherever he wanted. The police, however, argued they were using "preventive arrest" law, as provided in the Penal Code Act. The police posited that it was for Besigye's own good that he was not allowed to walk, because unruly people could hurt him during the demonstrations.

The W2W demonstrations brought together opposition politicians in the IPC (FDC, DP, and CP), as well as the UPC and DP, which had withdrawn from the IPC in the run-up to the election. Interestingly, the leaders of the latter were willing to be led by Besigye in the W2W. It appeared that W2W was conceived as a real strategy to destabilise the newly elected NRM government and to snatch power by other means. According to the DP president, Norbert Mao, "While we treat the symptoms of high fuel and food prices, we must continue rocking the foundations of this illegitimate government so that Ugandans get a better government. A president and government serve at the pleasure of the people. At any moment, if the people decide that you are no longer suitable to serve then, they can raise a red card for you to get out."[80]

It has been argued that there was something fundamentally deficient in Uganda's governance system that was likely to explode. Bishop Zac Niringiye argues thus: "While the purpose of an election is to promote peace and avoid violence, there was recognition in our governance context that elections in themselves would not promote peace. There are organizational issues as well as perception issues. To a great extent, fraudulent elections are a manifestation of how we have moved as a corrupt country."[81] On a critical note, the greatest irony of the W2W demonstrations was that it threatened Museveni's legacy, that his regime had brought peace, as his proverbial

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80. See Michael Mubangizi, *Our Agenda is to Remove Museveni*, THE OBSERVER, 1-23 May 2011.

81. Interview with retired Bishop of Kampala, Zac Niringiye, at Golf Course Hotel, Kampala, 29 March 2011.

catch phrase goes, "At least people can peacefully sleep in their homes."[82] However, excessive force was being used to suppress the dissenting voices, and since then a new law has been proposed by the government to curtail the freedom to protest.[83]

## VI. CONCLUSION

Recent surveys by the African Peer Review Mechanism (APRM) show that Ugandans have little confidence in the electoral process, stating that unless government acknowledges that there was a problem with the electoral laws it would be difficult to find common ground that would ensure free and fair elections.[84] The 2011 election did not increase people's trust in the IEC. And it is likely to be worse in 2016. In the aftermath of the 2011 elections, social unrest was rampant. Security forces were massively deployed on the streets and villages from Election Day onwards. It was a reminder that the regime, even after winning, felt insecure. As has been argued, bad election management is a recipe for instability. The opposition W2W protests should be understood in the context of the distrust perceived against the EC and its repeated failures to organize free and fair elections.

Genuine, rule-bound competitive politics that produces respectable and acceptable results is still a pipe dream in Uganda. Greed for power and the unwarranted desire for incumbents to stay at the helm indefinitely, rarely gives rise to full democratic processes. Such a leadership is prone to breaking rules for the sake of retaining power; as such elections are held more for the sake of regime legitimation than for enlisting popular consent of the governed. Elections still have little chance of changing the regime or the presidency in Uganda. This will only happen when the ground for competition has been levelled. The opposition argues that the removal of the presidential term limits made this likelihood rather tenuous.

The Supreme Court in 2001 and 2006 ruled that the IEC had failed to implement the laws in its administration of elections. The IEC still has a difficult task of proving that it is an entity independent from government. The constraints imposed on it by the manner of its appointment and operations appear to reduce its capacity to act sufficiently as a fair player in relation to all stakeholders.

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82. This is an expression commonly uttered by Museveni to compare his regime with past regimes, where state security forced ordinary citizens out of their homes.

83. The Public Order Management Act 2013 gives powers the Inspector General of Police or any authorized officer to regulate the conduct of all public meetings.

84. APRM (UGANDA NATIONAL COMMISSION), THE UGANDA COUNTRY SELF ASSESSMENT REPORT AND PROGRAMME OF ACTION (2007), at 41.

# STRENGTHENING DEMOCRACY THROUGH INVESTIGATING, PROSECUTING AND PUNISHING CORRUPTION IN MAURITIUS

Jamil Ddamulira Mujuzi*

**ABSTRACT**

*There is a close relationship between democracy and corruption. Corruption has a negative effect on the functioning of political and democratic institutions. It affects the delivery of services such as education and healthcare. In order to consolidate democracy, Mauritius has adopted different measures to prevent and combat corruption. These have included the ratification of international treaties such as the United Nations (UN) Convention against Corruption, the signing of the African Union Convention on Preventing and Combating Corruption and the enactment of domestic law, Prevention of Corruption Act, which criminalises different corrupt activities. The purpose of this article is to discuss the jurisprudence that has emerged from courts in Mauritius interpreting and applying the different sections of the Prevention of Corruption Act and to recommend ways through which the Act could be amended or interpreted to strengthen the fight against corruption.*

## I. INTRODUCTION

There is a close relationship between democracy and corruption.[1] Corruption has a negative effect on the functioning of political and democratic institutions.[2] It affects the delivery of services such as education and healthcare.[3] In order to consolidate democracy, Mauritius has adopted different measures to prevent and combat corruption. These have included the ratification of international treaties such as the UN Convention against Corruption (in December 2004), the signing of the African Union Convention

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1. M.T. Rock, Corruption and Democracy (2007) DESA Working Paper No. 55, ST/ESA/2007/DWP/55. Available at <http://www.un.org/esa/desa/papers/2007/wp55_2007.pdf>, (accessed 01 September 2015).

2. D.D. Porta and Y. Mény, *Introduction: Democracy and Corruption*, in DEMOCRACY AND CORRUPTION IN EUROPE (D.D. Porta & Y. Mény, 1997), at 1 – 2.

3. S. Gupta, H.R. Davoodi and E. Tiongson, Corruption and the Provision of Health Care and Education Services (2000) IMF Working Paper, WP/00/116, available at <http://www.imf.org/external/pubs/ft/wp/2000/wp00116.pdf>, (accessed 01 September 2015).

on Preventing and Combating Corruption (in July 2004) and the enactment of domestic law which criminalizes different corrupt activities.

In April 2002, the Prevention of Corruption Act[4] (POCA) came into force. Its long title is to the effect that the aims of the Act are '[t]o provide for the prevention and punishment of corruption and fraud and for the establishment of an Independent Commission Against Corruption.' Since the coming into force of the Act, courts have handed down several judgments dealing with its various sections. The Supreme Court of Mauritius has held that Mauritius has an international obligation to combat transnational crimes.[5] However, the Supreme Court has also warned:

> That the country has to improve its national and international image in the corruption perception index, of that there can be no doubt. However, it should not in the process impair its national and international image on the human rights perception index. The two indexes are not mutually exclusive.[6]

The purpose of this article is to discuss the jurisprudence that has emerged from courts in Mauritius interpreting and applying the different sections of the Prevention of Corruption Act and to recommend ways through which the Act could be amended or interpreted to strengthen the fight against corruption. This article deals with the following issues: the application of the Act, offences under the Act and how they have been interpreted by courts, reporting, investigating and prosecuting corruption, some of the challenges faced in prosecuting corruption and the sentences imposed for the offenders. The author will start by highlighting cases in which courts have dealt with the issue of the application of the Act.

## II. APPLICATION OF THE ACT

Section 3 of the Act provides that: 'A person shall commit an offence under this Act where— (a) the act or omission constituting the offence occurs in Mauritius or outside Mauritius; or (b) the act constituting the offence is done by that person, or for him, by

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4. Prevention of Corruption Act 2002, Act 5/2002, Proclaimed by [Proclamation No. 18 of 2002] w. e. f 1st April 2002.

5. *The Independent Commission against Corruption* 2005 SCJ 72 in which the Court emphasised Mauritius' obligation under the United Nations Convention Against Transnational Organized Crime to fight organised crime.

6. *Manraj & Ors v. ICAC* 2003 SCJ 75; 2003 MR 41, at 24.

another person.' Section 3(a) thus makes it very clear the Act is applicable to corrupt activities committed in Mauritius and outside Mauritius. In simple terms, it has territorial and extra-territorial application. Before 2006, section 3(a) provided that '[a] person shall commit an offence under this Act where - (a) the act or omission constituting the offence occurs outside Mauritius.'

In 2006, section 3(a) was amended to provide expressly that it was applicable to offences committed in Mauritius. Courts had to deal with the issue of whether section 3(a) before it was amended in 2006 was applicable to offences committed in Mauritius. For example, in *Independent Commission Against Corruption v. Peermamode M.R.A.F.E. and The Director Of Public Prosecutions v. Peermamode M.R.A.F.E*,[7] the accused were prosecuted under section 10(4) of POCA and the issue on appeal was whether 'the legislator had created a valid criminal offence in respect of which the accused could be convicted for the offences alleged to have been committed within Mauritius' before POCA was amended in 2006. The Supreme Court referred to the drafting history of POCA and that of the 2006 amendment Act and to various rules of statutory interpretation to hold that the offence of which the accused were prosecuted were known in Mauritian law before the 2006 amendment.

In *Joomeer N v. State*[8] in which the Supreme Court also dealt with the question of whether section 3 was applicable to offences committed in Mauritius, it was held that:

> If domestic jurisdiction was to be excluded, it could not have been done without express provisions such as: "This Act shall not apply to acts and omissions occurring in Mauritius." There was in fact no need for the legislature to amend section 3. A proper interpretation of section 3 in its 2002 version meant that where the act or omission constituting the offence occurs elsewhere than in Mauritius, the author shall commit an offence under the Act. There is no exclusion of territorial jurisdiction. This is what the clarification which the amendment of 2006 sought to bring.[9]

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7. *Independent Commission against Corruption v. Peermamode M.R.A.F.E.*; and *The Director of Public Prosecutions v. Peermamode M.R.A.F.E.* 2012 SCJ 104. See also, *ICAC v. Ng Sui Wa* 2012 INT 148; *ICAC v. Satyawan Kutwaroo & Iswaraj Ghallu* 2010 INT 61; *ICAC v. Suresh Mahadeo* 2010 INT 257; *ICAC v. Ng Sui Wa Christophe* 2012 INT 74; *Noormamode v. ICAC & Anor* 2015 SCJ 93.

8. *Joomeer v. State* 2013 SCJ 413.

9. *Id.*, para 33.

Another issue that courts have had to deal with is whether POCA is applicable to offences that were committed before it was enacted. In *Somauroo & Ors v. Independent Commission against Corruption*,[10] the applicants argued, inter alia, that 'in the absence of retrospective and retroactive provisions, the respondent is precluded from enquiring and investigating into alleged offences [in this case money laundering] which might have been committed before the coming into operation of' POCA.[11]

In dismissing the applicants' application, the Supreme Court held that section 90 of POCA empowered the police to investigate offences that were committed before POCA was enacted. The full bench of the Supreme Court held that 'the principle of non-retroactivity of criminal law…is in no way infringed by the investigation of facts prior to the enactment creating a specific offence so long as those facts tend to establish the commission of the offence not prior to the enactment but subsequent to the enactment.'[12] Therefore, in the light of those judgements, the questions of whether it is applicable to offences committed in Mauritius or to offences committed before it was enacted, have now been settled.

### *A. Offences under the Act*

As mentioned earlier, the Act criminalizes several corrupt activities. These include: bribery by public official; bribery of public official; taking gratification to screen offender from punishment; public official using his office for gratification; bribery of or by a public official to influence the decision of a public body; influencing public official; "trafic d'influence"; public official taking gratification; bribery for procuring contracts; conflict of interests; treating of public official; receiving gift for a corrupt purpose; corruption of agent; and corruption to provoke a serious offence. The author deals with the jurisprudence in which courts in Mauritius have interpreted the elements of some of the offences and the evidence that has to be adduced to prove that an offender committed an offence in question. Most of the offences refer to a 'public official.' It is imperative to first have a look at the definition of a public official and how a person's status as a public official has been or may be proved in court.

*1. Public official*—Section 2 of the Act defines a public official in the following terms:
(a) means a Minister, a member of the National Assembly, a public officer, a local

10. *Somauroo & Ors v. Independent Commission against Corruption* 2008 SCJ 307.
11. *Id.*, at 2.
12. *ICAC v. Somauroo & Ors* 2011 SCJ 299, at 4.

government officer, an employee or member of a local authority, a member of a Commission set up under the Constitution, an employee or member of a statutory corporation, or an employee or director of any Government company; (b) includes a Judge, an arbitrator, an assessor or a member of a jury; (c) includes an official of the International Criminal Court referred to in the International Criminal Court Act 2011.

Case law shows that courts have relied on different sources to conclude that a person is a public official. These have included the fact the accused is a senior employee of a local government,[13] is a manager of a government corporation,[14] is the chairperson of the committee of a statutory body,[15] has admitted that he is a public official, for example, and that he is a police official.[16] The circumstances of the case have led to the court's conclusion that there is no dispute that a witness[17] or the accused[18] is a public official because he or she was a cabinet minister (the accused);[19] a police official;[20] an employed official at the Ministry of Training Skills, Development and Productivity;[21] or a road traffic inspector.[22]

In some cases, evidence has been led to prove that the accused is a public official. These have included cases where the accused is an agricultural machinery operator at the Sugar Planters Mechanical Pool Corporation;[23] the prosecution

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13. *Independent Commission Against Corruption v. Sicharam* 2008 INT 436 (the complainant was the head of the Planning Department at one district council).

14. *ICAC v. Soobrah* 2013 INT 311, at 9.

15. *ICAC v. Bidianand Jhurry* 2010 INT 145 (the accused was the Chairman of the Sugar Industry Labour Welfare Fund Committee).

16. *Police v. Rambans Salick & Anor* 2008 INT 239, at 5.

17. *Police v. Parmanand Bundhoo* 2012 INT 80 (the court held that there was no dispute that the witness, whom the accused was attempting to bribe, was a police officer and therefore a public official). In *ICAC v. Roussety*, the Court held that 'It is not disputed that the complainant was a public official, being the Island Chief Executive of Rodrigues.' See *ICAC v. Roussety* 2012 INT 199, at 8.

18. *Police v. Joymungul Ambar Kumar* 2010 INT 12 (the court observed that it was not seriously disputed that the accused was a public official); *ICAC v. Jacques Roger Rousseau and Ors* 2014 INT 315, at 2.

19. *Police v. Jugnauth Pravind Kumar* 2011 PL3 213.

20. *Police v. Kiran Kumar Burhoo* 2010 INT 263; *Police v. Venkatakistnen Rangasananda* 2009 INT 91; *Police v. Soobarao Rama* 2009 INT 152; *ICAC v. Dowlut Imtiaz Khan* 2011 INT 84; *ICAC v. Gowry Suraj* 2013 INT 1; *ICAC v. Lutchmeenaraidoo Harishchandrah* 2009 INT 266.

21. *Police v. Veeria Hasokumar* 2009 INT 177.

22. *ICAC v. Seedeer* 2012 INT 92.

23. In *Police v. Ramchurn Shri Krishnaduth Jee*, the Court observed that 'it is not disputed that the accused was a public official within section 2 of the POCA. Witness Mungroo [Field Manager at SPMPC] confirmed that the accused was at the material time employed as Agricultural Machinery Operator by the SPMPC, no doubt a Statutory Corporation , governed by the Sugar Planters Mechanical Pool Corporation Act 1974.' See *Police v. Ramchurn Shri Krishnaduth Jee* 2012 INT 114, at 3.

producing a document or adducing evidence to show the accused's official status as a police officer;[24] a witness[25] or the prosecution[26] producing a letter from the Commissioner of Police to prove that the accused was a police officer or employed by the Road Development Agency.[27]

However, in some cases courts do not mention that the accused is a public official and the basis for that conclusion. This could be attributed to the fact that courts take judicial notice, without expressly stating so, that a police officer,[28] a probation officer[29] or land surveyor,[30] are public officials. A police officer will be prosecuted as a public official even if the gratification was solicited when he was off duty.[31]

*2. Bribery by public official*—Section 4 of the Act provides that:

(1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for - (a) doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties; (b) doing or abstaining from doing, or having done or abstained from doing, an act which is facilitated by his functions or duties; (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties; (d) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official, in the execution of the latter's functions or duties; (e) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, another person in the transaction of a business with a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e).

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24. *ICAC v. Baboolall* 2012 INT 77, at 2; *ICAC v. Seeruttun Leckram* 2009 INT 200.

25. *ICAC v. Gerard Phillippe Rayepa* 2011 INT 142, at 1.

26. *ICAC v. Hamtohul Balakrishna* 2008 INT 46, at 6; *ICAC v. Cangy* 2013 INT 287, at 2; *Independent Commission Against Corruption v. Chinnarassen* 2012 INT 229, at 1;

27. *ICAC v. Mohess* 2011 INT 14, at 2 and 7.

28. See for example, *ICAC v. Doyal* 2013 INT 62; *ICAC v. Soobrun Shivanand* 2006 INT 427; *Independent Commission Against Corruption v. Curpen Murday* 2013 INT 299.

29. *ICAC v. Pursoty* 2013 INT 134.

30. *Police v. Ghunowa Shalendrea* 2009 INT 51.

31. *ICAC v. Seeruttun Leckram* 2009 INT 200.

In *Hanumunthadu Rajen v. The State & Anor*,[32] in which the appellant, a town engineer, was convicted of soliciting a bribe from one of the contractors in order to certify and process a claim for the work the contractor had done, the Supreme Court held that:

> [I]n order to establish its case on a charge under section 4(1) of the POCA, what the prosecution had to establish, was that the appellant being a public official did solicit from the complainant a gratification for doing an act in the execution of his functions. It had to establish that the solicitation of the gratification was in relation to an act which falls within the execution of the officer's functions and that processing and certification of claims averred in the information formed part of the duties of the appellant. It was however not an element of the offence and it was not necessary for the prosecution to establish that the appellant had indeed processed or certified the claims. Indeed…section 4(1)(a) creates a distinct offence of a public official soliciting a gratification for having done an act in the execution of his duties. It is under that offence that it becomes necessary for the prosecution to prove that the act in respect of which the gratification was solicited, was in fact carried out by the public official.[33]

The Court appears to be of the view that section 4(1) creates an offence distinct from those under subsections (1)(a) – (1)(e). This reasoning is further supported by the Court's holding that '[a]n offence under section 4(1) of the POCA is committed the moment that the solicitation is made…'[34] In the author's opinion, that holding is debatable. This is because section 4(1) contains words that are meant to apply to all the paragraphs that follow it as each paragraph creates distinct offences. For the accused to be convicted under section 4(1)(a), the prosecution must prove, inter alia, the purpose for which the gratification was allegedly sought otherwise the accused will be acquitted.[35] If the prosecution alleges that the accused received a gratification for himself but the person who gave the said gratification testifies in evidence that he gave it to the accused for the accused to give it to another person, the accused will be

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32. *Hanumunthadu Rajen v. The State & Anor 2010 SCJ 288.*

33. *Id.*, at 5.

34. *Id.*, at 16.

35. *Curpen v. Independent Commission Against Corruption & Anor* 2015 SCJ 66, at 3; *ICAC v. Doyal*, *supra* note 28, at 2.

acquitted.[36]

In *Suneechara v. The State,*[37] the Supreme Court held 'that section 4(1)(a) sets down a number of permutations and possible ways whereby the offence of bribery by a public official can be committed.'[38] For a public official to be convicted under section 4(1)(a) for obtaining a gratification for 'doing…an act in the execution of his functions or duties' the prosecution must prove that the act he did was in the execution of his duties.[39]

In *Independent Commission Against Corruption v. Seeneevassen,*[40] the accused, a police official, was prosecuted under section 4(1)(b) because he, inter alia, collected, for his colleague's business, an outstanding debt. The Supreme Court in acquitting him held that 'paying a debt to CIM cannot form part of the duties of a police officer; nor can it be an act done by a police officer in the execution of his duties.'[41] For the accused to be convicted of soliciting a gratification for 'himself', the prosecution does not have to prove that the gratification was indeed for the accused. The court can infer from the circumstances of the case to conclude that 'the money would have been for the accused himself.'[42]

A person prosecuted for soliciting a gratification under section 4(1)(a) will be convicted even if he does not accept the money from the person from whom he solicited it because 'the charge is one of *soliciting* and not of accepting a gratification.'[43] This is because 'If ever there was no solicitation whatsoever, one would have expected the accused to report the complainant for offering bribe.'[44] For a person to be convicted of soliciting a gratification, the prosecution must prove that the words he used indeed meant that he was soliciting a bribe. A court will not take judicial notice of the fact that some words mean that the person is soliciting a bribe.[45] For a person to be convicted under section 4(1)(b) the prosecution must prove, inter alia, that the solicitation of the

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36. ICAC v. Doyal, *id.*, at 5.

37. *Suneechara v. The State 2007 SCJ 131.*

38. *Id.*, at 16.

39. *ICAC v. Soobrun Shivanand, supra* note 28. See also, *ICAC v. Soobrun* 2007 SCJ 318 in which the Supreme Court did not question the holding that for a person to be convicted he must have obtained the gratification in the execution of his duties.

40. *Independent Commission against Corruption v. Seeneevassen 2012 SCJ 328.*

41. *Id.*, at 7.

42. *Independent Commission against Corruption v. Chinnarassen* 2012 INT 229, at 7.

43. *Independent Commission against Corruption v. Curpen Murday* 2013 INT 299, at 9. Emphasis in original.

44. *Id.*, at 9. The accused, suspecting that he had been trapped by ICAC officials, refused to accept money from the witness although he attempted several times to give it to him.

45. *ICAC v. Dowlut Imtiaz Khan* 2011 INT 84, at 3.

gratification was in 'relation to an act which was facilitated by the accused's functions [or duties].'[46] In *ICAC v. Gowry Suraj,*[47] the accused, a police official, was convicted under section 4(1)(b) of accepting an offer of money to facilitate an offender's escape from lawful custody. Where the accused, a police officer, fined the witnesses for contravening traffic rules, the prosecution could not argue that he had 'solicited from another person, for himself, a gratification for abstaining from doing an act in the execution of his duties.'[48]

Another issue relates to the burden that is imposed on the accused under section 4(2). Is it a burden of proof, in that the accused must prove his innocence if he is to escape a conviction, or it is an evidential burden. In *Suneechara v. The State,*[49] one of the issues that the Supreme Court dealt with was whether section 4(2) of POCA 'is compliant…with the presumption of innocence [under section 10 of the Constitution] which places an onus upon the prosecution to prove all the elements of the offence with which an accused is charged.'[50] Relying on the relevant jurisprudence from England and Mauritius on the presumption of innocence, the Court observed that '[t]he presumption of innocence has long been a governing principle of criminal law' and that '[i]t is nothing new in our concept of criminal law and section 10(2)(a) of our Constitution but affirms that principle.'[51] The Court added that '[b]ut that principle though regarded as supremely important was stated [in a 1935 English court decision] not to be absolute.'[52] The Court referred to several cases from England on the issue of the presumption of innocence[53] and held that:

> There is no doubt that the underlying rationale of the presumption of innocence is a simple one: that it is repugnant to ordinary norms of fairness for the prosecution to accuse a defendant of crime and for the latter to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. However, any sovereign state has the full powers to legislate and to define the constituent elements of an offence. It may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it

46. *ICAC v. Suresh Mahadeo*, *supra* note 7, at 13.
47. *ICAC v. Gowry Suraj, supra* note 20.
48. *ICAC v. Cangy* 2013 INT 287.
49. *Suneechara v. The State, supra* note 37.
50. *Id.*, at 26.
51. *Id.*
52. *Id.*
53. *Id.*, at 27.

> results from criminal intent or from negligence. Indeed presumptions of fact or of law operate in every legal system and our Constitution does not prohibit such presumptions in principle. However, the State must remain within certain limits in this respect as regards Criminal law. Otherwise, the legislature would be free to strip the trial Court of any effective power of assessment and deprive the presumption of innocence of its substance. A balancing exercise must be carried out and section 10(2) of the Constitution would require the legislature to confine itself within reasonable limits which take into account the importance of what is at stake while maintaining the rights of the defence. The question in any case must be whether, on the facts, the reasonable limits to which a presumption must be subjected have been exceeded.[54]

The Court then referred to jurisprudence from the European Court of Human Rights and the European Commission of Human Rights on the issue of reasonableness[55] and held that 'section 4(2) of the POCA does not infringe the principle of fair trial and more specially [sic] that of presumption of innocence enshrined in section 10(2) of the Constitution.'[56] The Court seems to be of the view that the offender's right to be presumed innocent is not absolute and that there are certain circumstances under which he had to challenge the prosecution's case if he is to escape a conviction. It is argued that this holding threatens the accused's right to remain silent at his trial. The author is of the view that the preferred approach is not to interpret the presumption under section 4(2) as imposing a burden of proof on the accused, however exceptional the circumstances may be, but rather to interpret it as an evidential burden. The latter approach was taken by the Supreme Court in a later decision. In *Hanumunthadu Rajen v. The State & Anor,*[57] the Court also referred to section 4(2) and held that:

> [T]he prosecution had established…that the appellant had solicited the gratification, there was accordingly a presumption that this gratification was solicited for one of the purposes set out in the subsection which in this case is under sub section (1)(a), namely, for

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54. *Id.*, at 28.

55. *Id.*, at 29 – 30.

56. *Id.*, at 30. See also, *Parayag v. The Independent Commission against Corruption* 2011 SCJ 309, at 16.

57. Hanumunthadu case, *supra* note 32.

> performing an act in the execution of his functions, and which is particularised in the information as being the processing of the claims of the respondent. There was thereafter an evidential burden upon the appellant to prove the contrary and on the evidence, he has clearly failed to discharge this burden.[58]

The Supreme Court thus makes it very clear that the burden imposed on the accused under section 4(2) is an evidential burden. It is not a burden of proof. He does not have to prove his innocence. For the accused to escape a conviction, the burden imposed on him has to be discharged on a balance of probabilities.[59] Section 4 criminalises a wide range of activities and many public officials have been prosecuted and convicted in terms of this section for conduct such as soliciting for a bribe so as not to fine a person driving a vehicle without a valid licence,[60] soliciting for a bribe on behalf of his superior,[61] and soliciting a bribe for himself and for another police official so as not to fine the complainant for driving a vehicle without a licence.[62]

*3. Bribery of a public official*—Section 5 provides that:

(1) Any person who gives, agrees to give, or offers a gratification to a public official for—(a) doing, or for abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties; (b) doing or abstaining from doing, or for having done or abstained from doing, an act which is facilitated by his functions or duties; (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties; (d) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official in the execution of the latter's functions or duties; (e) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed another person in the transaction of a business with a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence under subsection (1) it is proved that the accused gave, agreed to give or offered

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58. *Id.*, at 9.

59. *ICAC v. Hamtohul Balakrishna*, *supra* note 26, at 10 (the court was referring to section 83 of POCA). See also, *Independent Commission Against Corruption v. Balluck* 2009 INT 101, at 9.

60. *Police v. Rambans Salick & Anor* 2008 INT 239 (this was in terms of section 4(1)(b)).

61. *Police v. Joymungul Ambar Kumar*, *supra* note 18.

62. *Bissessur v. The State & Anor* 2012 SCJ 16 (contrary to section 4(1)(b)).

gratification, it shall be presumed, until the contrary is proved, that the accused gave, agreed to give or offered the gratification for any of the purposes set out in subsection (1)(a) to (e).

The person contemplated in section 5 could be a public official bribing another public official or a person not being a public official bribing a public official. The prosecution must prove that the person being bribed is a public official and that the 'accused wilfully and unlawfully offered a gratification' to a public official.[63] Both natural and juristic persons may be prosecuted under section 5. The challenge though is that should a juristic person, for example, a company be convicted of an offence under section 5, there is no penalty prescribed for it. This rather unfortunate situation was evident in *Police v. Boskalis International bv and anor*[64] where the two companies pleaded guilty and were convicted of bribing public officials. However, the court could not impose a sentence on them as no sentence is provided for under section 5 for corporations. The Court held that 'i]n view of the impossibility to apply the sentence provided by section 5 of the POCA to corporate bodies, the legislator may consider taking legislative action so that there is no more the perception that corrupt corporate bodies can get away scot-free in Mauritius.'[65]

All the cases that the author is aware of have included non-public officials attempting to bribe public officials. For example, in *Police v. Parmanand Bundhoo,*[66] the accused who was driving under the influence of alcohol, was convicted of offering a gratification to a police officer to abstain from doing an alcohol test on him. In *Police v. Mohammad Ziad Aumeer,*[67] the accused was convicted on his plea of guilty for bribing a police official so as not to issue him fines for contravening a number of traffic laws. In *Police v Soobarao Rama*[68] the accused was convicted of bribing a police officer so as not to fine him for dangerous driving.

*4. Public official using his office for gratification*—Section 7 of the Act provides that:

(1) Subject to subsection (3), any public official who makes use of his office or position for a gratification for himself or another person shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

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63. *Police v. Parmanand Bundhoo* 2012 INT 80, at 3.
64. *Police v. Boskalis International bv & Anor* 2013 INT 288.
65. *Id.*, at 15.
66. *See Police v. Parmanand Bundhoo, supra* note 63.
67. *Police v. Mohammad Ziad Aumeer* 2014 INT 233.
68. *Police v. Soobarao Rama, supra* note 20.

(2) For the purposes of subsection (1), a public official shall be presumed, until the contrary is proved, to have made use of his office or position for a gratification where he has taken any decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest.
(3) This section shall not apply to a public official who - (a) holds office in a public body as a representative of a body corporate which holds shares or interests in that public body; and (b) acts in that capacity in the interest of that body corporate.

For a public official to be convicted of an offence under section 7, the prosecution has to prove one or a combination of the following elements: that he made use of his office for a gratification for himself; that he made use of his position for gratification for another person.[69] In *Independent Commission Against Corruption v. Seeneevassen*[70] in which a police official was accused of obtaining a gratification under section 7, the Supreme Court, in acquitting him, held that there was 'no evidence…that [he] obtained the money because he was a police officer.'[71] The Court added that section 7(2) is applicable in a situation 'where a public official uses his position, for example, to award a contract to a company in which he and his spouse own all the shares.'[72]

In *ICAC v. Soobrah,*[73] the accused was prosecuted under section 7(1) for failure to follow conventional practice in selling the corporation's unserviceable assets when he sold the said property to his work colleague and for appointing the same colleague as an employee of the corporation without the necessary qualifications. The court in acquitting him held that at the time he approved the sale there were no regulations that he should have followed and that the appointment of the employee had been approved by the board at a later stage. For the accused to be convicted under section 7(1), there is no need for the prosecution to prove that he obtained a gratification.[74] The Supreme Court held that:

> The opprobrium lies in the abuse or misuse of the office or the position as a public officer for a gratification. Whether the gratification is

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69. In addition to the above elements, the prosecution has to prove that the accused is a public official. See *ICAC v. Tupsy* 2014 INT 223, at 1. See also, *Police v. Charlot* 2008 INT 440 where the Court in acquitting the accused held, inter alia, that there was no evidence that he had solicited for a gratification for himself.

70. Seeneevassen case, *supra* note 40.

71. *Id.*, at 7.

72. *Id.*

73. *ICAC v. Soobrah* 2013 INT 311.

74. *ICAC v. Tupsy*, *supra* note 69, at 1.

> received or accepted is not part of the elements of the offence even if the reception or the acceptance adds further evidential weight to prove that the abuse of office was "for gratification."[75]

In *Joomeer v. State*,[76] the Supreme Court held that:

> The section that creates the offence is section 7(1) of the Act. Section 7(2) is only an evidential section. It creates a presumption. But the presumption operates not in all the cases falling under the purview of section 7(1) but only in those situations where the public official "has taken [a] decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest."[77]

Those who have been convicted under section 7(1) have included a police official who accepted a bribe from a driver for not reporting road traffic offences against him (he had used his position),[78] an agricultural machinery operator who used the Sugar Planters Mechanical Pool Corporation's tractor to plough people's land and pocket the money,[79] and the chairperson of the committee of a statutory body who used his position to appoint his relatives to different vacant posts.[80]

*5. Influencing public official*—Section 9 provides that:

Any person who exercises any form of violence, or pressure by means of threat, upon a public official, with a view to the performance, by that public official, of any act in the execution of his functions or duties, or the non-performance, by that public official, of any such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

For a person to be prosecuted in terms of section 9, he does not have to be a public official. What matters is that he or she threatens or commits any of the prohibited acts against a public official. In *Independent Commission against Corruption v Sicharam,*[81] the accused, a councillor at the district council, used abusive language against an official whom he though was responsible for his friends' company's

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75. *Joomeer v. State*, *supra* note 8, para 43.
76. *Id.*.
77. *Id.,* para 47. Emphasis removed.
78. *Police v. Kiran Kumar Burhoo*, *supra* note 20.
79. *Police v. Ramchurn Shri Krishnaduth Jee*, *supra* note 23.
80. *ICAC v. Bidianand Jhurry*, *supra* note 15.
81. *Independent Commission Against Corruption v. Sicharam, supra* note 13.

unsuccessful application for a development permit, threatened her and also verbally harassed her during the Planning Committee meetings. The Court held that there was evidence that the accused threatened the complainant and he was convicted accordingly. The Court observed that:

> I am satisfied that [the complainant] was a Public Official since she was the Head of the Planning Department at the Black River District Council. I am satisfied that in that capacity she had to make recommendations in respect of the granting of development permits, whether the recommendations were binding or not. I find that it was her duty to act in a professional and in an objective manner without interference in the execution of her duties. Since the accused came to her office and shouted at her… I find that the conduct of the accused clearly shows that the accused did exercise pressure by means of threat upon witness…so that the latter made a favourable recommendation to the Planning Committee in respect of the application of [the accused's friend's company] for a development permit.[82]

Although section 9 punishes 'any person' including a public official who commits any of the prohibited acts, the author is not aware of any case in which people who are not public officials have been convicted of violating section 9. It is also important to note that in all cases where people have been convicted under section 9, it was a senior or influential public official threatening a relatively junior public official. This means that section 9 could be an effective tool to prevent senior public officials from coercing junior public officials to make decisions that further the former's personal interests.

A public official who discloses confidential official documents to a corruption investigating body for that body to investigate an allegation that he had been threatened by another public official to perform or refrain from performing an act does not commit an offence.[83] This is because the POCA imposes a duty on public officials to report acts of corruption and the ICAC has a duty to keep such information as confidential.[84]

In *ICAC v. Roussey,*[85] the accused, the Chief Commissioner of the Rodrigues Regional Assembly, was convicted of exercising pressure by means of a threat on the Chief Executive of the Rodrigues Regional Assembly to set up a board, made up of

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82. *Id.*, at 6.
83. *Police v. Roussety* 2011 INT 130.
84. *Id.*, at 5 – 7.
85. *ICAC v. Roussety, supra* note 17.

people chosen by the accused, to appoint temporary employees. Evidence showed that the accused had threated the Island Chief Executive of the Rodrigues Regional Assembly that if he did not appoint the said board, he would recommend to the Prime Minister to dismiss him from his post.[86]

*6. 'Trafic d'influence'*—Section 10 creates different offences and section 10(4) provides that:

Any person who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

The person referred to in section 10 who uses his influence does not have to be a public official. What matters is that the benefit is to be obtained from a public body. In *ICAC v. Bumma,*[87] the accused, 'a very influential political person who had contacts at the Public Service Commission',[88] was prosecuted of soliciting a gratification from the complainant to use his influence for her to be offered a teaching job by the Public Service Commission. He had allegedly promised to use his 'political influence' to that end.[89] A public body is defined in section 2 of the POCA to mean: 'a Ministry or Government department, a Commission set up under the Constitution or under the authority of any other law, a local authority, or a statutory corporation; and (b) includes a Government company.'

In *ICAC v. Dauhoo Mohammad Iqbal,*[90] the accused was charged with obtaining a gratification from one A for the Master and Registrar of the Supreme Court for the cancellation of the sale of a plot. The accused's lawyer argued that the office of the Master and Registrar of the Supreme Court was not a public body within the meaning of section 2 of the Act. The Court in acquitting the accused held that:

> Can the court give a wide interpretation to public body to include the office of the Master and Registrar in the present information? The legislator made the distinction within the POCA itself between the

86. *Id.*, at 4.

87. *ICAC v. Bumma* 2010 INT 227.

88. *Id.*, at 2. The accused was acquitted because of the inconsistencies in the state witnesses' evidence.

89. *Id.*, at 4.

90. *ICAC v Dauhoo Mohammad Iqbal* 2008 INT 267.

> corruption of a public official and a public body and took pains to define it in the definition section. True it is that one section is headed "Bribery of public official" and the other "traffic d'influence". However, we find that there is no ambiguity to resolve in the present matter because the definitions are clear. The definition of Master and Registrar cannot be stretched to be brought within the definition of "a public body" as the information [charge sheet] is presently worded.[91]

The Court concluded that:

> The fact that the accused is alleged to have played an intermediary role, has prevented the prosecution in the present case from making full use of either section 5 or of section 10. The fact that the POCA does not cater for this particular scenario does not mean that the court can substitute itself for the legislator.[92]

Therefore, the mere fact that a person is a public official does not mean that he works for a public body. However, it is also possible for the accused to be a public official who is also working for a public body.[93] In *ICAC v. Gerard Phillippe Rayepa*,[94] the accused, a police officer, was convicted under section 10(4) for soliciting a bribe from one of the witnesses to help him obtain a driving licence. He informed him that the money was 'for the "Boss" and others involved in the operation.'[95] In his defence, he argued that he had borrowed the money from the witness because he was 'in financial difficulty and used that money to pay his electricity bill.'[96] In convicting the accused, the court held, inter alia, that 'the way the money was used is immaterial so long that accused has taken it for himself. An accused may chose to spent [sic] the money as he so wishes and it may a mitigating factor but not an excuse.'[97]

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91. *Id.*, at 4.
92. *Id.*
93. In *ICAC v. Satyawan Kutwaroo & Anor*, the Court observed that 'Accused No.1 is a draughtsman and Accused no.2 is an Inspector of Works. Both are posted at the Pamplemousses and Riviere du Rempart District Council. The District Council is a public body and both accused are public officials within the meaning of s. 2 of the Prevention of Corruption Act 2002.' See *ICAC v. Satyawan Kutwaroo & Anor* 2015 INT 24, at 1. See also, *Mungree v. The State & Ors* 2013 SCJ 468, where the district official allegedly solicited a gratification to remit to other district officials).
94. *ICAC v. Gerard Phillippe Rayepa* 2011 INT 142.
95. *Id.*, at 2.
96. *Id.*, at 3.
97. *Id.*

In *ICAC v. Dauhoo Mohammad Iqbal,*[98] the Court referred to section 10 of POCA and held that 'the word "benefit" is meant to be all encompassing. It is not possible to legislate or define all possible situations which may arise and we are of the view that "benefit" should not be interpreted restrictively…'[99]

For the accused to be convicted under section 10, the prosecution must prove the purpose for which the gratification was solicited otherwise the accused will be acquitted.[100] If the prosecution alleges that the accused obtained a gratification in order to use his influence, it must prove that there was such remittance to the accused otherwise the accused will be acquitted.[101] The identity or existence of the person at the public body to whom the gratification was to be remitted must also be proved if the accused is to be convicted.[102] In *Mungree v. The State & Ors*[103] in which the accused was prosecuted for soliciting a gratification for another person, the Supreme Court in allowing his appeal held 'that the evidence on record fell short of establishing to the required standard of proof who was or were to be the recipient(s) of the gratification solicited by the accused.'[104] Proving the existence of such recipients is in line with the accused's right to a fair trial to be informed in detail of the charge against him.[105]

*7. Public official taking gratification*—Section 11 provides for the offence of a public official taking gratification. It is to the effect that: Any public official who accepts or receives a gratification, for himself or for any other person—(a) for doing or having done an act which he alleges, or induces any person to believe, he is empowered to do in the exercise of his functions or duties, although as a fact such act does not form part of his functions or duties; or (b) for abstaining from doing or having abstained from doing an act which he alleges, or induces any person to believe, he is empowered not to do or bound to do in the ordinary course of his function or duty, although as a fact such act does not form part of his functions or duties, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Section 11 deals with a situation where a public official does or induces another person to believe that he is empowered to do something 'although as a fact such act

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98. *ICAC v. Dauhoo Mohammad Iqbal, supra* note 90.
99. *Id.*, at 5.
100. *ICAC v. Mohungur* 2014 INT 114; *ICAC v. Satyawan Kutwaroo & Anor*, *supra* note 93.
101. *Independent Commission Against Corruption v. Buddoo* 2012 INT 176, at 3.
102. *Id.*, at 4.
103. *Mungree v. The State & Ors, supra* note 93.
104. *Id.*, at 7.
105. *Id.*, at 9.

does not form part of his functions or duties.' In *ICAC v. Hamtohul Balakrishna,*[106] the accused, a police sergeant, was prosecuted under section 11 for receiving for himself a certain amount of money from a member of the public by inducing him to believe that he could cause him 'to secure a provisional driving licence whereas in truth and in fact this was not the case.'[107] The prosecution proved that the accused 'was not employed at the licensing section, the sole body responsible for issuing competent driving licence.'[108] The Court, on the basis of the accused's admission that he had received the money from the state witnesses, although as loans, and the state witnesses' evidence that the money had been for the accused to secure them driving licences, convicted him accordingly.

*8. Conflict of interests*—Section 13 provides for the offence of conflict of interests as follows:

(1) Where (a) a public body in which a public official is a member, director or employee proposes to deal with a company, partnership or other undertaking in which that public official or a relative or associate of his has a direct or indirect interest; and (b) that public official and/or his relative or associate hold more than 10 per cent of the total issued share capital or of the total equity participation in such company, partnership or other undertaking, that public official shall forthwith disclose, in writing, to that public body the nature of such interest.

(2) Where a public official or a relative or associate of his has a personal interest in a decision which a public body is to take, that public official shall not vote or take part in any proceedings of that public body relating to such decision.

(3) Any public official who contravenes subsection (1) or (2) shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Apart from POCA, the Local Government Act creates the offence of conflict of interest.[109] However, unlike POCA which empowers the court to impose a sentence of up to 10 years' imprisonment on an offender convicted of conflict of interests, the Local Government Act provides for a fine and imprisonment not exceeding two years. In *ICAC v. Chetanand Pursun & Ors,*[110] the accused were prosecuted under section 13 of POCA instead of section 99 of the Local Government Act and they argued that this was an abuse of process. The Court in dismissing their applications held that the DPP

106. *ICAC v. Hamtohul Balakrishna, supra* note 26.
107. *Id.*, at 1.
108. *Id.*, at 9.
109. Section 99.
110. *ICAC v. Chetanand Pursun & Ors* 2010 INT 104.

had the discretion to determine under which law to prosecute the accused.

In *ICAC v. Naushad Maudarbaccus and anor,*[111] the accused were prosecuted under section 13 for conflict of interest in that 'whilst being public officials, they took part in the proceedings of a public body whilst their relatives had a personal interest in a decision of the public body.'[112] Accused number one chaired an ad hoc committee meeting of the Tobacco Board at which his wife's application for a tobacco growing licence was considered and approved. Accused number two was charged with having taken part in the said meeting at which his wife's application for a tobacco growing licence was approved.[113] Evidence was led to show that:

> The Committee noted that some of the applicants were related to certain members and/or employees of the Board. The Committee held the view that the Board should take the policy decision as to whether employees of the Tobacco Board and/or close relatives might hold permits to grow tobacco. The Committee recommended to the Board that all applicants be granted a license and to take a policy decision in case of related parties. Accused no 3 was asked to leave the Committee before the application was discussed being given that there was conflict of interest as his wife was one of the applicants and he did so.[114]

Accused number one 'admitted that one of the applicants was his wife and that the recommendation of the Ad Hoc Committee was not binding upon the Board.'[115] All the accused argued that all the board members were aware of the fact that their relatives had applied for the licences and that they had declared their conflict of interest.[116] In convicting the accused, the Court observed that:

> The fundamental principle remains that any proceeding before any Board has to be conducted in a fair and just manner and has to be perceived to be fair and just by any onlooker. The fact that accused no 1 was the Chairman of the Board and accused nos 2 and 3 were

111. *ICAC v. Naushad Maudarbaccus & Anor* 2010 INT 197.
112. *Id.*, at 1.
113. *Id.*
114. *Id.*, at 3.
115. *Id.*, at 3 – 4.
116. *Id.*, at 4 – 5.

> members of the Board and they remained on the Board when the recommendations of the Ad Hoc Committee in relation to the applications of their relatives were being tabled and ratified before the Board cannot be perceived to be manifestly just and fair in as much as they might have affected the tenor of the debates by their mere presence.[117]

The Court concluded that 'it would not be unreasonable, from the vantage point of the fair-minded and informed observer, to come to the conclusion that a real possibility of bias remained in the proceedings before the Board by the mere presence of the accused parties.'[118]

However, in *ICAC v. Beegoo Kunal,*[119] the accused was present during a committee meeting at which the issue of the renewal of his father's contract to work for a public body, at which the accused was employed in a senior position, was discussed and did not disclose that the applicant was his father although 'everyone [on the committee] knew that the accused was the son of' the applicant.[120] However, the minutes of the meeting show that 'the accused did not talk at all nor did he intervene in that decision. In fact he stayed mute when the decision for the renewal of the contract of his father was taken.'[121] All the committee members knew that the accused was the applicant's son but he 'was not formally asked to momentarily leave the meetings when the decision regarding [his father's contract] was discussed and taken.'[122] In acquitting the accused, the court held that he had not taken part in the proceedings of the meeting because '[t]he word "take part" should certainly be construed as the accused taking an active part in the decision of the committees as opposed to his mere presence the more so that he did not even opened [sic] his mouth during that particular deliberation.'[123]

The above cases show that it is not enough for the accused to declare his conflict of interest, in addition to declaring his conflict of interest, he must also not take part in a meeting at which his relative's application will be considered. The accused also does not have to declare his conflict of interests if everyone knows that there is such conflict as long as he does not participate in the deliberations dealing with the issue in which he has an interest.

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117. *Id.*, at 7 – 8.
118. *Id.*, at 9.
119. *ICAC v. Beegoo Kunal* 2009 INT 166.
120. *Id.*, at 2.
121. *Id.*, at 3.
122. *Id.*, at 3.
123. *Id.*, at 4.

In *ICAC v. Jandoo,*[124] the accused was prosecuted under section 13 because 'whilst being a member of the Board of the Information and Communications Technology Authority (ICTA) he took part in the proceedings as regards the sale of car…when he was interested in obtaining the car for his personal use.'[125] Bids were submitted for the cars and the accused knew two of the bidders, a fact he did not disclose because he was not related to them.[126] He had helped one of the bidders to prepare the bid documents which helped her to win the bid. However, the accused had given money to one of the bidders to disguise as the buyer although the accused was the real buyer. When the car was sold, it was the accused that paid for its insurance and drove it. It was against that background the he was convicted of conflict of interest.

If an accused is prosecuted under section 13(1) for taking part in the proceedings of a public body at which a decision is taken to benefit his relative, the charge sheet must include the word 'relative' and not 'relation.' In *ICAC v. Moossun,*[127] the court held that the use of the word 'relation' instead of 'relative' in the charge sheet in the prosecution of the accused under section 13(1) meant that the accused was prosecuted for an offence that did not exist and the court ordered the stay of the accused's prosecution. The Court also held that he could not be retried as this would amount to an abuse of process as the Supreme Court had held that the accused had been tried for an offence that did not exist.[128]

*9. Corruption of agent*—Section 16 provides that:

(1) Any agent who, without the consent of his principal, solicits, accepts or obtains from any other person for himself or for any other person, a gratification for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal's affairs or business, or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any person who gives or agrees to give or offers, a gratification to an agent for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal's affairs or business or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude

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124. *ICAC v Jandoo* 2013 INT 95.

125. *Id.*, at 1 and 2.

126. *Id.*, at 4.

127. *ICAC v. Moossun* 2014 INT 225.

128. For the Supreme Court reasoning, see *Moossun v. The Independent Commission Against Corruption* 2013 SCJ 70.

for a term not exceeding 10 years.

Section 16(1) deals with an agent who solicits, accepts, obtains a gratification and section 16(2) deals with the person who gives, agrees to give or offers a gratification to an agent. In *ICAC v. Boutanive,*[129] the accused, a freelance jockey, was prosecuted under section 16(1) for having been paid for riding horses without his principal's consent. The Court observed that the prosecution had to prove the following elements for the offence under section 16(1): 'an agent; without the consent of principal; accept a gratification; for having done an act; in relation to his principal's business.'[130] The Court found that 'there was no contract of employment between the stable and the accused but merely a gentleman's agreement' and that a senior member from the stable gave evidence that the accused was a freelance jockey who 'could ride for whomsoever he wished.'[131]

The Court also found that there was no evidence that the accused had been paid the said commission without the stable's consent. It is against that background that the accused was acquitted. It is therefore important that for a person to be convicted under section 16(1), there is clear evidence that he was an agent for the principal and that one of the ways to prove that is to show that there is a contract of employment between the two.

As mentioned above, in *ICAC v. Boutanive,*[132] the Court held that the offence in section 16(1) has five ingredients. However, in *ICAC v. Nauzeer,*[133] the Court held that the offence under section 16(1) has seven essential ingredients: an agent of his principal; without the consent of his principal; solicits, accepts or obtain; from another person; a gratification; for himself or for any other person; for doing or abstaining from doing an act in the execution of his functions or duties, or for having done or abstained from doing such an act.[134] In *ICAC v. Nauzeer,*[135] the accused, a security guard, was prosecuted for obtaining a gratification to recommend the complainants to his employer to employ them as security guards. The Court held that: 'the seven ingredient of the present offence may be committed in two ways, namely for doing an act in the execution of his duties or for having done an act in the execution of his duties.'[136] After highlighting how courts have interpreted some of the sections creating offences in

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129. *ICAC v. Boutanive* 2012 INT 240.
130. *Id.*, at 3.
131. *Id.*, at 4.
132. *ICAC, supra* note 129.
133. *ICAC v. Nauzeer* 2013 INT 110.
134. *Id.*, at 1 – 2.
135. *ICAC, supra* note 133.
136. *Id.*, at 4.

POCA, it is now imperative to have a look at the jurisprudence in which courts have interpreted the sections relating to the issue of reporting corruption.

*10. Reporting corruption*—Both public officials and non-public officials are empowered to report corruption. In most of the cases discussed in this article, members of the public reported public officials who allegedly committed corrupt activities to the Independent Commission against Corruption (ICAC). There are also cases where public officials have reported fellow public officials to the ICAC.[137] Section 48 imposes an obligation on the ICAC to keep as confidential the identity of the person who has reported an act of corruption to it. It provides for what is known as the 'informer's privilege' in the law of evidence.

Under section 49, a person who discloses to the ICAC information that an act of corruption has been committed by another person is immune from civil and criminal liability resulting from that disclosure.[138] It has been held that section 49 'shields those persons who disclose information to the ICAC from civil or criminal liability as a result of such disclosure in order to assist the ICAC in its investigation.'[139] However, section 49(6) provides that '[a] person who makes a false disclosure under subsection (1) or (2) knowing it to be false shall be guilty of an offence and shall, on conviction, be liable to pay a fine...and to imprisonment not exceeding one year.' The purpose of section 49(6) is to prevent false disclosures.

In *P v. Gobin Hemraz,*[140] the accused was convicted of making a false disclosure to ICAC. It should be noted that for a person to qualify for the immunity under section 49(6), he has to make the disclosure to the officials mentioned in section 49(1) and (2). If the person disclosing an act of corruption is not a public official, he has to disclose it to a member of the ICAC Board or an officer of ICAC. If he is a public official, he has to make the disclosure to 'his responsible officer or to the Director-General.'

In *ICAC v. Chaundee,*[141] the court dealt with the issue of whether a member of the public who had disclosed an act of corruption to a police officer instead of

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137. See for example, *Police v. Ramchurn Shri Krishnaduth Jee*, *supra* note 23 (where the General Manager of Sugar Planters Mechanical Pool Corporation reported to ICAC that one of his employees had used the Corporation's tractor to plough people's land and take the money); *ICAC v. Suresh Mahadeo, supra* note 7 (where the Board of the Rose Belle Sugar Estate reported the accused, the General Manager of the Estate, to ICAC for soliciting a gratification contrary to section 4(1)(b)).

138. See *Parayag v. The Independent Commission Against Corruption*, *supra* note 56, at 12.

139. *Oshi v. Municipal Council of Quatre Bornes* 2015 INT 86, at 3.

140. *P v. Gobin Hemraz* 2013 PL2 10.

141. *ICAC v. Chaundee* 2012 INT 88.

disclosing it to the ICAC officer was immune from prosecution in terms of section 49. The accused was prosecuted for bribery of a public official contrary to section 5(1)(b) of ICAC. He had reported to a police station an act of corruption that had been allegedly committed by another police officer. After the necessary investigations, the police referred the matter to ICAC which found that the accused's allegations were false hence the prosecution. His lawyer argued that his prosecution was an abuse of the process of the court because it was the accused who had reported the alleged act of corruption to the police. The prosecution argued that had the accused reported the allegation to ICAC, section 49 would have been applicable.[142] The Court held that because of the fact that the police reported the allegation to ICAC three days after the accused had reported it to the police, the accused had 'indirectly' reported that allegation to ICAC because 'had the Accused not reported or disclosed the alleged act of corruption to the Police …, such an act would never have been disclosed to ICAC as well.'[143] The Court added that:

> It is obvious that a very narrow literal reading of section 49(1) of the Act would be in line with the submissions of the Prosecution in this case as the disclosure was made in the first instance to the Police authorities and not directly to the ICAC so that the Accused may not benefit the immunity. However, it is also undisputed that after the matter was referred to ICAC…, the Accused reiterated his allegation of the act of corruption against [the police officer] to ICAC officers…who recorded same in presence of a senior investigator of the Commission… Thus, this time there can be no doubt that the Accused directly disclosed the alleged act of corruption to two officers of the Commission and falls squarely within the four corners of section 49 of the Act.[144]

It is against that background that the Court held that it would be an abuse of its process to prosecute the accused under section 5(1). However, it concluded that there was no dispute that 'the Accused might have made up a false allegation against the Police Officer and therefore bearing potentially all elements of an offence under section 49(6) of the Act.'[145] This case highlights the fact that there may be a need to amend POCA

142. *Id.*, at 7.
143. *Id.*, at 8.
144. *Id.*, at 8 – 9.
145. *Id.*, at 9.

so that members of the public can report allegations of corruption to other law enforcement officers in addition to those who work at ICAC. This now takes us to the jurisprudence on the issue investigating corruption.

*11. Investigating corruption*—Section 46 provides that:
(1) Where…the Commission becomes aware that a corruption offence or a money laundering offence may have been committed, it shall…refer the matter to the Director of the Corruption Investigation Division who shall forthwith make a preliminary investigation of the matter. (b) The Director of the Corruption Investigation Division shall, within 21 days of a referral under paragraph (a) or within such other period as the Commission may direct, report to the Commission on the matter.
(3) Upon receipt of a report under subsection (1)(b) or 2, the Commission shall - (a) proceed with further investigations; or (b) discontinue the investigation.
Section 47 provides that:
(1) Where the Commission proceeds with any further investigation under section 46(3), the investigation shall be carried out under the responsibility of the Director-General.
(3) In carrying out an investigation under this section, the Commission may conduct such hearings as it considers appropriate...

The fact that ICAC decides not to investigate a case of alleged corruption does not mean that it is not in the public interest for such a case to be pursued by another statutory body.[146] One of the questions that the Court had to decide in *ICAC v. Anderson Ross & Ors*[147] was whether the ICAC was obliged to conduct a hearing under section 47(3). The defendants argued that:

> [W]henever there is a suspicion that an act of corruption or money laundering offence has been committed, there is a need to follow an established statutory procedure as set out under section 46 of the POCA, as a result of which a preliminary investigation should be the starting point consistent with section 46(1)(a) of POCA. The Commission would then have two options upon completion of the preliminary investigation which are spelt out under section 46(3) of the POCA, namely a discontinuance of the investigation or proceed with further investigation…[S]hould there be further investigation, the Commission would have no other options but to proceed by way of a hearing as per the statutory procedure set out under section 47 of

146. *Intralot (Mtius) Ltd v. Gambling Regulatory Authority & Ors* 2009 SCJ 90, at 4.
147. *ICAC v. Anderson Ross & Ors* 2014 INT 35.

> POCA and more particularly under section 47(3) of POCA… He submitted that adherence to this statutory procedure was mandatory despite the fact that section 47(3) of POCA reads '*…may conduct such hearings as it considers appropriate*…' and such a hearing is even more essential when the offence being investigated is one of money laundering.[148]

In dismissing the application, the Court held that in Mauritian law, the word 'shall' has to be interpreted to be imposing a mandatory requirement and the word 'may' gives the decision maker the discretion to decide whether or not to take a particular action.[149] The Court concluded that:

> [W]hen section 47 of POCA is read in its proper context and in line with the intention of the Legislator, the only clear mandatory requirement is that such further investigations are to be carried out under the responsibility of the Director General or by delegated powers to the Director of Investigations or any of his officers… As regards the requirement to conduct a hearing during the further investigation, I find that the legislator has not made it a mandatory requirement. A close reading of section 47(3) of POCA shows clearly that the Legislator has left discretion as to how to conduct the investigation and permitted the use of hearing amongst others. The word 'may' expressly used by the Legislator gives the Commission the power to also adopt any other mode of investigative process.[150]

In the author's opinion, the Court's interpretation of the relationship between sections 46 and 47 is correct. Another issue that the Court dealt with was whether ICAC's application to the banks to disclose confidential information about their clients which information ICAC needed in its investigation of money laundering allegations was not against the bank's duty to keep its client's information confidential. The Court referred to section 51 of POCA, to the relevant provisions of the Banking Act and to the relevant case law on the banker's duty of confidentiality and held that that duty is not absolute and that a banker was required to disclose such information to ICAC if it was

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148. *Id.*, at 3 – 4. Emphasis in original.

149. *Id.*, at 5.

150. *Id.* See also, *Independent Commission Against Corruption v. NG Sui Wa Dick Christopher* 2014 INT 16, at 5.

investigating corruption and money laundering allegations provided that ICAC makes an application to a judge in chambers for the judge to order the bank to disclose that information.[151] Therefore, in Mauritius, bank secrecy cannot be invoked to prevent the ICAC from investigating corruption. This is the case although the Supreme Court held in *Drouin & Ors v. Bank of Baroda*[152] that '[t]he rock-bed of a sound financial system is banker's confidentiality.'[153]

This holding is in line with Mauritius' international human rights obligation.[154] However, for a court to order a bank to disclose confidential information to ICAC, ICAC has to demonstrate that the situation requires the Court to make such an order. In *The Independent Commission Against Corruption*,[155] in which ICAC made an ex parte application for the Court to compel the Bank of Mauritius to disclose information relating to the services rendered to its clients, guidelines issued to commercial banks to combat money laundering, and other important documents, the Court held that it could not make such an order as ICAC's application appeared 'more like a fishing expedition than anything else.'[156]

In *Technology Soft Corporation & Ors v. Independent Commission Against Corruption,*[157] the Supreme Court held that '[t]he general rule is that confidentiality is the very foundation of business, and more specially in the financial services sector' but that '[c]onfidentiality should…not be invoked to shield criminal activities which undermine economic and political stability.'[158]

The relationship between sections 47 and 50 of POCA was dealt with in *Dowarkasing v. The Independent Commission against Corruption*[159] in which the applicant argued that 'following a preliminary investigation' and, where it is felt that a further investigation is needed, the law compels the ICAC 'to resort to section 50 of the POCA only' and that 'the provisions of section 47 go contrary to section 50 and to

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151. *ICAC v. Anderson Ross & Ors*, *supra* note 147, at 10 – 16.

152. *Drouin & Ors v. Bank of Baroda* 2008 SCJ 304.

153. *Id.*, at 5.

154. The UN Convention against Corruption requires states parties to ensure that bank secrecy is not invoked to hinder corruption investigations and prosecutions.

155. The Independent Commission against Corruption 2006 SCJ 02. See also Independent Commission Against Corruption 2006 SCJ 2; 2006 MR 52.

156. The Independent Commission against Corruption 2006 SCJ 02, *id.,* at 5.

157. *Technology Soft Corporation & Ors v Independent Commission Against Corruption* 2005 SCJ 99; 2005 MR 223.

158. Technology Soft Corporation & Ors v Independent Commission Against Corruption, *id*; 2005 MR 223, *id.,* at 6.

159. *Dowarkasing v. The Independent Commission Against Corruption* 2013 SCJ 138A.

the spirit of the POCA and should have no application' in such a situation.[160] It should be recalled that section 50(1) provides that:

> Where the Commission decides to proceed with further investigations under section 46 or 47, the Director-General may - (a) order any person to attend before him for the purpose of being examined orally in relation to any matter; (b) order any person to produce before him any book, document, record or article; (c) order that information which is stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, be communicated in a form in which it can be taken away and which is visible and legible; (d) by written notice, order a person to furnish a statement in writing made on oath or affirmation setting out all information which may be required under the notice.

In dismissing the applicant's application, the Supreme Court held that:

> Under section 47, the respondent may decide to invite a person to collaborate in its further investigation without any compulsive element underlying the invitation. A person who does not turn up for a hearing in response to the invitation does not commit any offence. If he does turn up, he will commit an offence only if he makes a false or misleading statement in the course of the hearing … Section 50…covers a different situation which can be qualified as a post-section 47 situation. It is where a person fails to respond to a request under section 47 that section 50 gathers its importance. The respondent is empowered under section 50(1) to direct a number of orders to any person… Non-compliance with any of the orders made under section 50 is an offence punishable by imprisonment not exceeding 5 years pursuant to section 50(6) of the Act.[161]

In *ICAC v. Joymungul Ambar,*[162] the accused was suspected to have committed an act of corruption and ICAC summoned him in terms of sections 50(1)(a) and (d) to answer some questions. He gave his statement after an oath had been administered to him by

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160. *Id.*, at 3.
161. *Id.*, at 3.
162. *ICAC v. Joymungul Ambar* 2009 INT 246.

a senior official of the ICAC who was not present at all during the recording of the statement. The defence argued that the evidence obtained from the accused was inadmissible because the procedure that was followed was irregular. In holding that the evidence was admissible, the court concluded that:

> The whole point of administering an oath is to give authenticity and due weight to the statement which comes afterwards. If the person administering the oath was not present during the whole proceedings, then he cannot vouch for the authenticity of whatever was said in his absence. However, the Commissioner who administers the oath under section 50(1)(d) is not supposed to record the evidence himself and transmit it to the authority concerned.[163]

The Court held that in the circumstances of the case, especially in the light of the fact that the accused's lawyer was present when he made the statement, the evidence was admissible. Section 56(1) of POCA provides that:

> Notwithstanding any other enactment, where a Judge in Chambers, on an application by the Commission, is satisfied that the Commission has reasonable ground to suspect that a person has committed an offence under this Act or the Financial Intelligence and Anti-Money Laundering Act 2002, he may make an attachment order under this section.

Section 56(2) provides for the effects of an attachment order and section 57 provides for the features of an attachment order. Section 57(2) provides that 'an attachment order shall, unless revoked by a Judge in Chambers, remain in force for 60 days from the date on which it is made.' Section 57(3) provides for the circumstances in which the duration of an attachment order may be extended. In *Fauzee Bros & Co. Ltd. & Ors v. Independent Commission Against Corruption,*[164] the applicant applied to the Supreme Court to rescind and/or vary an attachment order that had been issued by a judge in Chambers pursuant to the respondent's application. In dismissing the application because it had not been made before a judge in chambers, the Court held that 'it is clear

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163. *Id.*, at 2. The accused's appeal to the Supreme Court was dismissed. See *Joymungul v. The State & Anor* 2014 SCJ 143.

164. *Fauzee Bros & Co. Ltd. & Ors v. Independent Commission Against Corruption* 2008 SCJ 296.

that the intention of the legislator is that the Judge in Chambers, on account of the special features pertaining to the said jurisdiction ensuring expediency and confidentiality, should be the pre-eminent jurisdiction to be seized for…attachment orders' and other orders under the Act.[165]

Likewise, in *Technology Soft Corporation & Ors v. Independent Commission against Corruption,*[166] the Supreme Court referred to section 56 and held that 'an application for such an attachment order by the Commission can only have any significance if it is made to the Judge in Chambers and granted ex parte.'[167] An attachment order may be issued against any property which the ICAC reasonably suspects to be proceeds of unlawful activity even if the funds or property in question have originated from abroad.[168] However, an attachment order cannot be served on a person who is not in Mauritius.[169] The Supreme Court has held that 'section 56 does not allow for an Attachment Order to be sought against a party who is a suspect in a case or who has been charged.'[170] POCA used to provide for temporary freezing orders but the relevant sections were repealed in 2011.[171]

Another issue that courts have dealt with is whether a police officer who is seconded to ICAC retains his powers as an ordinary police officer. Section 24(5)(b) of POCA provides that 'the Commission may - for the purpose of this Act, make use of the services of a police officer or other public officer designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be.' Section 53(1) provides that:

> Where the Director-General is satisfied that a person who may assist him in his investigation - (a) is about to leave Mauritius; (b) has interfered with a potential witness; or (c) intends to destroy

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165. *Id.*, at 3.

166. *Technology Soft Corporation & Ors v. Independent Commission Against Corruption, supra* note 157; 2005 MR *supra* note 157.

167. Technology Soft Corporation & Ors v. Independent Commission Against Corruption, *id*; MR, *id.*, at 2.

168. The Independent Commission Against Corruption 2005 SCJ 72.

169. *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *supra* note 157; 2005 MR, *supra* note 157, at 4 – 5.

170. *Lesage v. ICAC* 2003 SCJ 101; 2003 MR 204, at 15. See also, *Manraj & Ors v ICAC*, *supra* note 6; 2003 MR 41, at 16

171. See Act 9 of 2011. For a brief mention of the freezing orders under POCA, see *DPP v. A.C.A. Gaffoor* 2010 SCJ 223, at 5; *Air Mauritius v. Tirvengadum* (Sir) 2005 SCJ 161, at 7; *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *supra* note 157; 2005 MR, *supra* note 157; *Peerkhan & Ors v. The State* 2008 SCJ 110, at 10.

> documentary evidence which is in his possession and which he has refused to give to the Commission, the Commission may, in writing, direct an officer to arrest that person.

Section 53(2) provides for the procedure that has to be followed after arrest, the rights of an arrested person and the circumstances in which the Commission may detain him. In *Ha Yeung Chin Ying v. Independent Commission against Corruption & Anor,*[172] the applicant argued that a police officer seconded to ICAC does not have the ordinary powers of a police officer and that such an officer is not an officer of ICAC if he still receives his orders from the Commissioner of Police. The Supreme Court held that when a police officer is seconded to the ICAC,

> [H]e remains a Police Officer within the meaning of the Police Act and retains all his functions under that Act, including his powers, immunities, liabilities and responsibilities under the common law or under any other enactment. Among such powers are notably his powers of arrest, detention and of lodging provisional information.[173]

The Court added that 'there is nothing abnormal' about the fact that a police officer who is seconded to ICAC retains his powers as any police officer even if he is appointed to a senior position in ICAC. This is the case although there is 'no doubt' that such officer 'is subject to the orders and directives issued to him by the [Commissioner of Police] under section 6 of the Police Act but when posted to the [ICAC] and …he is also amenable to the directives of the [ICAC].'[174] The Court added

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172. *Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor* 2003 SCJ 273; 2003 MR 228.

173. Ha Yeung Chin Ying v Independent Commission Against Corruption & Anor, *id*; 2003 MR, *id*., at 5 – 6. See also, *Peerthum v. The Independent Commission Against Corruption (ICAC) & Anor* 2012 SCJ 371. However, see also *Lesage v. ICAC*, *supra* note 170; 2003 MR, *supra* note 170, at 15, where the Court held that 'The text of the law that enables a Police Officer to come to ICAC empowers him to act as an Officer of ICAC and engage in the work of ICAC. It does not empower a Police Officer to do the work of the Commissioner of Police at ICAC in the name of ICAC. This fatal confusion of role has been caused by an absence of proper designation of statutory duties.'

174. The Court observed that 'It is noteworthy that the Legislator could also have achieved the same purpose by specifying in the Act, as was done in Section 101B of the Independent Commission Against Corruption Act 1988 of New South Wales, Australia, that police officers who are seconded for duty at the Independent Commission Against Corruption retain all their powers, immunities, liabilities and responsibilities attached to their office.' See *Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor*, *supra* note 172; 2003 MR, *supra* note 172, at 8.

that there was no need for POCA to expressly provide that police officers seconded to ICAC retain all their powers as police officers.[175] The Court concluded that the secondment of police officials to ICAC is crucial in empowering ICAC to fight corruption and fraud.[176]

The Privy Council also reached a similar conclusion in another matter.[177] A senior prosecutor may travel with investigators to a foreign country to advise them when they are in the process of gathering evidence that will be used at the accused's trial in Mauritius even if the accused is to be prosecuted by that same prosecutor.[178] Although the accused has a right to summon witnesses, his application to summon that prosecutor as a witness in chief to give evidence about the lawfulness of the investigations that were carried out abroad will be dismissed if it is meant to abuse the court process.[179] A public official may disclose confidential documents to ICAC if those documents are needed in the investigation of corruption and once those documents are disclosed to ICAC, even if the application to ICAC was not made in terms of section 52 of POCA, they are admissible in evidence.[180] Under part three of this article above, we have dealt with some of the offences under POCA. It is now necessary to have a look at the general principles relevant to prosecution of corruption that have emerged from Mauritian courts.

### *B. Prosecuting corruption*

POCA criminalises different conducts and a person could be prosecuted for the same conduct under different sections. In *ICAC v. Soobrun,*[181] the Supreme Court held that:

> POCA seeks to criminalize as many situations of bribery as may be possible and creates a host of offences. In many cases, the offences so

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175. Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor, *id*; 2003 MR, *id*.

176. Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor, *id*; 2003 MR, *id*., at 9. See also, *Ha Yeung Chin Ying v. The Independent Commission Against Corruption & Anor* 2003 SCJ 64; 2003 MR 36 in which the judge held that a police officer seconded to ICAC may lawfully arrest a suspect.

177. *Peerthum v. Independent Commission Against Corruption & Anor* [2014] UKPC 42. This was an appeal to the Privy Council after the Supreme Court granted the appellant the leave to appeal. See *Peerthum v. The Independent Commission Against Corruption & Anor* 2013 SCJ 138.

178. *Ahmine v. Chady & Anor* 2013 SCJ 264.

179. *Id.*, at 10.

180. *ICAC v. Pursun & 2 Ors* 2014 INT 218.

181. *ICAC v. Soobrun, supra* note 39.

> created overlap not only with others in POCA itself but also with criminal offences under the Criminal Code. They are, however, not mutually exclusive. Which charge befits which offender in which situation is not for the courts to decide but for the prosecution in its discretion.[182]

For example, a person may be prosecuted for the same conduct either under section 4(1) or under section 7 and the prosecution will remain valid. In *Burhoo v. The Independent Commission Against Corruption & Anor,*[183] the appellant was prosecuted and convicted of using his position as a public official for gratification contrary to sections 7(1) and 83 of POCA. He argued that he was wrongly charged under section 7(1) 'when the circumstances of this case fall squarely under Section 4(1) of the Act.'[184] In dismissing the appeal, the Supreme Court held that: '[t]he fact that the appellant could, in the circumstances of the present case, have been equally charged under Section 4 of the Act, does not mean that the charge laid against him under Section 7, was defective.'[185] The Court added that the prosecution had the discretion to determine which section to invoke in prosecuting the accused.[186]

Section 82(1) of POCA provides that '…no prosecution for an offence under this Act…shall be instituted except by, or with the consent of, the Director of Public Prosecutions.' Subsections 2 and 3 empower officers of the ICAC to also prosecute offences under the Act. Therefore, in terms of section 82, the general rule is that the offences under the Act have to be prosecuted by the Director of Public Prosecutions or by another person with the consent of the Director of Public Prosecutions. Subsections 2 and 3 provide for the exceptions. All the cases discussed in the article have been prosecuted either by the ICAC or by the police. In *Suneechara v. The State,*[187] one of the issues was whether ICAC's acting Chief Legal Adviser could legally institute proceedings against an accused under section 4(1)(a) of POCA. The Supreme Court held that:

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182. *Id.*, at 5. See also, *Joomeer v. State*, *supra* note 8, para 50; *Parayag v. The Independent Commission Against Corruption*, *supra* note 56, at 15.

183. *Burhoo v. The Independent Commission Against Corruption & Anor* 2012 SCJ 211.

184. *Id.*, at 4.

185. *Id.*

186. *Id.*, at 5. See also, *ICAC v. Subhiraj Dookhy and Anor* 2013 INT 38 in which the same approach has been taken.

187. *Suneechara v. The State, supra* note 37.

> There is no doubt that pursuant to section 82 of the POCA, the ICAC, in its own rights, has the authority to initiate criminal proceedings and conduct prosecution in respect of any offence under the Act. Although section 82(1) requires that a prosecution shall not be instituted for an offence under the Act without the consent of the DPP, one can hardly suggest that any prosecution undertaken by ICAC becomes that of the DPP. Under our legal system, an aggrieved party other than the DPP may legitimately institute and undertake criminal proceedings before a Court of law. This explains that informations [charge sheets] are lodged by local authorities or Ministries whenever there have been breaches, for example, of licensing, health or building regulations. This also explains the possibility of a private individual lodging a private prosecution provided he is an aggrieved party… All prosecutions initiated by a party other than the DPP are however subject to the DPP's decision to take over and continue or to discontinue such criminal proceedings as set down in section 72 of the Constitution.[188]

The Court also added that the mere fact that a public prosecutor had prosecuted the case on behalf of the ICAC did not mean 'that the DPP had taken over the conduct of the criminal proceedings so that it became the aggrieved party to the exclusion of the ICAC.'[189] This case shows that there may be a need for the law to be amended to specify, in clear terms, the circumstances in which public prosecutors and ICAC officials may co-prosecute the accused in such a manner that there is no ambiguity as to which of the two institutions is actually in charge of the prosecution. As the Court observes, the appellant's lawyer had a valid point when he submitted that the fact that the case was prosecuted by a public prosecutor 'could have misled the appellant into believing that the DPP had exercised his power to take over the prosecution pursuant to section 72(3)(b) of the Constitution.'[190] In *ICAC v. Jacques Roger Rousseau and Ors*[191] the Court held that ICAC is an integral part of the state and therefore cannot be categorised as 'person other than the state' for the purpose of section 4(1) of the Public Officers Protection Act which provides that such a person's right to institute criminal proceedings against another person expires after two years.

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188. *Id.*, at 7.
189. *Id.*, at 7 – 8.
190. *Id.*, at 10.
191. *ICAC v. Jacques Roger Rousseau & Ors*, *supra* note 18.

Should the offender be prosecuted by the ICAC with the consent of the DPP and he appeals against his conviction or sentence, he must cite the DPP as one of the respondents. In *Sicharam v. Independent Commission against Corruption,*[192] the appellant was prosecuted by the ICAC with the consent of the DPP and convicted of influencing a public official to make a decision favourable to the accused and sentenced to three months' imprisonment. In his appeal against the conviction, he only cited the ICAC as the respondent. In dismissing the appeal, the Supreme Court referred to its earlier jurisprudence and held that:

> We take the view that the proposition of law to be drawn from [the cases cited] is that, in an appeal against conviction following a prosecution by a party other than the Director of Public Prosecutions, the appellant has to join the Director of Public Prosecutions either by himself or through the State as a party to the appeal. However, in the case of an appeal against an acquittal following a prosecution by a person other than the Director of Public Prosecutions, the latter ought not to be joined as a respondent to the appeal, but notice of appeal may be given to him at any time before the hearing of the appeal. The requirement of joinder or notification is important if the Director of Public Prosecutions is to be in a position to meaningfully exercise his powers under section 72 of the Constitution.[193]

As mentioned earlier, there are many cases in which the police have prosecuted people who have committed offences under POCA. The question that the Supreme Court has had to deal with is whether POCA empowers the police to institute charges against people accused of corruption. In *Ramkalawon v. State,*[194] the appellant was prosecuted by the police and convicted of taking a gratification to screen an offender from punishment in breach of section 6(1)(b) of POCA. In his appeal against conviction, he argued, inter alia, that the Commissioner of Police did not have the power to assume the duties of the ICAC.[195] The point of contention was whether section 45(2) of POCA permitted the Police to prosecute offences under POCA. Section 45(2) provides that:

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192. *Sicharam v. Independent Commission Against Corruption* 2011 SCJ 375.
193. *Id.*, at 2.
194. *Ramkalawon v. State* 2012 SCJ 254.
195. *Id.*, para 14

> Where in the course of a Police enquiry - (a) it is suspected that an act of corruption or a money laundering offence has been committed; and (b) the Commissioner of Police is of the opinion that the matter ought to be investigated by the Commission, the Commissioner of Police may notwithstanding the Financial Intelligence and Anti-Money Laundering Act 2002 and subject to subsection (3) refer the matter to the Commission for investigation.

In dismissing his appeal, the Supreme Court held that:

> There would have been purchase in the argument of learned counsel for the appellant had POCA provided that ICAC has exclusive competence to investigate offences created under the Act. ICAC, albeit an independent and impartial body, with its own staff, its own parliamentary accountability, its own budget and its own statutory rules for the conduct of an enquiry is not a legal system outside our legal system. In no way does it curtail the power of any other person or body to investigate and prosecute an offence. ICAC is no more than a specialized body with proficiency in dealing with sophisticated offences of corruption and money laundering in their multiple forms. For all its independence and impartiality, it is still an integral part of our legal system and may only operate within the framework of our constitution. In this sense, ICAC is not the only specialized body which has been created by an Act of Parliament to deal with specialized and sophisticated areas of the law where the authority is entrusted with statutory responsibilities of conducting investigation and prosecution.[196]

The Court added that interpreting the law to exclusively empower the ICAC to investigate and prosecute corruption 'would be to stretch ICAC's powers beyond the permissible limits of the law.'[197] It should be noted that it is not POCA only which criminalises corruption. The Criminal Code, for example, criminalises the taking of bribes[198] as does POCA. A prosecutor has a choice either to prosecute the offender

196. *Id.*, para 18.
197. *Id.*, para 19.
198. See section 126(1)(b).

under the Criminal Code or under POCA.[199] It is not one of the requirements in POCA that for a police officer to arrest a person who is suspected of having committed one of the offences under the Act, he/she should have participated in that person's interrogation relating to the alleged corrupt activities. What matters is that the police officer has reasonable grounds to believe that the suspect committed one of the offences under POCA.[200] A suspect must be informed of his rights, such as the rights to remain silent, not to incriminate himself, and to have his lawyer present during the interrogation otherwise he may successfully challenge the admissibility of such evidence.[201]

Where a public official is accused of accepting a bribe, he will be convicted even if he chewed and swallowed the notes in question, provided that there is circumstantial evidence to prove that he accepted the bribe.[202] ICAC is not obliged to furnish the accused with a preliminary investigation report compiled under section 46 of POCA unless failure to furnish such a report will negatively affect the accused's right to a fair trial.[203]

Section 81 of POCA imposes an obligation of confidentiality on all officials and board members of ICAC. It provides, inter alia, that:

> (2) No member of the Board or officer shall, except in accordance with this Act, or as otherwise authorised by law - (a) divulge any information obtained in the exercise of a power, or in the performance of a duty, under this Act; (b) divulge the source of such information or the identity of any informer or the maker, writer or issuer of a report given to the Director of the Corruption Investigation Division. (3) Every Member of the Board and every officer shall maintain confidentiality and secrecy of any matter, document, report and other information relating to the administration of this Act that becomes known to him, or comes in his possession or under his control.

In *Independent Commission against Corruption (ICAC) v. Ramdoyal & Anor,*[204] the first respondent sued the second respondent for damages for malicious denunciation in

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199. *Rambhurosh v. The State* 2009 SCJ 218.

200. *Police v. Jugnauth Pravind Kumar*, *supra* note 19.

201. *Id.*

202. *Police v. Kiran Kumar Burhoo, supra* note 20.

203. *Chady v. Her Honour, Mrs. R. Seetohul-Toolsee,* Senior Magistrate, Intermediate Court & Anor 2011 SCJ 54; *ICAC v. Chetanand Pursun & Ors*, *supra* note 110.

204. *Independent Commission Against Corruption (ICAC) v. Ramdoyal & Anor* 2010 SCJ 156.

writing in the sense that the second respondent gave false and malicious information ICAC which led to the prosecution of the first respondent in a case that was dismissed by a lower court. In order to strengthen his case, the first respondent asked the lower court to order ICAC to bring and produce to him certified copies of all the documents and statements that the second respondent had submitted and made to ICAC about the first respondent. ICAC invoked section 81 and argued that it had a duty to keep that information confidential.[205] The Supreme Court held that 'the obligation of confidentiality imposed on the members of the board of the Commission and on the officers of the Commission is not absolute but is subject to exceptions "*in accordance with the Act, or as otherwise authorised by law*".'[206] The Court then concluded that:

> Accordingly, the imperative of affording to an accused party a fair trial is one of the instances where under section 81(2) of the Act, the disclosure of relevant investigative material should be considered as "authorised by law". Similarly where public interest requires that material which is otherwise confidential, be disclosed to ensure a fair trial in civil proceedings, such disclosure will necessarily be considered as "authorised by law", for the purposes of section 81(2).

The Court ordered ICAC to comply with the summonses issued by the lower court and produce the documents in question because they were 'necessary to ensure a full and fair trial of the civil action before the' lower court.[207]

*1. Sentences imposed for corruption*—POCA prescribes sentences ranging from six months to 10 years for those convicted of different offences.[208] However, the prescribed sentence for most of the offences is that not exceeding 10 years' imprisonment. In other words, courts have the discretion to decide which sentence to impose on the offender provided that the sentence does not exceed 10 years' imprisonment. Jurisprudence from courts in Mauritius shows that courts have imposed the following sentences on those convicted of offences under POCA: three months'

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205. *Id.*, at 2.

206. *Id.*, at 3. Emphasis in the original.

207. *Id.*, at 4. However, in *Independent Commission Against Corruption v. Ramdoyal & Anor* 2011 SCJ 44, the full bench of the Supreme Court held that the judge had erred in ruling on the issue of admissibility of evidence obtained on the basis of section 81. That this issue should be left for a trial court.

208. For 10 years, see sections 4(1), 5(1), 7(1), 8(1) and (2), 9, 10, 11, 12, 13(3), 14, 15, 16; for six months, one year and five years, see section 6(1).

imprisonment for influencing a public official contrary to section 9,[209] for accepting a bribe in breach of section 4(1)(b),[210] for soliciting from another person, for himself, a gratification for doing an act in the execution of his duties contrary to section 4(1)(a) and (2),[211] and for accepting for himself a gratification contrary to section 4(1)(a).[212] Five months' imprisonment for using his office for gratification;[213] six months' imprisonment for accepting a bribe as a public official contrary to section 4(1)(a),[214] for using his position for gratification contrary to section 7(1),[215] and for bribery by a public official contrary to section 4(1)(e).[216] Nine months' imprisonment for taking a gratification to screen offender from punishment contrary to section 6(1)(b);[217] twelve months' imprisonment for accepting a bribe contrary to section 126(1)(b) of the Criminal Code[218] and for soliciting a bribe contrary to section 4(1)(a) of POCA.[219] The Supreme Court held that the circumstances of the case will determine the sentence the court will impose on the offender.[220] The Supreme Court also held that the magistrate was correct not to impose the sentence of community service on the offender convicted of corruption because of 'the gravity of the offence and the position of the offender.'[221]

It is clear that in most of the cases courts have imposed sentences of less than a year in prison although the maximum sentence is 10 years' imprisonment. It is argued that although corruption is a serious offence, not all offenders are the same and not all offences are committed under the similar circumstances. It is better that courts are given the discretion to determine which sentence to impose on the offender depending on factors such as the offender's personal circumstances, the seriousness of the offences and the interests of society. POCA does not provide for sentences that may be imposed

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209. *Sicharam v. Independent Commission Against Corruption, supra* note 192.

210. *Bissessur v. The State & Anor*, *supra* note 62.

211. *Curpen v. Independent Commission against Corruption & Anor*, *supra* note 35. The accused was a police official and solicited a bribe so as to investigate a case against the suspect such that he would not be prosecuted.

212. *Suneechara v. The State*, *supra* note 37.

213. *Joomeer v. State, supra* note 8.

214. *Hanumunthadu Rajen v. The State & Anor*, *supra* note 32.

215. *Burhoo v. The Independent Commission Against Corruption & Anor*, *supra* note 183. See also, *Noormamode v. ICAC & Anor, supra* note 7 (marriage officer falsifying birth dates hence facilitating child marriage).

216. *Parayag v. The Independent Commission Against Corruption, supra* note 56, at 1.

217. *Ramkalawon v. State*, *supra* note 194, para 1.

218. *Rambhurosh v. The State*, *supra* note 199.

219. *Joymungul v. The State & Anor*, *supra* note 163.

220. *Hanumunthadu Rajen v. The State & Anor, supra* note 32, at 18.

221. *Joomeer v. State*, *supra* note 8, para 54.

on corporate bodies found guilty of corruption. The court recommended in *Police v. Boskalis International bv and anor*,[222] there may be a need for POCA to be amended to address this lacuna.

*2. Some of the challenges faced in prosecuting corruption*—Prosecuting corruption has not been a very smooth process. There have been cases where the prosecutors have not been able to secure convictions although there was evidence that an offence was committed. However, the mere fact that there is evidence of corruption does not mean that the accused will be convicted. The accused can only be convicted if the prosecution adduces evidence, beyond reasonable doubt, that the accused committed the offence. Factors which have led to the acquittal of those accused of corruption include: the witness's failure to lead evidence to convince court that he identified the accused as the person who solicited the bribe from him,[223] the main prosecutor's witness's refusal to come to court and testify,[224] and the inconsistencies in the main state witness's evidence.[225]

The inconsistencies in state witnesses' evidence have been largely attributed to the fact that many years pass by between the time the witness reports the case to ICAC and the time the accused is prosecuted. For example, in some cases it had taken three years,[226] four years,[227] six years,[228] or nine years,[229] for the accused to be prosecuted since the case was reported to the ICAC and statements taken from the witnesses.

Sometimes those who commit corrupt activities in their countries of nationality do not keep the proceeds of their unlawfully activities in those countries. They, for example, keep the money in foreign bank accounts or buy property in foreign countries. Mauritius has mechanisms in place to ensure that those who commit corruption in Mauritius and keep the proceeds of their corrupt activities outside the country do not

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222. *Police v. Boskalis International bv & Anor, supra* note 64, at 15.

223. *Independent Commission Against Corruption v. Kaundun* 2008 INT 10.

224. *Independent Commission Against Corruption v. Luchooa & Anor* 2007 INT 240; *Independent Commission Against Corruption v. Balluck, supra* note 59.

225. *Police v. Venkatakistnen Rangasananda*, *supra* note 20; *Police v. Veeria Hasokumar*, *supra* note 21; *Curpen v. Independent Commission Against Corruption & Anor, supra* note 35.

226. *Police v. Soobarao Rama*, *supra* note 20, at 2.

227. *ICAC v. Baboolall*, *supra* note 24, at 4.

228. *Police v. Veeria Hasokumar*, *supra* note 21, at 5 (the accused was acquitted of the offence of bribery of a public official because of the inconsistencies in the main state witness's evidence); *ICAC v. Gowry Suraj*, *supra* note 20 (prosecuted for assisting a prisoner to escape from lawful custody); *ICAC v. Joymungul Ambar, supra* note 162, at 1; *ICAC v. Bumma, supra* note 87, at 6.

229. *ICAC v. Satyawan Kutwaroo & Anor*, *supra* note 93, at 3.

escape justice. However, in practice it has been difficult to obtain evidence of abroad.

In *Police v. Chady Mohummud Siddick,*[230] the accused was provisionally charged with receiving a gift for corrupt purposes. In order to secure a conviction, the prosecution needed evidence from the United Kingdom, The Netherlands and Singapore where the accused had allegedly hid the proceeds of his criminal activities. However, despite the fact that the prosecution did all that it could to obtain evidence from these countries, there was a delay of several months in securing that evidence which resulted into the magistrate striking the case off the roll. However, the accused's application to travel abroad was dismissed as the court was of the view that '[t]his case bears an international ramification and is a complex one' and that '[t]here is a risk that if there is no condition imposed on the Accused restricting his freedom of movement in and out of Mauritius, he may try to interfere with witnesses and tamper with evidence.'[231]

In *Technology Soft Corporation & Ors v. Independent Commission against Corruption,*[232] the applicant was suspected of money laundering and some of the evidence needed to prosecute the case had to be obtained from abroad. However, the foreign authorities delayed to tender that evidence to ICAC and the court, in revoking the freezing order against the applicants' property, held that the 'institutional inadequacies which result in the applicants' assets remaining frozen for an unreasonably long period cannot be condoned.'[233]

The ICAC has also been sued sometimes successfully[234] and sometimes unsuccessfully[235] for terminating the employment contracts of some of its senior officials. Some ICAC officials have flouted fundamental procedural issues such as

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230. *Police v. Mohummud Siddick Chady 2011 PL3 18. The accused's earlier applications for the case to be struck off the role because of the delay in prosecuting him had been dismissed. See Police v. Mohummud Siddick Chady 2010 PL3 66; Police v. Chady Mohummud Siddick 2008 PL3 149.*

231. *Police v. Chady Mohummud Siddick* 2012 BRC 126, at 2.

232 *Technology Soft Corporation & Ors v. Independent Commission Against Corruption, supra* note 157; 2005 MR, *supra* note 157.

233. Technology Soft Corporation & Ors v Independent Commission Against Corruption, *id*; 2005 MR, *id.*, at 7.

234. *Bhadain v. The Independent Commission Against Corruption* 2004 SCJ 182; *Bhadain v. The Independent Commission Against Corruption* 2004 SCJ 183; *Bhadain v. ICAC* 2005 SCJ 132; 2005 MR 272. The Court held that the dismissal of the three applicants, the Director of the Corruption Investigation Division, the Chief Investigator and an investigator, was unlawful.

235. *Dabee-Bunjun v. Independent Commission Against Corruption* 2010 SCJ 266 (ICAC's refusal to renew its Chief Legal Adviser's contract was not unlawful). In *Dabee-Bunjun v. Independent Commission against Corruption* 2011 SCJ 23, the application to appeal to the Privy Council was dismissed. *Bisasur v. The Independent Commission Against Corruption* 2014 SCJ 189 (for terminating Deputy Commissioner of ICAC's contract of employment). In *Taujoo v. The State & Anor* 2013 SCJ 332, the former Deputy Commissioner's position was phased out by an amendment to POCA.

improperly conducting the identification parade[236] leading to the acquittal of the accused. In one case, the device that ICAC officials gave to a complainant to record the conversation with the accused did not function properly and the recording was unintelligible.[237]

## III. CONCLUSION

Although most of the accused have not been high profile public officials, there have been a few exceptions where senior public officials have been prosecuted under POCA. These have included a vice Prime Minister and Minister of Finance who was prosecuted for conflict of interest,[238] Chairman of the Mauritius Ports Authority,[239] and the Assistant Commissioner of Police.[240] The prosecution of senior public officials for corruption could to be attributed to, inter alia, the fact that there is no political influence in the decisions that ICAC makes. ICAC also receives the funds it needs to conduct its operations. And it would appear that it incurs a lot of expenses in the process and that the money comes from the national budget as opposed to donors. This is because the Supreme Court observed that ICAC 'is a publicly funded institution, drawing for its heavy expenses, on the pockets of the citizens of this country.'[241]

One of the issues that have consistently emerged during the investigations of corrupt activities relates to the use of traps or undercover operations. Some of the accused were arrested after a trap had been set by the ICAC officials. In some cases, the accused have raised the issue of whether evidence obtained through entrapment is admissible. For example, in *Police v. Kiran Kumar Burhoo*[242] where ICAC officials instructed the complainant how to take a bribe to the accused and when the accused received the money from the complainant he was arrested by the ICAC officials. The accused's lawyer argued that:

> That this was a case of 'entrapment or a shameful operation' and that entrapment was condemned by law… [T]he sting operation was planned as ICAC officers were keen to obtain results and the prosecution was based on entrapment. All the details of the sting

236. *ICAC v. Doyal, supra* note 28, at 6.
237. *Police v. Charlot, supra* note 69.
238. *Police v. Jugnauth Pravind Kumar*, *supra* note 19.
239. *Ahmine v. Chady & Anor, supra* note 178.
240. *Independent Commission Against Corruption v. Suneechara Oozageer* 2006 INT 190.
241. *Bhadain v. ICAC*, *supra* note 234; 2005 MR, *supra* note 234, at 20.
242. *Police v. Kiran Kumar Burhoo, supra* note 20.

> operation were given to the complainant. Everything was done to trap the accused.[243]

The Court held that:

> Indeed entrapment is one method by which executive agents of the state misuse the coercive law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment occurs where agents of the state, mostly police officers, lure or incite or entice or instigate citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. Was the prosecution here founded on entrapment? In this Court's view, far from it. We note here that by the time of the much-decried sting operation, the complainant had already reported an actual incident of a public official soliciting of a bribe from him. True it was the completion of the offence took place after the ICAC became involved. However, it was a fact that the completion would have occurred with or without such involvement.[244]

It appears that had the court found that there had been entrapment, it would have held that the evidence in question was inadmissible and the accused would have been acquitted. In *Parayag v. The Independent Commission against Corruption,*[245] the appellant argued that he had been arrested because of a trap set by ICAC officials and therefore the evidence of his involvement in the alleged corrupt activities should have been excluded. In dismissing his appeal, the Supreme Court held, inter alia, that:

> We are satisfied that the commission of the offence by the appellant has not been brought about by the 'state's own agents'. The appellant already had the intent to commit the crime and the police officers had no role to play in the formation of his intent. The present case is certainly not one where the police officers themselves lured the appellant into committing an act forbidden by the law and then prosecuted him for doing so. There is absolutely no evidence on record showing that the officers enticed the appellant to commit an

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243. *Id.*, at 7.
244. *Id.*, at 7.
245. *Parayag v. The Independent Commission Against Corruption, supra* note 56.

offence he would not otherwise have committed.[246]

In the light of the fact that some corrupt activities may not easily be investigated unless traps or undercover operations are used, there may be a need for the legislature in Mauritius to address the issue of the admissibility of evidence obtained through entrapment. Some countries in Africa, such as South Africa,[247] have legislative provisions which govern the admissibility of evidence obtained through traps or undercover operations.

246. *Id.*, at 9.
247. See section 252A of the Criminal Procedure Act, 51 of 1977.

# EXPLORING MORAL ARGUMENTS AGAINST RIGHTS OF HOMOSEXUALS IN UGANDA

Archangel Byaruhanga Rukooko*

**ABSTRACT**

*This article identifies and logically examines the moral arguments that were invoked by many Ugandans to deny homosexuals their human rights. The arguments are based on eight premises including Africans' love for children and that homosexuality is unnatural and against African culture, that the Bible and the Quran forbid it, and that it is imperialistic, harmful and violates the sanctity and integrity of sex and, finally, that it is pathological. The method used is logical analysis hoping to prove or disprove the validity of the arguments. The conclusion reached is that these arguments are not potent enough to justify denial of human rights to homosexuals. But the discussion raises a bigger question of how we should justify public morality.*

## I. INTRODUCTION

I have known few social concepts that do not covet controversy – whether it is socialism, development, justice, equality, social identity, love, ethnicity, globalization or human rights and many others. However, the subject of homosexuality is taken too far—it nearly sets hell on the loose when it is either mentioned or debated. It has torn families, churches, classes, institutions and friends apart. The language used and the magnitude of emotional content and the panic it engenders make it a heavy concept; but if that is the case, then equally, its social relevance to our African context cannot be over-emphasized. Thus, while some states like Nigeria have enacted laws criminalizing homosexuality,[1] others such as France[2] are relaxing the laws to protect the rights of homosexuals.

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1. Nigerian lawmakers pass anti-gay Bill, retrieved from <http://in.reuters.com/article/2013/05/30/nigeria-gay-law-idINDEE94T0EW20130530>, (accessed on August 10, 2013).

2. Jeanne Smits, *France passes gay 'marriage'*, LIFE SITE, April 23, 2013, retrieved from <http://www.lifesitenews.com/news/france-passes-gay-marriage/>, (accessed on August 08, 2013).

Meanwhile, hardly more than one and half months after Ireland had voted in a referendum to allow gay marriage,[3] the United States Supreme Court also ruled in favour of gay marriage.[4] Already a number of states in the United States like California had passed decriminalizing laws and legalized gay marriage.[5] In a region where it would even seem more traditional like Lebanon, the scientists' association has declared that homosexuality is a non-pathological condition.[6] For Ireland, and for the first time in the world, the country has voted to allow same sex marriages. This belief that homo-erotic behavior was pathological had been a widespread view in many countries, having been claimed so by some scientists like Richard von Krafft-Ebing, a nineteenth century neurologist, who also thought it was an aberration that needed treatment.[7] Many evangelical churches still treat homosexuals as deviants or psychopaths who should be counseled or prayed for or medically treated.[8]

Although Pope Francis' statement was welcomed by many, it was not defending homosexuality but rather seeking for the protection of homosexuals against harm.[9] Nonetheless, it was animating to both homosexuals and human rights defenders to hear such a statement from a historically conservative authority offering moral support—that homosexuals should not be marginalized. Whether this will silence the Pope's followers or create a schism in the church remains to be seen. Or, indeed, whether the Pope will go further to announce or initiate further changes towards protection of homosexuals is not clear. That said, it would seem that the "war" against violations of human rights of homosexuals is not yet won, as there are quite many recalcitrant forces pitched against it.

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3. See http://www.irishtimes.com/news/politics/marriage-referendum.

4. "Supreme Court makes gay Marriage legal throughout US" DAILY MONITOR, June 26, 2015.

5. Greg Stohr, High Court Allows California Gay Marriage, Voids U.S. Law, June 26, 2013, retrieved from <http://www.bloomberg.com/news/2013-06-26/supreme-court-ruling-may-allow-gay-marriage-in-california.html>, (accessed on August 08, 2013).

6. Dan Littauer, *Lebanon says: Being Gay is not a Disease and Needs no Treatment*, THE HUFFINGTON POST, 12 July 2013, retrieved from <http://www.huffingtonpost.co.uk/dan-littauer/gay-treatment-lebanon_b_3585192.html>, (accessed on August 10, 2013).

7. Since then, many writers both social anthropologists, biologists and other scientists had generally argued in line with Krafft-Ebing until recently when many scientific associations removed it from the list of pathological cases. *See* ELI COLEMAN, ENCYCLOPEDIA OF BIOETHICS, 3RD EDITION, VOL.2 (2004).

8. Coleman, *id.*

9. See http://www.patheos.com/blogs/standingonmyhead/2013/08/homosexuality-what-did-the-pope-really-say.html- (accessed on August 10, 2013).

In Uganda, the recent situation about homosexuality has been described as "panicky" while the debate as having reached the "crescendo"[10] in response to the Anti-Homosexuality Bill (referred to as "Bahati Bill").[11] So visceral was the debate that almost all the Members of Parliament were readying themselves to pass it into law as soon as it was tabled. It was scary and it required extremely courageous but tactical individuals or groups to oppose the bill.[12] Probably, it was international players like human rights organizations and powerful governments plying their leverage on the government of Uganda through diplomacy or even clear threat that reduced the speed towards the passing the bill.[13]

In a recent research on homosexuality, the findings are indeed in agreement with the attitude of the Members of Parliament: 1,431 (94%) of the 1,522 respondents interviewed rejected the idea that homosexuals have, or can enjoy their entitlements and freedoms since it was "a wrong" rather than "a right" to be a homosexual.[14] This finding makes it even more imperative to examine the situation of homosexuality carefully.

From an ethical point of view, moral arguments against homosexuality are an attractive starting point not only for moral philosophy's sake but also for the general justification of human rights. In other words, as is well known, violations of rights of homosexuals are well documented,[15] and the concern here is whether the whole gamut

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10. J. Oloka-Onyango, 'We Are More Than Just Our Bodies': HIV/AIDS and The Human Rights Complexities Affecting Young Women who Have Sex with Women in Uganda, HURIPEC Working Paper No.36, March 2012.

11. The Bill is referred to as such because it was developed and moved on the floor of Parliament by Hon. David Bahati under the Private Member's Parliamentary procedure.

12 At the time of writing this article, efforts to return the Bill to Parliament for passing into law are in high gear. It should be noted that the earlier Bill had been passed by parliament in December 2014, assented to by the President in February 2014 but was challenged successfully in court on the basis of lack of quorum.

13. See The New Vision Editions from 1st November to 20 December 2014. Both President Obama and Prime Minster Cameron of the United States of America and Britain respectively, talked of withholding financial aid to Uganda if the anti-homosexuality bill was passed into law. They were joined by the Office of the United Nations High Commissioner for Human Rights, and other diplomats especially ambassadors of European countries.

14. Alex Nkabahona, Stella Avuni and Byaruhanga A. Rukooko, Homosexuality in Uganda (forthcoming) [On file with the authors: The process to publish it is in advanced stages]. This was a research carried out between 2010-2012.

15. See <http://iglhrc.org/content/human-rights-violations-lesbian-gay-bisexual-and-transgender-lgbt-people-guatemala-shadow>; <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14275&LangID=E>, and <https://www.amnesty.org/en/latest/news/2014/10/uganda-discriminatory-legislation-fuels-repression-and-

of rights of homosexuals should be respected or not. Put differently, under what moral authority do we, as Ugandans, deny or allow any rights to homosexuals?

I venture into this direction because hardly has any space been offered to Ugandans to discuss issues about homosexuality more systematically and most importantly, from a clear ethical predisposition. That is, to try to understand what is morally wrong or right about it to the extent that identifying with it can lead to denial of human rights including the right to life. Neither have moral philosophers come out to discuss this issue systematically, identifying the moral arguments that form the basis for this seemingly uncompromising, catalytic situation that is obtaining about homosexuality in Africa. How sound or unsound are these arguments? How do we contextualize this moral debate in our geographical and temporal contexts? Indeed, what does this visceral debate say about our moral judgments as Ugandans who are part of a wider humanity? What, on the one hand, informs our moral judgments and consequently, how do these standards of judgment affect respect, protection and promotion of human rights in Uganda or any other similar situation?

In this article, I examine the arguments identified in the above-mentioned research and try to assess the extent of their validity, if any. In order to do this effectively, I begin by trying to conceptualize homosexuality from a Uganda perspective and then follow this with delineation of the arguments as identified and later on juxtapose each with my response(s). At every stage, I am interested in assessing the logical soundness or otherwise of these arguments. Obviously, some of these arguments could have been already discussed at many fora including at family, village, class, local town, office, seminar, conference, parliament, regional forums, and of course, at international levels; but they have not been contextualized and systematized in Uganda as moral concepts and their human rights implications considered. In short, I have three major interests in this article: logical, moral and human rights. That is to say, my methodology will mainly depend on logical analysis as a way of securing the justification, or none of it, for the moral and human rights positions that Ugandans hold.

## II. HOMOSEXUALITY FROM THE UGANDAN PERSPECTIVE

Just as there are guesses about the number of homosexuals in any country, there is also lack of consensus on what homosexuality really means and the connotations both negative and positive that they may engender.[16] Indeed, many myths about it thrive wildly and the arguments and counter responses about homosexuality do no

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abuse/> (accessed on June 28, 2015).

16. Coleman, *supra* note 7, at 1157-1160.

better—they also lose direction due to the lack of understanding of these concepts. Even researchers themselves fail to distinguish between sexuality, sexual behavior and community participation as gay or lesbian movement members.[17] It is probably from this context that Thebo Msibi argues, for instance, that the words "homosexuality" and "gay" have no meaning in Africa because they were constructed under contexts that are not our own.[18]

Moreover, not only are these concepts overlapping, but also the individuals involved may change their identities and behavior over a period of time.[19] Otherwise, homosexuality is historically understood from the view point of physical behavior focusing on a person's sexual biological sex and by the sex of sexual partners.[20] That is to say, a homosexual is that individual whose erotic orientation is inclined or predisposed to an individual of the same biological sex, and by this, bestiality and pedophile were excluded as this understanding was based on the assumption that only two human sexual orientations do exist – heterosexual and homosexual.

However, in Uganda, the perception of a homosexual is, to say the least, very negative and judgmental. It describes the most disgusting, dirty, corrupted and sub-human individual who should be excluded from the community, as he or she is doing what is socially "undoable"! In fact, the language used is so hostile that one senses that there is a wish to eject such a person from society because he or she cannot publicly associate with others in any way. As one female respondent said:

> In reality, homosexuality aims at 'extinction of man by man' since this sexual gratification and relationship does not end in procreation. They should therefore be ex-communicated from the society. If they are arrested, they should be flogged in public and the men castrated.[21]

In my language (Runyankore of South Western Uganda), there have been some attempts to assign a label to homosexuality but I don't agree with the translation. Nonetheless, the so-called label is "*ekitiingwa*". As far as I understand the language, this word means someone more close to a female whore; a sexually, non-self respecting

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17. *Id.*

18. Thabo Msibi, *The Lies We Have Been Told: On (Homo) Sexuality in Africa*, 58 AFRICA TODAY (2011), at 55-77.

19. *Id.*

20. *Id.*

21. Statement made by a respondent in one of the interviews during the Nkabahona-led research, cited in Nkabahona et al, *supra* note 14. Note that, most likely, the understanding of homosexuality is ascribed to males only.

woman, one who is indiscriminate in her sexual life, probably perverted, but not necessarily a homosexual.

Obviously, the patriarchal insinuations can be detected because a man was not expected to be *ekitiingwa* since this falls in the homosexuality language and logic of the "penetrator" versus "penetrated".[22] There could have been homosexuals in our society but their conceptualization is only getting coalesced probably due to increasing knowledge and debate about it, and the ever growing demand for recognition exerted mainly by human rights activists and the homosexual lobbyists aligned to other groups from the Western countries. Even though an equivalent of a homosexual may not be found in a number of Ugandan languages, the meaning or concept of a homosexual as currently conceived is negative and of a sub-human category as described above.

The Baganda, the central and among the biggest ethnic groups of Uganda, call it *okulya ebisiyaga* which is equally a disgusting term, describing a shameful and dirty person, who eats garbage or what has been excreted! In northern Uganda, among the Langi, the word "mudako dako" is more kind because it sounds more neutral and is translated as a transformed man who is treated as woman and may live as a legitimate wife to a man. Nonetheless, in a number of cases, the negative meanings of dirty people or witches are used but the exact terms do not easily get through to the public. In general therefore, terms used in describing homosexuals are of strong disapproval and resentment and are not amenable to the understanding of human rights—i.e, as people who have dignity irrespective of what social property they may have acquired. Violating the right to life of homosexuals may not be a common form of "punishment", although two cases have been registered in Uganda; but beating, humiliation, opprobrium, exclusion and marginalization are common forms of mob justice and violation of any of their human rights.

Moreover, an unrepealed colonial law of 1950, on the Uganda Penal Code, subsection 120 still criminalizes homosexuality. According to research findings by Nkabahona *et al*, Ugandans across different ethnic tapestry consistently presented eight clear arguments against homoeroticism (homosexuality) in favour of hetero-eroticism.[23] These arguments were based on the following premises or reasons, namely: (a) that Africans highly value children; (b) that it is against order of nature; (c) that it is not according to African culture; (d) that religion forbids it; (e) that it is an expression of colonialism; (f) that it is risky and harmful; (g) that it violates the sanctity and integrity

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22. That is to say, "ekitiingwa" would mean the person who is acted on sexually (or one made love to) but in a more negative sense such that everyone who wishes can sleep with her can do so since she has no self respect.

23. Nkabahona *et al*, *supra* note 14.

of sex; and (h) that it is pathological. In a way, some of these arguments are overlapping but for clarity's sake we shall name these arguments according to these considerations.

### *A. Moral Arguments against Homosexuality*

The first argument is premised on *the love of children* and it is based on the view that Africans loved and believed in producing children. That is partly why they practiced polygamy, among other reasons, to produce many more children. According to John Mbiti, for instance, traditional Africans believed that from the very beginning of human life, God commanded or taught people to get married and bear children.[24] This position was moreover enhanced by the biblical view that human beings should produce and fill the earth,[25] and many Africans have since the early 19th century become either Christians or Moslems. Whether male or female, Africans treasured many children, and to date, many still do; and not any children but male children, implying that patriarchal designs were already at play because girl children and women were clearly discriminated against.

As part of the African world view, children were a means for production to acquire power, prestige, and also as an army for domination of the environment as well as security in later life. It was believed that children would enable the parents live longer and "defeat death" through the children who would hopefully live beyond that person's death and extend the life of the parents. Interestingly, to date, girl children are considered 'travelers' in the home because they are expected to leave their parents home when they get married, while a boy child is expected to bring home a wife. In other words, this worldview and power game reflects the historical relations of the times and conditions of production and survival are fast disappearing.

Yet, out of same sex relationships come no children and in their view, not having children is a catastrophe. Generally, my ethnic group considers people involved in same sex relationships as people who have "killed children", namely, "Okwiita abaana". Although I do not think my society treats them as murderers, they are still looked at negatively as people who have refused to fulfill their obligation of procreating. Any person, whether by choice like nuns or Catholic priests, or by failure

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24. J.S. MBITI, INTRODUCTION TO AFRICAN RELIGION (1992), at 104. In fact, if one does not produce, in Runyankore, a local dialect, they say "*ayitsireabaana"* meaning that such a person has killed children.

25. Genesis, Chapter 1, verse 28.

to beget children would be looked at by some people with incredulity.[26] If it is by failure, then it is great sympathy.

In some cases, however, some respondents were extreme in saying that all homosexuals should be regarded as criminals, no different from cold-blooded murderers. In this regard, homosexuality should be condemned and discouraged because of failure to deliver children.

In light of this, heterosexual marriage was therefore looked upon as a sacred duty, which every 'normal' person was expected to fulfill. Failure to do so meant in effect stopping the flow of life through the individual and hence the diminishing of humankind. Yet, anything that deliberately worked or seemed as an obstruction to flourishing of human life was regarded as an abomination. In the absence of marriage—and not any marriage, but hetero-sexual marriage—which made it possible for people to germinate and sprout, human beings would cease to exist.[27] In another language, therefore, homosexuality could be seen as extremely harmful to society since it would surely, even though slowly, eradicate human beings. This position evokes two implications: one, this view was part of the African worldview at the time, and for many, it is still the case. Second, it entailed some form of God's will expressed in nature which then leads us to the argument based on natural law, which we shall return to, later on.

In regard to the traditional African worldview, producing children per se may be good but its moral worth depends on several other factors affecting the world in which the children and parents live. To begin with, beliefs or value options change over time in view of new experiences. Africans of yesterday, or of 50 years ago, are not Africans of today or tomorrow. If, at that time people were producing just to fill, till and graze animals in the then extensive empty land, now free land has reduced sharply. If children were to till and graze, now their lives are different; they demand school fees and computers. If they were producing for social protection purposes, now the children move away from the parents' homes to urban places to look for jobs which are also scarce. If the children do not get enough income or none at all, they opt to stay in urban places leaving the old parents to fend for themselves and many parents now know this.

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26. At a personal level, as a brother to a Catholic priest, I often meet people who keep asking whether my brother has children or not. Indeed, many people cannot understand why a person would do such a thing as to choose to be celibate.

27. Mbiti, *supra* note 24**.** It should be noted also that ironically, although they wanted children, pre-marital sexual intercourse was also not allowed because of another cultural reason: namely, since girls were seen as sources of bride wealth for their families, if they got pregnant before marriage, then they would not fetch sufficient or any bride wealth at all. It is known to me, as an African myself, that the consequences were so bad for the girl that, in ancient times, it could result in the girl being murdered.

Yes, the change may be slow, but for sure, the issue is not if it will happen, but when will it reach an individual! Whether it is globalization or capitalism or urbanization or technological advance or civilization or any socio-economic political reality, it changes our value choices, decisions and actions whether in Uganda or elsewhere. And this is not far-fetched; the number of countries either decriminalizing homosexuality or legalizing gay marriage is not decreasing but increasing, suggesting a different perception in many societies—a revision of some of our hierarchy of values. Therefore, the value of producing many children or any children at all is less forceful than it was in the past.

Also to mention is the fact that no country registers a significant percentage of homosexuals of more than three.[28] This means that the number of homosexuals in any society cannot meaningfully affect human propagation beyond what is needed to keep human population at a desirable level. In any case, were the numbers of homosexuals to grow so big, which I strongly doubt, there is still a possibility to encourage those who want to have many more children to go ahead and do so. Otherwise, questions of what type of sex of children their parents may wish to have and can have, may be handled today as long as the parents have capacity to secure the technology to produce the sex of the children they desire. Can we raise the question of parents' obligation to produce both sexes? Finally, questions still challenge this argument—for instance: Can we trace the origin or source of the obligation to produce children for the African society? If it indeed exists, how much does it bind its members today? Is it time or geographically bound? We find ourselves with this kind of challenge.

The second argument *that homosexuality is against nature* is derived from the fact that homosexuality is unnatural and not functionally possible and proper, physically and psychologically. Therefore, it should never be allowed. This argument must be distinguished from the religious one that is both Biblical and Quranic, because it stands on its own. But even on its own, it has several strands. One, whereas the religious argument stands on God's condemnation of the act as revealed in the Holy Scriptures, this argument is based on the practical possibility or impossibility of penetration and non-penetration. Besides, how does a man psychologically and physically engage in sexual indulgence with a same sex partner? The central issue is, how do sexual organs

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28. Jennifer Robison, What percentage of the population is gay?, retrieved from <http://www.gallup.com/poll/6961/what-percentage-population-gay.aspx> (accessed on October 08, 2015). It should be noted that it is very difficult to be exact since many researchers disagree on the exact numbers. While some may have claimed that it may be 10%, many more claim it is less than 3 per cent. See also <http://www.theguardian.com/society/2015/apr/05/10-per-cent-population-gay-alfred-kinsey-statistics> (accessed on December 25, 2015).

of the same-sex couples physically and procedurally interact to perform a real sexual operation?[29] How do they physically interpenetrate one another?

According to our respondents, therefore, naturally, it is not possible to have sex between same sexes and consequently, homosexuality is a self-deception or an imitation of real sex. A fortiori, even marriage is not possible because, after all, nothing will happen in terms of sexual performance and production of children. In other words, this argument assumes that, if there is no heterosexual penetrative sex, then there is no sex and obviously there would be no children! In other words, sexuality is entirely about a penetrative sexual act. The second strand is that according to human nature, the reason why males and females have sexual reproductive organs is because they were meant to have a union for the purpose of procreation. It is teleological and it links to our first argument of God's purpose that opposite sex couples should unite to produce. This is what both Aristotle and Thomas Aquinas presented and defended and we call it the teleological argument.

The *teleological argument* of procreation claims that it is a direct duty imposed on us by God to produce. This claim, as I said earlier, is also suggested in our (first) argument of the African worldview above. So, our major question is: Is producing children a necessary duty of everyone on earth? Is there no choice of producing or not? Is it just a command from someone, or some legitimate authority or whether from society or God or whoever, that one must have children? The answer, in my view, is that it is a "no" since, through experience, we can identify some conditions under which we cannot and should not procreate.

To begin with, human nature is also coexistent with freedom and therefore rationality, which help people to guide and implement natural or other demands. The nature of a human being is not blindly determinative; but rather, it entails rational considerations and making choices to respond to and guide natural tendencies. It is true, we neither use our feet to eat nor do we use our mouths to see, but we have our freedom to choose what to see and what not to see; in the same way, we can manipulate our bodies to walk with our arms. I have seen acrobats and several young people these days manipulate their bodies in several ways that would seem unnatural to us.

Normally, our reaction is one of admiration but not disgust. Moreover, because it is natural for men to crush on women, men do not go for every female or the other way round. We do not generally have sexual relationships with our close relatives even

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29. Interestingly, at the time of writing this article, a mail message sent by a Makerere University staff read partly as: sex is continuation of God's race according to the Bible or to pass on genes to the next generation. Biologically, the function of the anus is to provide an opening for the removal of waste matter from the stomach just like an exhaust pipe.

though they are of a heterosexual disposition like ourselves. In short, nature does not stop choice; instead, it encourages it; otherwise, we would be blind actors like animals (although some animals do discriminate). After all, the strongest proponents of this view (naturalist), i.e, Thomas Aquinas and Immanuel Kant, were both unmarried for different reasons[30]—meaning that they made choices not to marry or procreate.

I am aware there is a possibility of the fallacy of *ad hominem,* but we are only emphasizing the choice element in their lives which many other people do cherish. If we can make choices in sexual relationships, why not allow choices for homosexuals? In other words, we can make a choice on the type of sexual act and the number of children to have or not to have any.

Besides, the concept of what is natural is not clearly defined and this creates many practical difficulties. For instance, to say "his smile was not natural" is to say that it is doubtable whether the smile was genuine or not. Does doing everything that is unnatural become morally wrong? Is it natural to deliver a child by cesarean delivery or cutting of finger nails or kissing another person or a million other things that could be granted as unnatural? What exactly is wrong with being unnatural? What about innovations that are scientific? Is it natural to perform a kidney transplant? Does natural mean the normative understanding of a thing, act or subject? What about aesthetic or cosmetic surgery? Or should we conceive unnatural as being an equivalent of moral inversion? Or is there something else that is not being said or is just implied? What is it? As John Corvino asks, what is bad about being unnatural?[31] Do we always do things which are only natural? Are parachutes morally wrong apparatus? Otherwise, should we be walking on bare feet without shoes all the time? Should we abandon condoms for instance? Are artifacts natural? How then do such acts turn out to be morally right if they are not natural?

According to Aquinas, all sin is unnatural because it is against reason which is distinctive of human nature. However, he was particularly condemnatory of deliberate, non-procreative sexual acts as being of "the gravest kinds of sin" because they are against God Himself. In these worst sins, he listed homosexuality, bestiality, masturbation and oral sex. However, this would easily lead to absurdities. In our hierarchy of wrong actions, how would rape be a lesser sin than homosexuality or masturbation for that matter? Indeed, how could Thomas Aquinas condemn people who chose/reasoned to have sex differently? Probably, in our society, many people are familiar with oral sex today; then, how is oral sex more natural than homosexuality

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30. While Thomas Aquinas (1225-1274) was a monk and therefore chose not marry, Immanuel Kant (1776-1804) did not marry because he had inability to make a decision over who to marry.

31. JOHN CORVINO, WHAT IS WRONG WITH HOMOSEXUALITY? (2013).

since there in no known or open objection to oral sex? Indeed, how may the use of the mouth rather than our "sexual organs" be more natural than anal sex?[32] For some people kissing seems natural, but we now know that it started in India about 3,500 years ago.[33]

The *first strand* of the natural argument is one of practical impossibility in a sexual union and self-deception, if not self-denial, as long as there is no physical and biological compatibility. I call this strand the *incompatibility argument.* Frankly, sexual gratification depends on both psychological and physical experiences. However, we need to appreciate that what goes into both psychological and physical gratification of different persons is influenced by different experiences and choices. For instance, a kiss on the lips of heterosexual persons would be understood in my culture as proper foreplay just like nakedness of a woman in the eyes of my ethnic group.[34]

Surprisingly, it is normally the women who condemn such naked or semi-naked women for being whores and shaming women and, in this way, patriarchy reigns as much as discrimination against the women. Unfortunately, in my traditional culture, hardly the nakedness of a male is ever expressed in sexual terms but rather of a general social deviant because it is men making judgment and for whom the judgment is made! This is because when women put on skimpy dresses or miniskirts and get molested, the reason is that they deserved it. Indeed, as is well known, human sexual styles can be somewhat non-penetrative but nonetheless very satisfactory. It could also be added that nature provides the tools but how the tools are deployed is upon the individual's choice which is morally alright under given circumstances and as long as there is no harm to innocent beings. After all, in the majority of African cultures, sex is largely a private matter and defining and prescribing private experience between consenting adults is a clear tall order if not an unwarranted interference seeking to destroy the happiness of the people involved. And if this is their only option to be happy, what, and why should an alternative be forced upon them?

The third argument is *the Religious Argument* and probably the most cited by the respondents.[35] It is based on the Christian and Moslem teaching that God already condemned it as is communicated in the Old Testament of the Bible. If political and legal colonialism defined African sexuality in terms of heterosexuality and

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32. In my view, it may also be problematic to insist that it is only the penis and vagina that are the only sexual organs, because lips, fingers, tongues and others may equally influential roles in sexual engagements.

33. See <https://en.wikipedia.org/wiki/Kiss>.

34. This picture is not surprising because the culture of the Banyankore from whom I am born is still patriarchal and it will probably take some time before this can change.

35. Nkabahona *et al*, *supra* note 14.

reproduction, the attendant but dominant religions of Christianity and Islam combined together to entrench this position. Even if the African communitarian value system was generally hetero-normativistic and would still have agreed with colonialists, the new dominant religions presented heterosexuality as an absolute truth from God. The majority of African Christians and Moslems invoked the holy text of Sodom and Gomorrah from the Bible and Qur'an.

In Genesis, Leviticus and in Quranic Scriptures, it is alleged that God destroyed the city of Gomorrah on the basis of homosexuality. In short, God hates and condemns homosexuality and its related acts with fury and vengeance. For these people, homosexuality is a clear act against what God meant and intended for sexual relationships when he created man and woman (Adam and Eve). Any act contrary to this order is sinful, abominable and punishable by God.

To be sure, there are many biblical sections that condemn same sex-relationships.[36] The supposedly divine language of response to same sex relationships is vengeful, namely that "*they shall surely be put to death*" and "*Their blood guiltiness is upon them.*" In the New Testament, Paul advises that the sinners including fornicators, idolaters, adulterers, effeminate, homosexuals, thieves, the covetous, drunkards, revilers and swindlers cannot inherit the kingdom of God.[37] In *Rom*. 1:26-28 it is indicated that same-sex relationships are unnatural and therefore ungodly.

In the New Testament, the issue of unnatural lust is mentioned as well.[38] In short, overtly, the Bible is opposed to, and condemns non-normative homoerotic relationships. In Islam too, the Quran is categorical in its condemnation of homosexuality, but it is also based on the similar narratives as in the Bible although Moslems regard it even as a criminal offense.[39]

For this matter, one of the harshest campaigners against homosexuality in Uganda, Pastor Martin Sempa of Makerere Community Church, has consistently claimed that homosexuality is a sin against God, and therefore homosexuals can be reformed through preaching to them as well as inculcating cultural norms and religious values but have no right to their sexual orientation. He further said that they have many in their midst who have experienced redemption and healing and therefore promised to

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36. See for instance *Gen*. 19, the Old Testament story of Sodom and Gomorrah and many others like *Lev*. 18:22 and *Levi*. 20:13.

37. See 1 Cor. 6:9-10.

38. Jude 1:5-7.

39. SUSAN HOLLAND, RELIGIOUS PERSPECTIVES", ENCYCLOPEDIA OF BIOETHICS, 3RD EDITION, VOL.2, at 1177-1178.

help everybody struggling to free themselves from homosexual feelings.[40]

Both texts in the Bible and the Quran condemn homosexuality. However, both books are not as reliable as God's books should be, because of contradictions and absurdities in and surrounding them; and because of these absurdities and clashes, the meaning was lost. Therefore, rather than being adequate and clear guides to human beings, they turn out be confusing texts. As for the Bible, for instance, there has been a lot of debate for a long time in terms of historicity, of real intended meaning, of consistency and application and probably, of many other aspects.

In fact, the controversies are as old as the Bible itself. At the time of compiling the Bible,[41] there were so many controversies and hostilities that the compilation had to be made and concluded under a decree (The decree of Damasus) of Pope St. Damasus I at the Council of Rome in 382 AD.[42] The controversies have not ceased till today, since the Catholics retain 77 books of the Bible while Protestants retain 66 books of their Bible- supposedly God's only holy book.

In a more recent case, a doctoral student at the University of Stavanger School of Mission and Theology completed a dissertation where she demonstrated that the murderous warlord in Northern Uganda, Joseph Kony, was inspired by Moses of the Bible—hence his use of the "Ten Commandments" in his war campaign.[43] After all, since Charles Darwin generated his evolutionary theory, the skepticism about the Bible became entrenched to the extent that Ken Ham and Britt can talk of "epidemic of unbelief across Europe and America."[44] Given this context, how then can we derive sufficient moral authority to adopt or reject homosexuality today? I also know that Islam like Christianity recognizes the Old Testament about which many absurdities have already been adumbrated.[45]

Let me conclude this point by re-asking an old question to both Moslems and Christians since they share the text. If the Pentateuch was written by Moses, how come

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40. Pastor Martin Sempa, as quoted by Plus News, Africa Correspondent, Andrew Goeghegan, August 2007.

41. See <http://www.tertullian.org/rpearse/nicaea.html>, (accessed on September 01, 2013).

42. Who compiled the Bible and when, retrieved from <http://answers.yahoo.com/question/index?qid=20080928064041AATOZUD>, (accessed on September 01, 2013).

43. Hellen Nkabala, Kony and the Northern Uganda War (Doctoral dissertation, School of Mission and Theology, University of Stavanger, 2012).

44. Ken Ham and Britt Beemer, Chapter 4: The Short Road to irrelevance, November 2011, retrieved from <http://www.answersingenesis.org/articles/ag/short-road-to-irrelevance>, (accessed on September 01, 2013).

45. I was forewarned by my Moslem friends to abandon criticism of the Koran because, traditionally and doctrinally, it cannot be done. I agreed to abandon it.

it contains a description of his death and funeral as indicated in Deut.34? If he did not write it, how do we believe such a text especially if it is claimed that the author was inspired? At the same time, how do we explain so much vengeance from the so-called God suggested in these texts?[46] Let me quote only two verses from *Lamentations* and one from *Judges* and let us judge if indeed they are God's books: "*God mercilessly kills everyone, young and old. He even causes women to eat their children*[47] and second, "*God is like a bear or a lion which secretly pursues you and then tears you apart*".[48]

Consider also, that a man of God threw his concubine out of his house so that lustful men wantonly raped her and abused her all the night.[49] How Godly does this book (Bible) sound to us? Thus, if these two authorities present us with such ignominious, contradictory or unsatisfactory grounds for belief in God, how do they become moral authorities on homosexuality?

Regarding the authority of the Holy Scriptures, it is also important to consider the issue of meaning in relation to historical and literal contexts. In terms of history, we now know that the story of Genesis was simply a story of imagination about the creation of the world except that it was written and presented as a book of Jews, God's chosen people! How are we sure that other stories in the Bible are not simply imaginations like the Genesis story? In Uganda, we have many stories of such kind describing the first man as Kintu, who came from heaven. God for the Bagisu (from Eastern Uganda) came from Mountain Elgon and still influences their lives from there. But most importantly, how can such stories be taken seriously today? Do these stories have relevance today beyond the powerful symbolism and the numbers that cherish them?

In regard to the correct meaning of the biblical texts, how do we assign meaning to these seemingly contradictory or absurd statements as have been indicated above? In the past, it would be argued that a verse or statement has been taken out of context and for that reason, experts (exegetics) are said to be able to help. For instance, in Uganda, Catholics were not encouraged to read the Bible. But what happens if the experts disagree? So, whose context should we believe and how much authority of this can be used to reject or support the right to sexual orientation of homosexuals?

It may be argued further that from a pragmatic point of view, the two Holy

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46. Richard Dawkins, Cruelty and Violence in the Old Testament, retrieved from <http://skepticsannotatedbible.com/cruelty/ot_list.html>, (accessed on September 01, 2013). The author lists 1152 cases of clear instances of violence and vengeance.

47. *Bible, Lamentations, 2:20-22.*

48. *Id*., 3:10-11.

49. See the Bible, Judges, 19: 23-25. A number of absurdities in the Bible are captured in a letter cited in Corvino, *supra* note 31, at 33-35.

Scriptures are believed and applied by billions of people in the world, and ignoring their views or, even worse still, confronting them would be unwise. However, this alone does not make them carriers of truth. The truth lies elsewhere - in the sense earlier mentioned – that many people believe in them and apply them to concrete situations and get results. It needs to be tested whether people still believe in them. But even if they did, they do not necessarily become right.

The *fourth argument—the cultural argument*—is based on the fact that homosexuality is not in our history and our culture as Ugandans (read Africans). It is therefore against our culture as Africans and we cannot accept homosexuality. As the Kabale Bishop testified:

> Here in Kabale I grew up not knowing of same sex relationships but this is something invading us. Thus, our African culture never experienced or got involved in same-sex relationships, and for this reason, homosexuality cannot be accepted now. Same sex relationships are against our norms, values and standards of conduct.[50]

A woman in Kapchorwa said, culturally, this practice is a taboo and therefore not good, adding that if a homosexual person was identified in Kapchorwa, she would be killed. She stated as follows:

> If we got to know of a homosexual person here in Kapchorwa we would immediately chase him away. If he delayed leaving, he would be calling for his death. We Sabiny people are very fond of respecting and preserving our culture. In our culture when a person grows he/she is married to another person of the opposite sex. We can't tolerate anyone introducing such stupid practices which are in conflict with our culture.[51]

It is further claimed that had it not been Arabs who introduced it to Buganda in the early 18th century, and later on by the Westerners (whites), it would probably never

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50. Interview with the Catholic Bishop of Kabale Diocese, Uganda on 15th May 2012.

51. With his eyes razing with anger and raising his palm in air above his head, one man participating in an urban Focus Group Discussion (FGD) held in California Cell, Kapchorwa Town Council in Kapchorwa District swore, July, 2012.

have been known.[52] Otherwise, Uganda would not have had homoerotic indulgence history or culture.

In response to this argument, two issues come to the fore. One is based on the consideration that we do not have the same culture as Africans called "African culture" and we are not even able to define who is an African. Second, that there is increasing evidence showing that, indeed, homosexuality was present in Africa, and whether it was reviled or not, is another matter. This is to say, the claim that homosexuality was not African is not true. The meaning of "Africanness" or "African culture" need appropriate rendition; namely, what is African culture? Is there any sexuality that can be called African? From my experience as an African, there is no such a thing. I know that even within Uganda, a country in which I grew up, there are several sexual mentalities, fantasies, myths, behavior and practices so different and diverse that these can only be reconciled at individual levels. For instance, while western Ugandan ethnic groups to which I belong, through to Rwanda and Burundi, have sexual practices that do not necessarily involve penetrative sex, other groups may cherish penetrative sex.

Instead, these western Ugandan groups use local styles (local sexualities) which are believed to be extremely sexually gratifying for those involved. Also, many female individuals from similar ethnic groups (western Ugandan) imaginatively construct their sexualities in the manner that they desire.[53] Now, would this be ugly and immoral? Is this morally wrong or right, simply because others do it differently? Unfortunately, others cut off these structures (which others pull as much as they can) in a manner that has been called Female Genetic Mutilation (FGM), which, of course, has many harmful effects on the people who go through it, including physical, psychological and biological. Yet, in my culture circumcision was abominable while in others it is a great achievement. Now, if we were to talk of Africa generally, the amount of variation and diversity of sexuality would probably be overwhelming! So an attempt to define and render African sexuality in monolithic, hetero-normative, ethnic or nationalistic forms may misrepresent and distort the true picture of African sexualities that we want to

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52. For instance, it is reported that indeed Kabaka (king) Mwanga of Buagnda accepted homosexuality and subsequently, was forced to kill his own pages who rebuffed his advances for the same-sex intercourse. *See*, Sylvia Tamale, Is Homosexuality UnAfrican? (Paper presented at a Human Rights workshop, College of Humanities and Social Sciences, Makerere University, March 17, 2012).

53. Men in these ethnic groups invented a non-penetrative sexual method called *kakyabali* in Runyankore *(Kunyaaza* in Rwanda) that is very gratifying to their female partners. And indeed, some of the women in the same ethnic grouping will have none of it. Yet, also, many women from Banyankore, Banyarwanda and Baganda manipulate their sexual organs – they pull the libia minora to probably as long as index fingers.

comprehend.[54] This attempt is highly generalized and serves little purpose if any.

The second response to this argument is that increasingly, more and more evidence has been gathered to ascertain existence of homosexual relationships in Africa[55] before full blown interaction with colonial Europe and Asia, even though their numbers were small. Tamale wrote:

> Although, as elsewhere in the world, heterosexuality was the dominant form of sexuality, in pre-colonial Africa (and most communities valorized fertility and reproduction), there is no doubt that same sex copulation was also practiced.[56]

She went further to list cases of proof of existence of homosexuality in different cultures, context and even in languages of different people.[57] However, the seminal work of Stephen Murray lists a litany of evidence of homosexual practices across Africa before European invasion of Africa and seems to put to conclusion this pervasive and yet un-researched claim.[58] Indeed, homosexuality existed in Africa. Thus, what are needed are research and more information about this issue in traditional Africa.

As President Museveni had earlier admitted in a BBC Hard Talk interview on February 23, 2012[59] as follows:

> Homosexuals—in small numbers—have always existed in our part of black Africa… They were never prosecuted, they were never discriminated… What happened in African tradition was that the homosexuals would be known; it would not be approved, but would be ignored. It would be their private issue.[60]

This would mean that their human rights were not violated at the time, and this would be partly true because the concept of human rights was not yet clearly developed in Africa.

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54. Tamale, *supra* note 52.

55. *Id.*

56. *Id.*

57. *Id.*

58. STEPHEN MURRAY, WILL ROSCOE AND NORBERT BROCKMAN, BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES (1998).

59 See the full interview transcript as it was reproduced in *New Vision* on February 28th, 2012, at 10.

60. *Id.*

The third response is that even if it were indeed true that homosexuality was not in our cultures, still, that is not a good and sufficient reason for criminalizing homosexuality and violating the rights of those involved. Can we justifiably use alienness of cultures to justify the violation of other people's human rights? Is being culturally alien equivalent to being immoral to the extent that people of different cultures from our own should be humiliated and targeted for opprobrium, effuse, exclusion and marginalization? Is it justifiable that anything that is not treated as "our culture" should be proscribed or condemned? Is it the case that something that is not part of a people's a culture cannot be accepted by other people? For instance, if we mean by internal culture (as opposed to alien culture) that eating pork was a taboo, how come that today, there is a craze for eating pork in Bushenyi and Mbarara where it was most reviled? Just because some practice is not a people's culture does not mean that it should be barred unless it is harmful. Otherwise, there are many practices outside our culture that we have imbibed and indeed, we ought to imbibe. For instance, how do Ugandans rate in terms of time keeping? Is time keeping not a culture that we should adopt? After all, neither Islam nor Christianity is an African religion; both of them are foreign to Africa. This leads us to another related argument - namely that it is not only un-African and therefore foreign, but it is also of Western origin.

Thus, the fifth argument that holds that *homosexuality is part and parcel of Western Imperialism* claims that homosexuality is a Western culture and therefore an export of the Western world to Africa and on this account, it should be rejected. It is further alleged in support of this argument that the reason why homosexuality was introduced to Africa is because the West has a hidden specific agenda against Africans; namely to re-colonize, dominate and this time round decimate the population and take away their resources even the more. To prove their case, they point out that there is a lot of money for recruiting the youth into homosexuality.

As one of the religious leaders said: "*This is all because of funds; the Western world is trying to influence it through barriers on the donor funds; it is surprising people are claiming to be clever than God.*[61] In other words, it is an anti-Western colonial stance or if you prefer, it is to be interpreted in the post-colonial paradigm dialectics. Besides, it is being alleged that Western culture is not only ugly and unappealing, but it is also harmful to genuine African well-being and development. President Museveni of Uganda warned Ugandans against copying Western culture in

61. Interview with a religious leader in Masaka who chose to remain anonymous.

trying to live a life of Whites.[62] Although he was not speaking about homosexuality directly, I believe it is easily inclusive.

It is proper for any people and anybody to reject domination and colonialism of any sort, but it is also not correct to violate the rights of others who are innocent. As indicated above, homosexuality was in Uganda in the past, so positing it as a Western practice is not correct. However, a more serious logical issue is whether anything of Western origin should be judged as bad or ugly and should therefore be rejected. Take Christianity for example, why is it generally accepted in Africa in spite of being Western? Is Western influence always bad? What is wrong with it? Suppose we were to assume that homosexuality originated from the West, how come homosexuality is still reviled in much of the Western countries as was experienced recently in the state of California and in France.

Furthermore, we indicated earlier that it may be too much generalization to talk of African culture. Why is it not a generalization if we talk about other cultures? Is it not fallacious to think or even argue that all Westerners think and behave alike? Yes, there are certainly racists and exploiters or even thieves and other types of bad people, but this is not unique to the Western world. Even in African and other societies, these people exist and they are many, some of them as bad as Hitler. Therefore, to be Western is not the equivalent of badness or rightness in Africa or even anywhere; it is a question of being human and rational beings who choose to do good or evil.

The sixth argument is the *harmful argument* which claims that it is physically harmful to the couples who get involved because their anuses are torn or ruptured due to frequent friction from another partner who exploits it as a vagina for a sexual act—the physical consequence that the anus is made dysfunctional, wounded, painful and unable to handle feces—which continuously flow and, as a result, need to be padded like women in their monthly periods.

As if to give proof, it is further alleged that it is the reason why these Western young men wear their trousers half-way their buttocks, and also that indeed, if these young men were to pull-up their trousers to fit the waists and the buttocks, then the trousers will tear the wounds further. It was further explained that the reason given as to why homosexuals opt for the anus of a human being is because they are comparatively tighter and therefore provide better sexual pleasure than ordinary loose vaginas. However, much as they are tight, the individuals involved lose both the grip and friction, and ultimately, the sexual function and pleasure they were seeking in the

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62. See President Museveni's full speech at signing of the Anti-Homosexuality bill, Daily Monitor Newspaper, Kampala, 24th February 2014. See also "Museveni speaks out on Homosexuality", NEW VISION, Kampala, March 19, 2013.

first instance gets lost. One Biology Professor at Makerere University wrote at the Makerere University webmail as follows:

> What happens to your car when the exhaust pipe is damaged? In the case of humans, the consequences are very grave. Some men are wearing nappies secretly. Others are mentally disoriented. From this view, intolerance is justified.[63]

Earlier, this same point was made by one of the leaders in South Western Uganda as follows:

> Each body part is used for its own function, the penis, vagina, anus all have their purpose. These young people need to be helped; the opening of the anus is from inside and when they open it from outside there is no control for the feces.[64]

Indeed, when I surfed on the Internet under the entries of "homosexuality and anal rupture", the results were overwhelming; in fact, scary to say the least, indicating that the problem is already well-known and documented—as the Gay-Bowel Syndrome.[65] For instance, consider the following consequences:

> The proper tool for accommodating a penis after surgery for hemorrhoids is an anal dilator. Some cases of anal incontinence are so severe, that people lose the ability to sense stool in their rectum and cannot prevent it from escaping. This calls for major lifestyle changes such as wearing diapers or in the extreme, going for a colostomy (a surgical procedure which results in bowel movements emptying in a pouch carried on the abdomen).[66]

In many cases, lesbian intercourse was not an issue because it was considered to be extremely non-functional, useless, silly, not real sex and only dirty. No sex was

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63. Quote picked from an email sent by a Professor of Biology at Makerere University, Uganda to the University webmail on August 30, 2013.

64. Interview with the Resident District Commissioner, a government representative at the district level, on 15th May 2012.

65. Gay Bowel Syndrome and other Consequences of Anal Eroticism, retrieved from <http://www.homosexinfo.org/Sexuality/AnalEroticism>, (accessed on September 05, 2013).

66. *Id*.

possible between females except self-deception.[67] When women were asked separately, curiously, a number of them gave similar answers: One woman cynically asked back: "*Hmmm? What happens then? Nothing! Tell me."*[68] She challenged the interviewer! Another one said: "*What can happen between two women*?" And indeed, this is included in our list of proverbs that "*whenever a hyena sees a woman escorting another, it dies of laughter."*[69] Therefore two things can be said here. One, that homosexuality is harmful and second, lesbian sexual intercourse is not real sex because there is no penetration and satisfaction.

To begin with, this argument is similar to the one raised by Christopher Wolfe and others that homosexual life is broadly risky, only that this one focuses only on the anal penetrative action of male sex. Otherwise, cases like high mortality rate, HIV/AIDS and other diseases like anal cancer, high rate of suicide, depression, as often cited in Western literature were not clearly mentioned among our respondents.[70] Instead, they were concerned with physical harm that is caused to homosexual partners whose anuses are ruptured and wounded. As pointed out above, this argument focuses on male homosexuality only and not homosexuality as a wider relationship. It assumes that the central sexual place of intimacy of homosexuals is the anus which is easily or often ruptured. In my view, this is a very serious problem against homosexuality even though Carvino argues that people should be allowed to enjoy what pleases them.[71]

Notwithstanding, I am still unable to come to terms with the appalling picture painted above. Yet, in spite of this horrifying revelation, the following can be said: One, that the broad issues of high mortality rate, HIV/AIDS infection, suicide, depression and others are corrigible factors that can be reduced dramatically if there is genuine interest and effort to deal with them by those in power and with the means to do so. Thus, if there was sufficient sensitization to homosexuals as well as the communities in terms of responsible sexual lifestyles including encouraging long-term relationships and other supportive measures like effective health care systems and public accommodation and respecting their human rights generally, most likely, these negative consequences would be mitigated.[72]

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67. Carvino also makes this observation that even in the West many critics of homosexuality emphasize gay sex at the expense of lesbian sex. See Carvino, *supra* note 31, at 66.

68. Interview with a senior woman teacher, Koboko District, on September 17, 2011.

69. Interview with a respondent in California Cell, Kapchorwa Town Council in Kapchorwa District on 24th March 2012.

70. See Corvino, *supra* note 31, at 58.

71. *Id.*, at 72.

72. Coleman, *supra* note 7.

Second, even if the Gay Bowel Syndrome poses a formidable challenge, a number of measures can be taken to address it, if only, and only if, that is the only way for some human beings to be happy. Third, if society or the state were to act paternalistically (positively) and provide counseling, religious and health care services by qualified gay officers for purposes of improving their sexual relationships, it would ameliorate the suffering so described rather than the opprobrium, discrimination and abuse that are unleashed upon them.

Further, since the argument leaves out the consideration of lesbianism, then homosexuality per se is not challenged. This is because it is assumed that since there is no penetrative sex, no anus can be ruptured. But if this is the case, homosexuality remains intact as long as the dangers associated with anal penetrative sex are excluded or managed by some means to be scientifically discovered, or are already in use. As Corvino informs us, although he is a homosexual, he does not use the anus for sex and therefore, if he is honest, then there is no physical harm.[73]

And indeed, the case for homosexual life is not undermined; a congruous case in form of many diseases like HIV/AIDS could be cited. In the case of AIDS, it has never been said one should stop having sex (except for un-married); rather that care should be taken not to harm oneself or others by getting infected or infecting others. Sexual intercourse remains valid in spite of all the dangers associated with it. Moreover, should sports, which clearly in some cases veers on high risk, be stopped? My personal view is that sex is also a type of sport. Otherwise, equally, homosexuality remains valid if all the necessary precautions are taken into consideration.

The seventh argument is that homosexuality is a sign of a pathological condition. It is argued that homosexuality is a sickness either of physical or psychological or biological nature that should be rectified rather than permitting it flourish. Otherwise, if the homosexuals were not sick, they would not do what normal people are not doing. Normal people are heterosexual and those who develop sexual feelings for the same sex as they do are not normal; they are either physically or psychologically or biologically sick. They need medical attention to correct their pathological imperfection, and when this is done, they will be cured and behave normally like normal human beings. Additionally, the religious oriented people alleged that they are afflicted by the devil and therefore sick people who need to be prayed for. Others have claimed that some of the homosexuals have been prayed for and got cured and therefore it is a disease that needs attention whether religious or medical or psychological.

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73. Corvino, *supra* note 31, at 66.

This argument in a way recalls the natural argument discussed above, namely, that were they normal and therefore natural, they would be acting heterosexually. Since they are not normal, they are pathological and therefore abnormal. However, many medical professional organisations/ practitioners, one after another, the latest being from Lebanon, have increasingly proscribed homosexuals from their lists of illnesses.[74] Scientific studies have not yet established whether they are indeed pathological or not, and therefore whether they need therapy or not. Neither indeed has the cause of homosexuality been determined.[75]

In addition, the attempt at reparative measures have been seriously criticized because of their methodological proficiency, ethical standards like consent and as a social-political-religious artifact for committing injustice against those homosexuals.[76] For instance, the veracity of the effect of religious programs can hardly be proved. Not only do these approaches assume that they are sick, which is not true in my view, but render homosexuals as objects of social mistreatment; and if they are children or adolescents, they are forced into such therapies. It has also been argued that actually, the health problems of the homosexuals derive from the health care system – policies, attitudes, and traditional professional practices which in effect exacerbate their problems by discriminating against them by denying them health care.[77] Thus, if homosexuality is not a disease of some kind, what justification is there for anyone to revile and criminalize it?

The eighth argument can be called the integrity of sex argument and it is based on the fact that sexual performance has certain moral standards, style, and procedure without which its sacredness/sanctity it would be threatened.[78] Sex between same-sex couples is as bad as bestiality or as pedophile or incest. It is morally wrong because it undermines the completeness that is inherently good in a sexual act. Having sex in a different way is not proper because it desecrates the normative morality of the sexual act. Therefore, the type of sexual act such as that of homosexuals is not proper and should be banned. This argument could overlap with the natural and religious arguments but it stands on its own because it claims existence of specific moral (human created) criteria.

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74. Littauer, *supra* note 6.

75. TIMOTHY MURPHY, HOMOSEXUALITY, ENCYCLOPEDIA OF BIOETHICS, 3RD EDITION, VOL. 2, (2003), at 1161-1169.

76. *Id*.

77. *Id*., at 1168.

78. One of the claimants of this view was a female teacher and a religious reader, both of whom were respondents in this research.

In a way, this argument seems to echo the naturalist argument elaborated above, in the sense that it suggests some sort of standardized essentialist type of sexual acts without which no sex is performable or should we say acceptable? Nonetheless, the difference is that, rather than natural determination, sex is determined by normative standards or moral considerations which are human determined and executed. This is of course a bigger-than-life claim. Namely, if we admit of normativity here, then we have to define what these normative standards are and whose standards are applicable.

For instance, one of the respondents indicated that it must be penetrative, in privacy, by adults and between men and women. Others may prefer no penetration like a number of women of my region (Western Uganda). Indeed, how come that a homosexual act cannot have sanctity and sacredness? What about a homosexual act between adult people in private who are, mutually supportive, committed and loving and, as Corvino alleges, are satisfies by it?[79] In other words, who determines sanctity? Is it the youth of 50 years ago or the Africans or Westerners? Who are these Africans? Is it of today's homosexuals or of heterosexuals? This sanctity and normativity of sexual acts goes farther every time we try to seize it.

Thus, in general, all the above arguments against homosexuality, important as they seem, do not substantially and logically negate or effectively dislodge the homosexual phenomenon and cause the denial of the human rights of homosexuals. Yet, the debate is not yet concluded although a lot of reflection and education are going on. However, it is still of interest to see how the whole debate and efforts to legislate either against it or for it unfold in Uganda and other African states and to what extent people's rights will be abjured or promoted and protected.

### *B. Beyond Moral Arguments*

Now, if the arguments against homosexuality are not potent enough to negate it, what then informs our disdain for it? If our moral reasoning is not able to show why we disagree with something, then what informs our moral choices? Do people mean something else when they say it is not in our culture or does having a culture imply abhorring other cultures? Is it a question of emotional feeling or lack of assurance? Is it insecurity that heterosexuality will be challenged or that it will disappear? Why would it be a problem if it were challenged? Is it lack of familiarity, experience and possibly knowledge about it? If it is because of lack familiarity, why then do we like some new experiences and still dislike others? Is it because we have made a good

79. Corvino, *supra* note 31. Corvino paints a blossoming picture of his relationship with his cranky partner, Mark. See the Introductory chapter and generally in the whole book.

logical analysis and have found out that some choices are objectionable while others are justifiable? In short, what is the source of moral truth?

In my view, Wolfe seems to offer some indication on how to handle the difficulty of dealing with public morality. He points out that in a liberal democracy one could take comprehensive and fundamental arguments full-blown to the public sphere and try to persuade it (the public) in the hope that the arguments will do the job. However, he cautions that this would be a tall order because the public is not a forum where such lengthy, systematic arguments can be processed and understood fully and get convinced or not. Such arguments would be for graduate seminars or scholarly journals.[80] In this case, elaborate arguments may not be the solution. Even an individual trying to deal conclusively with moral questions he/she experiences does not dig in scholarly journals in order for him/her to make a morally right decision. Yet, both individuals and public face moral dilemmas—and these become even more complicated at a public level. In Marxist societies or theocracies, it would probably take a dictatorial route through legislation to implement public morality.

Second, Wolfe further informs us that in the pluralism of liberal democracies, sufficient agreement on fundamental moral concepts to claim to achieve moral consensus is hardly possible.[81] However, this is where probably lies the difference between traditional societies (which are often authoritarian) and liberal democracies. Whereas the liberal democracies tend to allow full debate on a number of issues, the traditional societies depend largely on traditional or cultural resources (communitarian) or authoritarian leadership to defend their positions and try their best to restrict variations or, at least, to go slow on changes in relation to issues of morality.

Wolfe further contends that he doubts whether most people are interested in the elaborate complex rhetorical and psychological power of the arguments. These arguments seem to end in the foundational propositions of morality which may not appeal to most people. He demonstrates this case by suggesting that one should seek an answer from the public why murder is wrong. Such an attempt would be futile because good rhetoricians can totally negate such foundational positions. Consequently, in this regard, he suggests that it may be inevitable for the citizenry to settle for the overlapping positions as in Rawls' "overlapping moral consensus" without striving for a consensus with finality.

In fact, in my view, the state of affairs where there is overlapping of moral positions could be settled in terms of time, if more experience or more knowledge

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80. Wolfe Christopher, *Homosexual Acts, Morality and Public Discourse*, in CONTEMPORARY DEBATES IN SOCIAL PHILOSOPHY (Thomas Laurence ed., 2008), at 97.

81. *Id.*

comes forth however slow the process may be. Finally, Wolfe suggests that public moral arguments should be of limited or confined moral forms like those involving *reduction ad absurdum.*[82]

However, Wolfe does not solve the major question: namely what is moral truth? How is it achieved? Instead, he suggests that:

> Ultimately, the most important norm for evaluating what a society does is simply moral truth (which includes not only ethical truths themselves, but also proper prudential judgments that must be made in the concrete *circumstances of a given society*.[83]

What are legitimate and necessary compromises? What are proper prudential judgments? *Does this position not raise cultural relativism to the extent that the so-called "givens" are totally the basis of legalization of homosexuality in culturally determinative societies?* What are the givens? In my view this question remains unresolved.

When I discussed with a European philosopher, his view was that the reason for rejection of homosexuality is mainly because of fear. This is what is known as homophobia. In this, he is joined by Tamale who argued that this is homophobia, and that it was brought to Africa by Europeans. But if so, why do we have this fear?[84] To say that it is because of homophobia is not to answer the question why we develop a fear. Tamale on her part argues that it is the manner in which homosexuality is defended and represented that makes it abhorred by Africans.[85] She instead proposes that we should adopt the *Ubuntu philosophy*, which means treating with dignity as it was in Africa.[86]

First, I do not agree with Tamale that homophobia is exported from the West as it is old people who are starkly against it and yet during their youth there was not much debate about it. Second that *Ubuntu* is a solution, because she is saying nothing new since it is, after all, already represented in the concept of human rights - i.e, the concept of human dignity which she rightly refers to as "obuntu bulamu"; a different concept from "ubuntu" or "obuntu" which means "being human" or "humanness." For instance, when a person is caught in the wrong, as a way of defense, he or she could

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82. *Id*., at 98.
83. *Id.*, at 99.
84. Tamale, *supra* note 52.
85. *Id*.
86. *Id*.

say, "nanye ndi omuntu" literally translated that "I am also human."

Instead, my view is that our objection to certain actions as moral wrongs or moral rights derives from how we feel about something as painful, disgusting, ugly and undesirable. Largely, this feeling is because of our *imagination of the particular act or experience we have about it or lack* of it. In terms of imagination, for example, I feel scared when they talk of female genital cutting or even circumcision. It was reported in one Ugandan newspaper that a woman put broken pieces of a razor blade into the child's tiny vagina and that she was likely to lose her uterus—and I felt disgusted and angry.[87] Why am I emotional about it? It is because of the pain I imagine it caused to the child and possibly the motive behind such a thing. If this is the emotive theory of our moral judgments, namely that I feel so bad about it, then, that is what I posit. The question is then how to deal with our emotional feelings about different situations including homosexual instances. That is an issue of importance that should be given another space.

## IV. CONCLUSION

In view of the foregoing discussion, therefore, the arguments against homosexuality as presented are important, but they are not adequate for pressing its criminalization and consequent denial of human rights. It is true that there is intense opposition against homosexuality citing certain reasons which in Wolfe's language may be due to the "givens". However, we need to give time and space for continuous engagement including education, research and debate with which better policies and laws can be designed. Even as more time and space are sought, there are some of the human values like human rights that we have already agreed upon as a modern society, and therefore, we should try as much as possible to allow them to guide us at the time of such intense social apprehension.

Although Wolfe informs us that elaborate arguments may not easily solve public morality issues it is neither our naivety nor our ignorance nor non-engagement with this great debate that will solve the problem of homosexuality in Africa. Instead, we need good and tolerant leaders at all levels - at family, community, national and international levels.

Finally, this opportunity should be seized upon to make our citizens understand human rights generally and in specific reference to homosexuals and other persons being unfairly discriminated, targeted, and dehumanized.

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87. *Stepmother Puts Razor Blades in Baby's Vagina*, THE OBSERVER, September 15, 2013.

# UNPACKING PRESIDENTIAL MODELS IN AFRICAN CONSTITUTIONS

Fred Sekindi*

**ABSTRACT**

*Constitutions in many African countries have demonstrated that the presidency must be granted command of the armed forces, as well as immunity from legal proceedings, among other presidential privileges and powers. However, very few attempts have been made to question the origins of these powers and privileges, and to circumscribe presidential authority in order to avoid the potential misuse and abuse of the power and privileges of the presidency. As a result, the control of presidential authority in many African countries remains one of the most challenging issues in constitutional frameworks. This article attempts to unpack presidential models in African constitutions. It argues that constitutions in Africa are designed to entrench the powers of the heads of state and governments under whose leadership or influence they were created, and it is from those laws that presidential authority has emerged. Therefore, because of the purpose for which those laws were designed, they have not provided sufficient constraints on heads of state and governments.*

## I. INTRODUCTION

There is no ideal model of a constitution that would be suitable for all countries. However, constitutions are often inspired by the need to change the political and social direction of a country often in the aftermath of conflicts. They are often aimed at redressing the ills and injustices of the past.[1] For these reasons, they need to take into account the political history of the country. Particularly in Africa, where political leaders have generally demonstrated lack of the legitimacy needed to rule, constitutions need to effectively negotiate the relationship between governments and the citizenry, to ensure that the state powers exercised by leaders are derived from the citizenry who can control or withdraw such powers when they are misused and abused. This bestows legitimacy on the leaders because they can be perceived as exercising powers granted by the governed. A constitution should also serve as an instrument that ensures that the

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1. See for example the Constitution of the Republic of South Africa 1996, Preamble.

powers of the leaders are constrained by universally accepted principles of constitutionalism.

## II. UNPACKING THE AFRICAN MODEL OF EXECUTIVE PRESIDENT

The establishment of the 'Big African President' with untrammeled constitutional powers stands in opposition to the concept of constitutionalism. It represents the biggest challenge towards a smooth democratic transition in post-colonial Africa. Twenty-eight constitutions of countries in Africa vest executive powers in a president or a prime minister,[2] yet some of these constitutions, including that of South Africa, which is widely acclaimed as being one of the most innovative in Africa, do not subject a president to direct elections by the populace.[3] Thus, the exercise of state power by the presidents of these countries is not directly sanctioned by the popular will. Nearly three-quarters of Africa's heads of state who left power in the 1960s and 1970s were ousted through a *coup d'état*, violent overthrow or assassination.[4] Arguably, this is because constitutions in Africa make it impossible for the incumbent president to be removed from power through constitutional processes.

Today, the current heads of state in several African countries continue to tinker with their countries' constitutions in order to maintain their hold on power. It is therefore not surprising that those presidents who have managed to manipulate their

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2. These are: Constitution of the Federal Islamic Republic of Comoros 2001, art 12; Constitution of the Federal Republic of Nigeria 1999, art 130(2); Constitution of the Gabonese Republic1991, art 8; Constitution of the Islamic Republic of Mauritania 1991, art 2; Constitution of the Republic of Angola 2010, art 108(1); Constitution of the Republic of Benin 1990, art 54; Constitution of the Republic of Botswana 1996, art 47; Constitution of the Republic of Congo 2001, art 56; Constitution of the Republic of Cote D'Ivoire 2000, art 41; Constitution of the Republic of Djibouti 1992, art 21; Constitution of the Republic of Gambia1996, art 76; Constitution of the Republic of Ghana1992, art 58(1); Constitution of the Republic of Guinea 2010, title III; Constitution of the Republic of Kenya, 2010 art 131(1) (b); Constitution of the Republic of Liberia 1984, art 50; Constitution of the Republic of Malawi 1994, art 70; Constitution of the Republic of Mali 1992, art 29; Constitution of Rwanda 2003, art 97; Constitution of the Republic of Seychelles 1993, art 66(1);Constitution of the Republic of Sierra Leone 1991, art 53(1); Constitution of the Republic of South Africa 1996, art 85(1);Constitution of the State of Eritrea 1997, art 39(2); Constitution of the Togolese Republic 1992, title IV; Constitution of the Tunisia Republic 2014, art 71; Constitution of the Republic of Zambia 1991, art 33(2); Constitution of the Republic of Zimbabwe 2013, art 88(1); Constitution of the United Republic of Tanzania 1977, art 34(4).

3. Under the Constitution of the Republic of South Africa 1996, art 86(1) the president is elected by the National Assembly from among its members; also see the Constitution of Mauritius 1968, art 28(2) (a) (i) which provides that a president is elected by the National Assembly.

4. D. Posner and D. Young, *The Institutionalisation of Political Power in Africa*, 18 JOURNAL OF DEMOCRACY (2007) 127, 131.

countries' constitutions in their favour have held power the longest.[5] Another unsurprising fact is that the other category of long-serving presidents in Africa managed to hold power because the constitutions of their countries do not impose limits on the re-election of the head of state.[6]

The most significant innovation of post-colonial African leaders is the manner in which they have perpetuated their incumbency through constitutions. Arguably, civil wars, corruption, poverty, ethnic or religious tensions which have afflicted post-colonial Africa are as a result of constitutions that have entrenched governments in power without the possibility of change through constitutional processes. Since the advent of independence in the 1960's, more than 180 presidents have held power in different African countries but less than twenty-percent of that number have relinquished power or retired voluntarily.[7]

It is because of the void of constitutionalism, created as the result of bestowing excessive powers on presidents and their governments, which makes it impossible to transfer power through constitutional processes that Africans have resorted to waging wars to access political power. The paradox in Africa is that it is almost impossible for a change of government to occur through elections.[8] Yet most African constitutions

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5. Seven Presidents, most of the longest-serving leaders in their countries post-independence history and in Africa, secured constitutional amendments that allowed them to stand for more terms in office and all seven won the subsequent elections. These were Presidents Blaise Compaore of Burkina Faso who was forced to resign in November 2014 as a result of a popular uprising in his country following his second attempt to amend his country's Constitution to allow him to run for a fifth term. He had been in power for 27 years; Idriss Deby of Chad who has held the reigns for 24 years; Omar Bongo of Gabon ruled his country for over 41 years until his death in October 2011; Lansana Conte of Guinea held power from April 1984 until his death in December 2008; Sam Nujoma of Namibia held power from 1990 to 2005; Gnassing Beeyadema of Togo held power from 1967 until his death in 2005; Yoweri Museveni of Uganda has been in power for 29 years. *See,* D. Vencovsky, Presidential Term Limits In Africa, Conflict Trends, Issue No. 24, 2007) at 4.

6. These include Emperor King Haile Selassie, who was deposed from power in Ethiopia in 1974 after 44 years; Muammer Gaddafi of Libya, who ruled for almost 42 years; Teodoro Obiang Nguema of Equatorial Guinea seized power in a coup on 3 August 1979. He has been in power since; Robert Mugabe of Zimbabwe is the only remaining African leader to have been continuously in power since his country's independence. He became Prime Minister in April 1980 and President in 1987. He has held the office of the President for 27 years. See Vencovsky *id*., at 5.

7. These include: Julius Nyerere of Tanzania; Leopold Senghor of Senegal; Nelson Mandela of South Africa and Quitt Masire of Botswana who voluntarily relinquished power and paved the way for smooth transfers of political power.

8. According to a recent study, from 1990 to 2012 opposition parties in African States were able to take power in only one of every twenty-eight elections. *See*, Giovanni Carbon, Elections and leadership changes: How do political leaders take (and Leave) power in Africa, (Consultancy Africa Intelligence, 2014) at 7.

provide that elections are the only legitimate way of transferring political power.[9] However, elections serve no democratic purpose as they offer no prospect of change of governments. This is often because the incumbent president is often constitutionally empowered to appoint heads of electoral management bodies.[10] Also, there is usually no envisaged end to the tenure of office of some of the executive presidents whose only constitutional limit to power is age.[11] Some constitutions do not impose age restrictions on the presidency,[12] thereby allowing presidents to govern for life. Constitutions in Africa generally allow the presidency command over the armed forces,[13] which they

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9. These are: Constitution of Burkina Faso 1991, art 37; Constitution of the Democratic Republic of Congo 2005, art 5; Constitution of the Federal Democratic Republic of Ethiopia 1995, art 8; Constitution of the Federal Islamic Republic of Comoros 2001, art 3; Constitution of Gabonese Republic1991, arts 3 and 4; Constitution of the Islamic Republic of Mauritania 1991, art 2; Constitution of the New Arab Republic of Egypt 2012, art 136; Constitution of the Republic of Angola 2010, art 4(1); Constitution of the Republic of Benin 1990, arts 3-6; Constitution of the Republic of Burundi 2005, arts 7 and 8; Constitution of the Republic of Cameroon 1972, art 2; Constitution of the Republic of Cape Verde 1992, arts 4 and 111; Constitution of the Republic of Congo 2001, art 3; Constitution of the Republic of Djibouti 1992, art 4; Constitution of the Republic of Equatorial Guinea 1991, art 2; Constitution of Guinea-Bissau 1984, art 2; Constitution of the Republic of Kenya 2010, art1(2) read with art 81; Constitution of the Republic of Liberia1984, art 2; Constitution of the Republic of Malawi 1994, art 6; Constitution of the Togolese Republic 1992, art 5; Constitution of the Tunisian Republic 2012, art 1 (3); Constitution of the Republic of Uganda 1995, art 1.

10. *See*, Constitution of Burkina Faso1991, art 153; Constitution of Ghana 1992, art 43 read with art 70; Constitution of the Federal Republic of Somalia 2012, art 89; Constitution of the Republic of Uganda 1995, art 60; Constitution of the Republic of Zimbabwe 2013, art 91; Constitution of the Togolese Republic 1992, art 59; Constitution of the United Republic of Tanzania 1977, art 74.

11. *See*, Constitution of the Federal Republic of Somalia 2012, art 89; Constitution of the Islamic Republic of Mauritania 1991, art 28 states that the president of the Republic is eligible for re-election; Constitution of the People's Democratic Republic of Algeria 1996, art 74; Constitution of the Republic of Cameroon 1972, art 5(2) ; Constitution of the Republic of Djibouti 1992, art 23 read with art 24; Constitution of the Republic of Mauritius 1968, art 28(2)(a)(ii); Constitution of the Republic of Uganda 1995, art 105(1) - (2); Constitution of the Republic of Zimbabwe 2013, art 29.

12. *See*, Constitution of the Republic of Equatorial Guinea 1991, art 34 read with art 35; Constitution of the Republic of Zimbabwe 2013, art 91.

13. See Constitution of Burkina Faso 1991, art 52; Constitution of the Democratic Republic of Congo 2005, art 83; Constitution of the Federal Democratic Republic of Ethiopia 1995, art 74(1) allows a Prime Minster who is vested with executive power, command of the armed forces; Constitution of the Federal Islamic Republic of Comoros 2001, art 12; Constitution of the Federal Republic of Nigeria 1999, art 130(2); Constitution of the Republic of Gabon 1991, art 22; Constitution of the Republic of Angola 2010, art 108(1); Constitution of Burundi 2005, art 110; Constitution of the Republic of Cameroon 1972, art 8(2); Constitution of the Republic of Cape Verde 1980, art 147(1) (a); Constitution of the Republic of Congo 2001, arts 77 and 78; Constitution of the Republic of Cote D'Ivoire 2000, art 47; Constitution of the Republic of Djibouti 1992, art 32; Constitution of the Republic of Equatorial Guinea 1991, art 40; Constitution of the Republic of Gambia1996, art 188(1); Constitution of the Republic of Ghana 1992, art

have more often than not used as a weapon of coercion against political adversaries and citizenry, and as an instrument to arbitrate political disputes.

Presidents are above the law as they are not subjected to legal proceedings during their tenure of office.[14] As a result they can break the law, so can their supporters or allies, to whom a president can extend the powers of pardon and commutation deriving from the constitutionally vested unquestionable power of clemency.[15] Constitutions declare the president as the most important person in the country or the first and most important citizen.[16] A president may appoint and dismiss

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57(1); Constitution of the Republic of Guinea 2010, art 47; Constitution of the Republic of Guinea-Bissau 1984, art 65; Constitution of the Republic of Kenya 2010, art 131(1) (c); Constitution of the Republic Liberia 1984, art 50; Constitution of the Republic of Malawi 1994, art 78; Constitution of the Republic of Mali 1992, art 44; Constitution of the Republic of Rwanda 2003, art 110; Constitution of the Republic of Seychelles 1993, art 50; Constitution of the Republic of South Africa1996, art 202(1); Constitution of the State of Eritrea 1997, art 39(1); Constitution of the Togolese Republic 1992, art 72; Constitution of the Republic of Zimbabwe 2013, art 89; Constitution of the United Republic of Tanzania 1977, art 33(2).

14. *See,* Constitution of Southern Sudan 2011, art 103; Constitution of the Republic of Angola 2010, art 127; Constitution of the Republic of Congo 2001, art 87 the only exception is high treason; the Constitution of the Republic of Gambia 1996, art 69; Constitution of the Republic of Ghana 1992, art 57 (4)-(6); Constitution of the Republic of Guinea 2010, art 37; Constitution of the Republic of Kenya 2010, art 143(1) the immunity however does not extend to crimes for which the president may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity; Constitution of the Republic Liberia 1984, art 61; Constitution of the Republic of Malawi 1994, art 91; Constitution of the Republic of Namibia 1990, art 31; Constitution of the Republic of Rwanda 2003, art 115; Constitution of the Republic of Sierra Leone 1991, art 48(4); Constitution of the State of Eritrea 1977, art 43 is the only exception where a president is faced with impeachment; Constitution of the Republic of Uganda 1995 art 98(5); Constitution of the Republic of Zambia 1991 art 43; Constitution of the Republic of Zimbabwe 2013 art 88; Constitution of the United Republic of Tanzania1977, art 46.

15. *See*, Constitution of Islamic Republic of Mauritania 1991, art 37; Constitution of the Republic of Kenya 2010, art 33; Constitution of the Republic of Liberia 1984, art 59; Constitution of the Republic of Malawi 1994, art 89(2); Constitution of the Republic of Mali 1992, art 45; Constitution of the Republic of Mauritius 1991, art 75(2) requires the president to act on the advice of the Commission on the Prerogative of Mercy. Members of the Commission on Prerogative Mercy are appointed by the president; Constitution of the Republic of Rwanda 2003, art 111; Constitution of the Republic of Sierra Leon 1991, art 63; Constitution of the Republic of Zimbabwe 2013, art 121 allows a president to exercise prerogative mercy after consultation with the Cabinet appointed by the president; Constitution of the United Republic of Tanzania 1977, art 45; Constitution of Uganda 1995, art 122 (1) creates an Advisory Committee on the Prerogative Mercy to advice a president on the exercise of pardon. The seven members of the Committee are appointed by the president.

16. *See,* Constitution of the Republic of Equatorial Guinea 1991, art 32; Constitution of the Republic of Ghana 1992, art 57(2); Constitution of the Republic of Uganda 1995, art 98(2); Constitution of the Republic of Zimbabwe 2013, art 27(2).

the entire civil service at will.[17] Parliament, which is supposed to be one of the constitutional institutions for checking and balancing presidential authority, is beholden to a president who can disband it at whatever time.[18] The impeachment provisions are inadequate as a deterrent tool to ensure that a president complies with their constitutional and other legal obligations because of the proportion of MPs that is required to trigger the motion to impeach a president,[19] who often enjoys majority

17. *See*, Constitution of the Federal Republic of Somalia 2012, art 117; Constitution of the Republic of Angola 2010, art 119; Constitution of the Republic of Burundi 2005, art 111; Constitution of the Republic of Cameroon 1972, art 8(10); Constitution of the Republic of Cote D'Ivoire 2000, art 46; Constitution of the Republic of Equatorial Guinea 1991, art 39(g); Constitution of the Republic of Kenya 2010, art 134(c); Constitution of the Republic of Liberia 1984, art 56; Constitution of the Republic of Rwanda 2003, art 113; Constitution of Tunisian Republic 2014, art 78; Constitution of the Republic of Zimbabwe 2013, art 74; Constitution of the United Republic of Tanzania 1977, art 56.

18. *See*, Constitution of the Islamic Republic of Mauritania 1991, art 31 allows the president to dissolve Parliament and call fresh elections at any time after consultation with the vice president and prime minister who are both appointed by the president; the Constitution of the Republic of Equatorial Guinea 1991, art 66 permits a president to order the dissolution of the National Assembly and organise new elections at any time; Constitution of the Republic of Guinea 2010, art 96 allows the president to dissolve the National Assembly and call elections if there are persistent disagreements. A president is however only allowed to do so in the third year of the National Assembly's four-year tenure; Constitution of the Republic of Mali 1992, art 42 allows the president in consultation with the pprime minister appointed by the president to dissolve the National Assembly and call for elections at any time; Constitution of the Republic of Rwanda 2003, art 133 allows the president to dissolve the National Assembly if there national interests, after consultation with the prime minister, both presidents of the Chambers of Parliament and the president of the Supreme Court; Constitution of the Republic of Seychelles 1993, art 110 allows a president to dissolve the National Assembly for any reason which the president considers to be in the national interest after giving seven days' notice to the Speaker; Constitution of the Republic of Togo 1992, art 68 allows the president to dissolve Parliament for any reason after consultation with the prime minister who is appointed by the president.

19. *See*, Constitution of the Federal Republic of Nigeria 1999, art 143(2) requires half of the members of Parliament to approve a motion to initiate proceedings against the president; Constitution of the Republic of Kenya 2010, art 145 provides that one-third of members of the National Assembly are required to trigger impeachment proceedings against the president; Constitution of the Republic of Malawi 1994, art 86 requires half of the members of the National Assembly to sign a motion initiating impeachment proceedings against a president; Constitution of the Republic of Seychelles 2011, art 54(1) provides that a motion proposing impeachment proceedings against the president must be signed by half of the members of the National Assembly; Constitution of the Republic of Sierra Leone 1991, art 51(1) mandates that not less than one-half of all the Members of Parliament must sign a motion alleging that a president has committed any violation of the Constitution or any gross misconduct in the performance of the functions of his office and specifying the particulars of the allegation, in order to trigger impeachment proceedings against a president.

support in a partisan parliament. The presidency has the sole power to issue decrees.[20] It may also initiate constitutional amendments[21] which may allow a president to propose and to effect amendments to provisions of the constitution relating to the presidency[22] in order to fortify power. A president may also suspend the constitution.[23] This design of the presidency suffers from constitutionalism deficit as it not founded on the basic tenets of constitutionalism. It also breeds violent struggles for political power because there is no prospect of replacing the incumbent president and government through constitutional means. It also does not provide sufficient mechanisms for meaningfully tempering a president's actions.

Thus, most constitutions in Africa do not provide sufficient checks and balances on the presidency, despite the rhetoric suggesting that the exercise of executive power is subject to checks and balances by the legislature and the judiciary. Presidents and their governments rule under the constitution but not according to the norms of constitutionalism. In practice, the legislature and the judiciary are incapable of keeping a president and his government in check. Often, constitutions can be easily amended at the initiative of the president to allow the ruling regime to consolidate and advance its ambitions. Several state positions and the financial benefits that go along with such positions are dependent on the patronage of a president. Most prominent government positions and offices are occupied by persons who owe allegiance to the president who has the constitutional mandate to appoint and to dismiss the entire civil service almost at will.

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20. *See,* Constitution of Burkina Faso 1991, art 58; Constitution of the Democratic Republic of Congo 2005, art 218(1); Constitution of the Islamic Republic of Mauritania 1991, art 71; Constitution of the Republic of Angola 2010, arts 125-126; Constitution of the Republic of Cameroon1972, art 8(8); Constitution of the Republic of Congo 2001, art 81; Constitution of the Republic of Equatorial Guinea 1991, art 41; Constitution of the Republic of Guinea 2010, art 46; Constitution of the Republic of Guinea-Bissau 1984, art 67 (11); Constitution of the Republic of Rwanda 2003, art 63.

21. *See*, Constitution of the Federal Islamic Republic of Comoros 2001, art 42; Constitution of the Islamic Republic of Mauritania 1991, art 99; Constitution of the Republic of Angola 2010, art 233; Constitution of the Republic of Cameroon 1972, art 63(1); Constitution of the Republic of Congo 2001, art 185;Constitution of the Republic of Djibouti 1992, art 91; Constitution of the Republic of Guinea 2010, art 152; Constitution of the Republic of Rwanda 2003, art 93; Constitution of the State of Eritrea 1997, art 59(1).

22. *See,* Constitution of the Republic of Equatorial Guinea 1991, art 102-103; Constitution of the Republic of Liberia 1986, art 93 allows for the amendment of the presidential term limits provided the amendment does not become effective during the term of office of the incumbent president.

23. *See,* Constitution of the Republic of Equatorial Guinea 1991, art 42(d) allows the president to suspend the Constitution in the event of terrorist attacks or mutiny and sentence those involved according to the gravity of the situation.

Civil servants misappropriate foreign aid and state funds without fear of being brought to account, because they are only answerable to the president. The armed forces are made up of people of the same tribe as the president who can be trusted, because a president has to depend on it for power. Constitutions in Africa, often, do not make provision that the armed forces must reflect the ethnic diversity of the country. Assets of the state are sold into the private ownership of the president's family and supporters on instructions of the president. Public service jobs and lucrative state business opportunities are accessed only by the ruling government's supporters.

Presidential constitution excesses may also be responsible for creating two societies in African countries, namely, the extremely wealthy who are supporters of the president and the ruling government and the poor who are not. These are some of the possible effects of the domineering presidential systems found in constitutions of most African countries. The other notable fact is that in those countries where the domineering executive presidential model exists, constitutions have either been sponsored by the ruling governments or they have been dubiously amended so as to provide incremental powers to the presidency.[24] Thus their popularity and legal legitimacy are questionable. It is, therefore, not surprising that when the International Criminal Court (ICC) declared that it would investigate presidents Omar al-Bashir of Sudan and Uhuru Kenyatta of Kenya for allegedly committing international crimes against their people, African heads of state have attempted to convince Africans that the ICC is a colonial tool seeking to re-establish colonialism.[25] Consequently, they have moved to expand the jurisdiction of the African Court of Justice and Human Rights, to create a regional legal framework for international crimes under which heads of state, ministers and government officials are provided with immunity from prosecution.[26] This is because, for many African leaders, constitutions have not imposed any legal limits to their powers. Therefore, their authority had not been questioned and they had not faced legal scrutiny before the ICC's operations.

Fed up with immovable African presidents and political dynasties, Africans across the continent are joining forces to 'turn the page' on leaders who have consolidated power through constitutions. The former president of Burkina Faso, Blaise Compaore, was driven out by his people in October 2014 after twenty seven

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24. These include: Angola; Botswana; Burkina Faso; Central African Republic; Comoros; Congo; Cote d'Ivoire; Ethiopia; Gabon; Guinea Gambia; Rwanda; Uganda; Zimbabwe.

25. See Joel Kimathi, *ICC is a racist and imperialist court- UHURU says as he tells Bensouda to respect Kenya's sovereignty*, DAILY POST (Nairobi, 23 October 2013) 2.

26. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2011 (decision of 20-24 June 2014 on the draft legal instruments Doc. EX.CL/846(XXV)), art 46 (a).

years of rule, while President Paul Biya of Cameroon and his Congolese counterpart, Denis Sassou Nguesso, have each accumulated more than thirty years in power.

Zimbabwe's Robert Mugabe has been president for thirty-eight years; Angola's José Eduardo dos Santos for thirty six; Equatorial Guinea's Teodoro Obiang Nguema Mbasogo for thirty three; and Uganda's Yoweri Museveni for twenty nine. At the time of writing, in the Democratic Republic of Congo, President Joseph Kabila is seeking to hang onto power at the end of his second term despite Article 70 of the constitution of the Democratic Republic of Congo 2011 limiting the term of a president to five years renewable once. President Pierre Nkurunziza of Burundi has defied a two-term constitutional limit on the re-election of the president imposed by article 96 of the constitution of Burundi 2005 to run for a third term although the Constitutional Court has ruled in the case of *Décision de Cour Constitutionnelle du Burundi validant la candidature du Président Pierre Nkurunziza un troisieme mandate présidentiel*[27] that the president is eligible for re-election.

Also, President Paul Kagame of Rwanda once hinted that he might support a constitutional amendment that would allow him to run for a third term. When asked whether he would support the idea, he is reported to have responded that, 'let's wait and see what happens as we go—whatever will happen, we'll have an explanation.'[28] In October 8, 2015, The Rwandan Supreme Court ruled against the lifting of presidential term limits in the country. This case had been filed by the opposition party, Democratic Green Party of Rwanda, in a bid to stop President Kagame, from seeking another term in office. In November 2015, the country's senate, which is the upper house of parliament, unanimously approved a constitutional amendment to allow President Kagame to seek a third term.[29] The vote by the senate cleared the path for a referendum to decide on whether or not to remove presidential term limits. The results of the referendum which was held on 18 December 2015 returned a verdict of 98 per cent in favour of constitutional amendments to allow President Kagame to run for another seven-year term in 2017. He would also be eligible thereafter to run for another two five-year terms.

The election in Nigeria in March 2015 and the subsequent peaceful power transition from the incumbent President Goodluck Jonathan to his opponent, General Muhammadu Buhari should have delighted Africans everywhere as Nigeria marked its first ever democratic change of power. The elections highlighted just how unusual it

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27. *RCCB* (4 may 2005).

28. All Africa 'Africa: Is African Democracy Hopeful? '*All Africa* (13 April 2015) http://allafrica.com/stories/201504131420.html (accessed 15 March 2015).

29. Rwandan Senate votes to allow third term for Kagame, AL JAZEERA, 17 November 2015

is to vote an incumbent government out of power.

The new wave of constitutional reviews that is sweeping across West Africa at the moment deserves a brief mentioning. At least six countries in the sub-region including Benin, Ghana, Liberia, Nigeria, Senegal and Sierra Leone are currently reviewing their constitutions. Does this wave of constitutional reform signal a new era of recognition and acceptance of democratic processes in West Africa? Or does it merely reflect a trend of governments initiating constitutional reviews in order to surreptitiously attempt to subvert the democratic process through 'legitimately-accepted' means?

## III. CONCLUSION

This article attempts to highlight presidential models in constitutions in Africa and some of the implications of grating excessive powers to the presidency. Pre-colonial traditions and cultures have been blamed for the bad governance systems in Africa,[30] and some post-colonial despotic rulers have justified dictatorship and violations of their people's rights on the basis of pre-colonial African traditions, cultures and histories because human rights and democracy were not organically built into pre-colonial African systems of governance.[31]

On the other hand, some scholars have argued that governance systems in post-colonial African societies are a result of the colonial policies of divide and rule and the integration of diverse ethnic groups into a single nation.[32] The dictatorial constitutional structures for exercising state power indicate that post-colonial leaders have styled themselves in a manner that allows them to dominate power without the possibility of transferring it through constitutional processes. This has given rise to the authoritarian presidential systems found in most constitutions in Africa.

This means that African leaders have hardly enjoyed the necessary legitimacy gained through plural democratic laws but have depended on authoritarian legalism[33]

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30. Sabelo Ndlovu-Gatsheni, *Who ruled by the spear? Rethinking the form of governance in the Ndebele State,* 2 AFRICAN STUDIES QUARTERLY (2008) 71, 73.

31. *Id*., at 79.

32. GARDENER THOMPSON, GOVERNING UGANDA: BRITISH COLONIAL RULE AND ITS LEGACY (2003), at 27-31; also see, SAMWIRI KARUGIRE, ROOTS OF INSTABILITY IN UGANDA (2ND EDITION, FOUNTAIN PUBLISHERS 2003) 38-44.

33. In a legal authoritarian state, laws serve the purpose of the political elite. The main purpose of the law is to protect and preserve political power. For a detailed discussion on legal authoritarianism, see TOM GINSBURG AND ALBERTO SIMPER, CONSTITUTION IN AUTHORITARIAN REGIMES (CAMBRIDGE UNIVERSITY PRESS 2014) 14-21.

as well as the gun for their power. In others words, they have ruled according to the laws that they have dictated and their military might but not by the rule of law. This mode of governance has been instrumental in keeping heads of state in power because it allows them to subjugate and terrorize the citizenry.

# CRIMINAL JUSTICE SECTOR REFORMS IN NIGERIA

Matthew Olong*

**ABSTRACT**

*The quest for a criminal justice system that is just, responsive, humane and recognizes the fact that changes are inevitable and criminal legislation should move and adapt to changes in society remain the tap root on which rest an ideal justice system. The article explores the possibility of a criminal justice system in Nigeria that would imbibe respect for the rule of law, human rights, integrated, efficient and effective criminal justice that is fair and provides reasonable and equal access to justice. The author argues for an ideal criminal justice system that provides qualitative and speedy delivery of justice; a criminal justice delivery that would strike a balance between delayed and hurried justice and would utilize information and communication technology for the attainment of substantial justice.*

## I. INTRODUCTION

The dilemma and discourse of reforming a very crucial sector like Nigeria's criminal justice system has become an area in which every citizen has an opinion. But such is not unexpected because of the continuing revelation of how much the weight of public opinion has succeeded in influencing the criminal justice machinery that over time has been comatose.

There is, however, no doubt that the criminal justice sector in Nigeria is undergoing a lot of transformation. The Nigerian people and the international community have realized the importance of strengthening the criminal justice sector institutions to meet the challenges of the 21st century. Momentous legal reforms are therefore taking place. These changes are no doubt a response to the expansion of the democratic space engendered by Nigeria's new democracy and the collapse of authoritarianism.[1]

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1. *See*, FEDERAL MINISTRY OF JUSTICE, AGENDA FOR THE REFORM OF JUSTICE ADMINISTRATION IN NIGERIA (2004), at 2. The problems in the criminal justice administration in Nigeria and the need for a comprehensive reform necessitated the setting up of a National Working Group on the Reform of the Criminal Justice Administration in Nigeria on June 10, 2004 to review and produce a legislation that would reform and modernize the administration of criminal justice in the country. The group commenced work on July 10 of the same year and submitted its report to the Federal Government on 14th June, 2005.

Legal reforms taking place in Nigeria remain a response to the multifaceted problems besetting the Nigerian criminal delivery system leading to calls for a system of criminal justice that delivers both qualitative and speedy justice. Justice at its substantive and procedural levels depends for its efficacy and effectiveness on the mandate of the law makers; the manner and procedure of law making and the reverence of and acceptability to the people.[2]

Laws must advance in accordance with the movement of society and must respond to societal needs and changes.[3] In this article, the writer seeks to chronicle the progress made, if any, within the last three years of Nigerian's fledging democracy.

## II. BASIS FOR REFORMS

The writer agrees no less with Obiagwu when he asserts that:

> The demands on the criminal justice system have increased over a thousand percent because of the increase in population, city migration, economic and social activities. Yet there are no corresponding reforms of the legislation to meet those increasing demands. Consequently, there are huge and over-bearing pressures on the entire criminal justice sector: from the police, the courts prosecution prisons to the civil society partners including the law.[4]

At a national ministerial press briefing held on 13th December, 2005, the then Attorney General of the Federation and Minister of Justice reiterated the recommendations of the National Working Group by stating that the recommendations of the group are aimed at tackling many of the problems associated with the administration of criminal justice such as: chronic delay in the trial of cases; lack of effective coordination amongst the criminal justice agencies—the police, prison, prosecutors and the courts; absence of clear and consistent sentencing guidelines; growing number of people awaiting trial; limited alternatives to imprisonment; dichotomy between Federal and State offences; and indiscriminate transfer of investigating police officers.

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2. *Id.*

3. *Id.*

4. C.E. Obiagwu, Reforming Criminal Justice Administration in Nigeria: Going Beyond Visions (A paper presented at the Nigeria Bar Association Annual Conference held at Port Harcourt on 20th August, 2006), at 81.

Information technology has democratized the acquisition of knowledge and it is imperative for all judicial officers and their support staff to be computer literate as lack of computerization has made record keeping and tracking of cases almost impossible.[5]

The intractable problem of rigidity still rears its ugly head in the annals of the criminal justice system in Nigeria as it stems from the fact that the composition of court remains unaltered from the beginning to the end of any criminal trial. Failure to follow procedure may lead to the entire proceedings being nullified and the case starting afresh in spite of the several incidents of death, retirement and transfer of judges. These deliberately affect the smooth grinding of the wheel of justice.[6]

The National Economic Empowerment and Development Strategy (NEEDS) policy document states that:

> Any threat to the administration of justice is a threat to the corporate existence of the society. The essence of democracy is justice. Every democracy ought therefore to thrive to provide access to justice for all and protect the rights of the citizenry. The destiny of the country lies in making the system of justice work smoothly and efficiently. The congestion in prison is party due to the judicial system that is beset by pending cases frequent adjournment, ineffective dispensation of justice and pure perversion of justice in some instance. An unjust judicial system cannot invoke confidence and does often promote self-defense aggressiveness and abandonment of the rule of law[7].

Until 29th May 1999, the greatest constraint on criminal justice administration in Nigeria was unaccountable government as military rule had a corrosive effect on the judiciary. Justice Ayoola puts it thus:

> The aberration of the military regime dealt a dangerous, blow to law because military regimes engendered lawlessness. You cannot have

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5. *See*, O. Alubo, The Role of Judicial Officers in Ensuring Efficient Litigation in A Democratic Nigeria in Contemporary Frontiers in Nigerian Law: Essays in Honour Of Hon. Justice Belgore (O. Alubo, eds., 2007), at 112.

6. *Id.*

7. NIGERIA NATIONAL PLANNING COMMISSION, NATIONAL ECONOMIC EMPOWERMENT AND DEVELOPMENT STRATEGY (NEEDS) (2004).

> law when somebody is above the law. Law was not supreme.[8] Unaccountable rules allow institutions to decay as there is wholly no reliable mechanism to ensure consistent corrective response.[9]

The organs of criminal justice administration suffer from gross under-funding. To underscore the effects of inadequate funding on one of such organs, Ogowewo wrote that:

> Let us consider for a moment the docket of the Nigerian Supreme Court. In the 2001/2002 Legal Year for instance 504 appeals were filed at the Supreme Court and the 2002.2003 legal year 421 appeals were filed. The US Supreme Court, with its considerable budgetary provisions, the resources of a strong administrative structure, a fellows programme and an internship/clerkship programme that assist the court in its research delivers full formal written opinion in 80-90 cases per year.[10]

The Nigerian Supreme Court in the legal year 2001/2002 delivered 248 judgments. When one considers the number of cases that must be clogged up in the system with a clearance rate of about 49% using 2001/2002 figures, it is easy to lament the slow pace of justice. But when one pauses to consider the effort that goes into achieving this figure (producing 275 judgments a year), it becomes apparent that Nigeria's Supreme Court justices are writing three times the number of full formal judgments written by their US counterparts, without anything nearly like the resources available to that court.

Clearly therefore, the deficient system of administration of criminal justice has resulted in the loss of public trust in the justice system.[11] This led to people abandoning due process and resorting to private means of settling dispute, mostly by violent means.[12] The abandonment of the erstwhile traditional restorative justice mechanisms has also left no effective options to the citizens.[13] People are simply frustrated with the inefficiency in the justice sector. The criminal justice system has failed to respond to

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8. *See*, T. Ogowewo, Self-Inflicted Constraints on Judicial Government in Nigeria (A paper presented at the Law Teachers Conference held in UNIJOS, Jos, June 4, 2005).

9. D.A. Ijalaye, Justice as Administrated by the Nigerian Courts (Justice Idigbe Memorial Lecture Series held at UNIBEN, February 06, 1992), at 46.

10. Ogowewo, *supra* note 8, at 40.

11. Obiagwu, *supra* note 4, at 83.

12. *Id.*

13. *Id.*

the increasing needs and demands of the Nigerian society which are further complicated by the Federal constitution that gives states and federal governments the concurrent competence over justice administration. This is notwithstanding that the Nigerian agencies and instruments of criminal justice administration such as the police, prison, legal communities, among others, are within the exclusive control of the Federal government.[14]

In the 21st century Nigeria, there is near absence of good police-community relations. Community policing gives ownership of the police system to the community thereby generating greater community support for the police and their law enforcement functions. Certain factors have been identified as being responsible for the poor police-community relations which include, but are not limited to, student unrest, religious and ethnic upheavals, illiteracy, partisan politics, allegations of police brutality, corruption, abuse of office, allegations of filtration of the police force by undesirable men of the underworld.[15] The Nigerian police have often been criticized for their ineffectiveness, corruption, brutality and general lack of respect for members of the public.[16]

As a result, members of the public do not offer the necessary assistance to the police to effectively enforce the law especially in the areas of crime prevention, investigation and intelligence gathering. The result has been high crime rate, delay in investigation and long pre-trial detention of suspects.[17] Then there is the Nigerian prison which Aliyu once described as:

> a total institution; a place of residence and work, where all inmates are in a similar situation cut off from the society and lead an enclosed formally administered life under the absolute control of administrative authority, deprived of liberty, possession, inter sexual outlets and personal autonomy.[18]

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14. *Id.*

15. *See*, E. Ofori-Amankwa, *Improving police – community Relations in Nigeria,* 3 JPPL (1999), at 42.

16. *See*, T.N. TAMUNO, THE POLICE IN MODERN NIGERIA (1970); E.O. Entannibi Alemika, *Colonialism, State and Policing in Nigeria,* 20 CRIME, LAW AND SOCIAL CHANGE (1993), at 187-219.

17. *Id*.

18. *See*, P. Aliyu, Criminal Justice System Reform in Nigeria (A paper presented at a workshop on Prison Reform organized by the Catholic Health Justice and Peace Commission, Abuja, Nigeria at pastoral center, Makurdi, August 25, 2005).

Things had prior to 1999 not really changed for the better. The first prison was built by the British colonial government on Broad Street in Lagos.[19] In 1990, forty-seven new prisons were constructed all over Nigeria to alleviate the problem of prison congestion.[20]

Prisons in Nigeria are yet to make any significant impact in the reformation and rehabilitation of criminals especially when viewed against the background of the increasing crime rates in Nigeria. Practical experience over the years has shown that prisons do not reform criminals, and not necessarily because the criminals have become so incorrigible.[21] The truth is that rather than rehabilitate criminals, the prison system hardens them and makes them even more dangerous upon the completion of their sentences. A characteristic feature of the Nigerian prison is the fact that a first time offender convicted for a relatively minor offence serves his sentence and leaves only to come back into the society to commit a more grievous crime. Prisons in Nigeria are in a deplorable state not having met the demands of a humane, just, democratic and civilized society and the standards of international law including the UN standard minimum rule.

There is equally absence of a progressive human penal philosophy to serve as an orienting framework for the prison system. As a result, the prisons are more or less warehouses for the control of human beings and theatre of misery.[22] As of 2000 there were 147 conventional prisons and 83 satellite (lock-up) prisons. The average inmate population was 43, 312 prisoners with a total of 16, 827 convicts and 26, 485 non-convicts, representing 38% and 61.2% respectively.[23]

## III. SOME POSERS

At this juncture, posers become apt:

(a) Whether the concept of taking cognizance of offences by the magistrates' courts is still a useful tool in the administration of the Nigeria criminal justice system.
(b) How can alternative and faster sentencing policies evolve that will decongest the prisons?

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19. E.A Alemika, Challenges and Prospects of Reform and Improved Services in the Nigerian Prison (A paper presented at a workshop on Prison Reform organized by the Catholic Health Justice and Peace Commission, Abuja, Nigeria at pastoral center, Makurdi, August 25, 2005).

20. C.S. OLA, NIGERIA CRIMINAL LAW (2001), at 201.

21. Alemika, *supra* note19.

22. *Id.*

23. *Id.*

(c) Given the complex nature of the Nigerian society, does it make for a transparent criminal justice system for the police investigators and prosecutors to continue to use their resources/funds to transport awaiting trial inmates to and from court?
(d) How can alternative dispute resolution be enhanced and integrated in the criminal justice system to decongest the courts?
(e) How can unnecessary adjournments of cases by legal practitioners and the courts be avoided?
(f) Can the criminal justice system of Japan be studied and adapted as regards alternatives to imprisonment?
(g) Should the debate on alternatives to imprisonment not be opened taking into cognizance the failed state of the Nigerian criminal justice system?

An elegant testimony of an effective criminal justice system is that of Japan. In 2000, Japan's crime rate reached its highest point since 1955. After consistently declining, from the 1950s through the 1970s, the crime rate begun increasing especially in the late 1990s. The 2000 crime rate of 1,925 per 1,000,000 population was greeted with much concern throughout Japan. Interestingly, during the same period, the imprisonment rate dropped from 90 to 41.

Despite the increasing crime rate during the 1990s, the fairly consistent imprisonment rate indicates that Japan chose not to respond to increasing crime by simply imprisoning more people.[24] Even at this highest point since 1955, Japan's crime rate remains amongst the lowest of all industrialized countries. When crime does occur and after the police catch the offenders, more than 99 percent of the offenders eventually coming before a judge are convicted. Furthermore, nearly 90 percent of those convicted are sentenced to prison but over half of those prison sentences are suspended. Probation in Japan is a complement to a suspended sentence and only offenders eligible for a suspended sentence are eligible for probation.[25]

## IV. FLAWS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

It remains an altruism that justice delayed is justice denied. Unnecessary and frequent delays in judicial proceedings definitely have a great adverse effect on the administration of criminal justice in Nigeria. This situation is brought about by the congestion of cases in the courts as well as unnecessary adjournments sought by counsel in criminal proceedings.[26] Alubo posits that lawyers engage in a frivolous

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24. *See*, P. L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEM (4th edn., 2005), at 360.
25. *Id.,* at 396.
26. Ijalaye, *supra* note 9, at 46.

search for adjournments and rely on legal technicalities to filibuster cases.[27]

Delays in the dispensation of criminal justice arguably remain the most perturbing aspect of criminal justice administration. Faultless criminal law rules are destined to become redundant unless adequate safeguards exist for substantial minimization of delays in the criminal justice system.[28] In *Ageinda v. the state,*[29] the court held that inordinate delay in the prosecution of a criminal case constituted an infraction of the accused's constitutional right to a fair hearing. In his judgment, Olatawura J.C.A. (as he then was) stated as follows:

> the trial which lasted over two years could not be said to have been conducted within a reasonable time. Beside, the accused was said to be 70 years old when the trial started. His age and confinement ought to have been taken into account when the various applications for adjournment were granted.

In *Ozunloye and M.S. v. the state*,[30] the court held that the pith and marrow of the arguments in the appeal was on the inordinate and unnecessary delay, both by the prosecution and the court in the disposal of the criminal charge against the appellants. This in no doubt has occasioned much injustice to appellants and was in utter violation of the fundamental rights guaranteed under the constitution of the Federal Republic of Nigeria.[31]

In *Ariori and ors v. Elemo & org*,[32] the action was commenced on October 15, 1960 and the Supreme Court delivered judgment 22 years later on 21st January 1983 and then ordered a re-trial. The intractable problem of delay in the administration of criminal justice may only be resolved if a time limit is imposed within which matters must be disposed of by the court.[33]

The problem of rigidity still confronts the criminal justice system in Nigeria in the 21st century. To insist, as is still the position of the law, that the composition of the court remains unaltered from the beginning to the end of the case, failing which the entire proceedings are nullified and the case starts denovo inspite of the several

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27. Alubo, *supra* note 5, at 113.

28. *See,* Y. OSIPITAN, PROBLEMS AND CAUSES OF DELAYS IN CRIMINAL JUSTICE ADMINISTRATION: ESSAYS IN HONOUR OF JUDGE BOLA AJIBOLA (1992), at 490.

29. (1985) 6 N.C.L.R. 141.

30. (1983) 4 N.C.L.R.

31. *Id.,* at 212.

32. (1983) LSC N.L.R.I.

33. Alubo, *supra* note 5, at 118.

incidents of death, retirement or transfer of a judge, is to deliberately assist in slowing down the smooth running of the wheel of justice.[34]

Another noticeable flaw in the criminal justice system is the fact that proceedings are still in most parts of Nigeria carried out in uncompleted buildings, rented apartments that more or less question the seriousness of any reasonable government with regard to the business of dispensation of justice. To this end, Dakas succinctly puts it that:

> a magistrate in one of the states in Nigeria occupies a prison's senior staff club building in the morning and vacate the premises after the courts proceedings for the day to pave way for the club's activities. To worsen matters, the area that serves as the magistrate chamber has no ventilation and is better described as a cubicle. In another state, an Area Court judge went to his court only to discover that the owner of the premises had, without prior notice, locked up the place and starting removing the roofing sheets.[35]

The nation awaits the passage of the administration of criminal justice bill into law. But any reforms that do not touch the core ingredients of the legal system would cease to meaningfully impact on the would-be beneficiaries.

## V. GAINS OF DEMOCRACY ON CRIMINAL JUSTICE SECTOR

Nigeria's return to democratic governance in 1999 brought high hopes and expectations nearly to all strata of the country's society, the criminal justice sector inclusive. In a ministerial press briefing, Bayo Ojo (SAN), the Attorney General of the Federation and Minister of Justice, highlighted the recommendations of the National Working Group on the reform of criminal justice administration geared towards addressing the problems associated with the administration of criminal justice. As regards to how to deal with the problem of indefinite remand of suspects in prisons, the Working Group recommended an enlargement of the power of the attorney general to control case file

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34. *Id.*, at 115. Rule 25 of the American Federal Rules of Criminal Procedure provides that any judge regularly sitting in or assigned to the court may complete a jury trial if (a) the judge before whom the trial began cannot proceed because of death, sickness or other disability; and (b) the judge completing the trial certifies familiarity with the record.

35. C.J. Dakas (eds), *Impediments to the Speedy Dispensation of Criminal Justice in Nigeria and the Imperative of Urgent Remedial Action*, JOS BAR JOURNAL (2005), at 158.

management.[36] It further proposed the establishment of time frames and protocol for arresting, arraignment and trials. Accordingly, magistrates are also to be empowered to conduct 'preparation examination' which will enable them process as early as possible applications for remand to grant bail in deserving cases pending the issuance of the Director of Public Prosecutions (DPP) advice.

In respect to the grant of bail in remand proceedings, it provided that if at the expiration of a remand order, the trial of the suspect has not commenced or a charge has not been filed at the court with appropriate jurisdiction, the court shall issue a hearing notice on the inspector general of police and the Director of Public Prosecutions and adjourn the matter for not more than 30 days to enable them show cause why the person remanded should not be released unconditionally.

Bayo Ojo once reiterated that if these and other proposals in the draft bill are eventually passed into law, we may be on our way to finding a solution to the problem of "holding charge" and indefinite remand of persons. The draft bill[37] presents proposals for the protection of victims of crimes as well as witnesses, plea bargain, mandatory legal aid to defendants, alternatives to custodial punishments namely suspended sentence, community service, probation and parole.

A perusal of the draft bill shows a clear attempt by the working group to respond to the issues of fundamental human rights which the criminal justice system of a democratic society as ours cannot afford to ignore. Yet, the draft bill seems clear on the need to ensure that the criminal justice system is effective enough to protect the interest of the larger society in the stability, peace and security of the country. There is no gain saying the fact that a democracy without an effective and efficient system of administering justice is unsustainable. Therefore, no stone should be left unturned in introducing a modern system of criminal justice which would in turn enhance the economic and political reform agenda of any democratic government.

Reforms in the criminal justice sector would not be complete without a reform of the law of evidence; such reform as to produce a modern evidence law which would take account of developments in the field of e-banking, e-commerce and other aspects of electronically generated evidence. In this way, a draft bill on the reform of the law was forwarded to the National Assembly.

Interestingly, there is also a cyber crime prosecution unit as it is a completely new initiative aimed at enhancing the response capability of the ministry of justice to

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36. AGENDA FOR THE REFORM OF JUSTICE ADMINISTRATION IN NIGERIA, *supra* note 1.
37. *Id.*

contemporary challenges.[38] The increase in the use of computers and the internet has led to an increase in the rates of computer- related crimes, thereby necessitating the establishment of a specialized unit to curb cyber crime.

For the first time after a long while, Nigeria recorded greater cooperation in judicial and legal matters between Nigeria and the United Kingdom. Many cases cutting across the legal systems of the two countries have driven home the need for investigators and prosecutors in the two countries to have a better procedure of seeking and obtaining mutual legal assistance between both countries.[39] As regards prison decongestion, many private legal practitioners were empowered to enable them take up the cases of awaiting trial inmates. That strategic intervention led to the assignment of over ten thousand cases of awaiting trial inmates across the country. Consequently, over five thousand cases of inmates awaiting trial have been disposed of.[40]

## VI. INNOVATIONS IN THE ADMINISTRATION OF CRIMINAL JUSTICE BILL

The objective of the Criminal Justice bill as indicated in section 1(1) (3) is "to ensure that the system of administration of criminal justice in Nigeria promotes the speedy dispensation of justice, protection of the society from crime and protection of the rights and interest of the defendant and the victim."

The bill[41] therefore posits that an efficient criminal justice system is one that achieves a considerable balance of both crime prevention and enforcement and protection of rights of persons involved.[42] Any aim at a uniform criminal procedure must make a choice in the interest of justice between the criminal procedure act which is patterned on the adversary principle, where the person accused of the commission of an offense is brought before the tribunal and the criminal procedure code which adopted the inquisitional principle whereby the trial court relying on the first information report filed by the police determines the offense with which the accused person is to be charged, frames the charge and proceeds to try him on it.[43]

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38. Bayo- Ojo (SAN), Justice sector Challenges of Change and Consolidating the Reform. National Ministerial Press Briefing, 2006 at 12-13.

39. *Id.,* at 17.

40. *Id.,* at 11.

41. *Id.*

42. Obiagwu, *supra* note 4, at 84.

43. E. Anabi, Criminal Justice Dispensation in Nigeria, in THE NIGERIA JUDICIARY PERSPECTIVES AND PROFILE 1st ed (E. Yusuf eds., 2006), at 368.

Whilst the adversary procedure scrupulously observes the rules of natural justice in precluding a person to be a judge in his own course, the inquisitorial approach though not clearly infringing the rule would seem to be enabling the tribunal which frames the charge to try the accused person.[44] Thus the important thrust of the bill[45] is to unify the criminal justice administration in Nigeria in order to strengthen the laws as well as the coordination and cooperation of agencies and bodies involved in the administration of justice. Section 1(2) of the bill provides that this act shall apply in all criminal matters throughout the federation of Nigeria.

Equally, section 3 provides that all offences under the criminal code or the penal code or any other enactment creating an offence shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this bill except where there are specific provisions in such enactment in relation to the manner or place of inquiry or trial.[46]

Section 13(1) (2) (3)[47] puts to rest the seeming problem of inability to get personal data of arrested persons for future or further reference. It provides that:

> when any person is arrested whether with or without a warrant, and taken to any police station or any other agency effecting the arrest, the police officer making the arrest or the official of the agency making the arrest or the police officer or official in charge of the police station or the agency shall cause to be taken immediately of the person arrested in the prescribed form, the record of:
> (a) the alleged offence;
> (b) the date and circumstances of the arrest;
> (c) the physical address of the person arrested; and
> (d) for the purpose of notification:
> (i) the physical measurement,
> (ii) The photograph and
> (iii) the full fingerprint impressions
> (iv) such other means of identification including but not limited to DNA samples

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44. *Id.*
45. Draft Bill Section 1 (2).
46. *Id.*
47. *Id.*, at 17.

> 2. The process of recording in Sub Section 1 of this section shall be concluded within a reasonable time of the arrest of the person but not exceeding forty-eight hours.
> 3. Any further action in respect of the person arrested pursuant to sub section 1 of this section shall be entered in the record.[48]

The sordid concept of "holding charge" hopefully will be rested, as section 103 draft bill provides that:

> every charge shall be filed in a Magistrate Court by complaint and the prosecution shall also be filed along with the charge sheet:
> (i) The list of witnesses and their addresses
> (ii) The list of exhibits to be tendered
> (iii) Copies of statements of the witnesses
> (iv) Copies of statements of the defendant(s)
> (v) Any other document, report, or materials that the prosecution intends to use in support of its case at the trial, the change sheet and all the documents filed by the prosecution shall be served on the dependant or his legal representative, if any within 7 days of its being filed or such time as the court may allow.[49]

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48. Section 13 of the Draft Bill empowers the police to maintain and coordinate a centralized and automated crime record registry. All records and entries of the accused person, and subsequent or further action, taken of an arrested person under section 13 (1) would be forwarded every month to the central registry and updated accordingly. The failure of any official to take proper record or make the necessary entry of arrested person or failure to forward such record to the central registry, constitute an offence punishable under section 13 (6) of the Bill.

49. Furthermore, the Section provides in (f) that the trial of any charge preferred under Sub Section (6) of this section shall be commenced not later than 30 days from the date of arraignment upon that charge, and the trial of a person brought under that charge shall be completed within a reasonable time; provided that where any charge preferred under Sub-Section (b) of this section, and of which trial does not commenced within 30 days of binging such charge, or trial has commenced but has not been completed after 180 days of arraignment upon that charge the magistrate shall forward to the Chief Justice the particulars of the charge and reasons for failure to commence the trial or complete the trial; (g) Every magistrate seized of criminal proceedings shall every quarter forward returns of the particulars of all cases including charges, remand and other proceedings commenced and dealt with in his court within the quarter to the Chief Judge. The Chief Judge shall review the cases in the return and may direct any pending case to be struck out for want of prosecution. Consequently, every change which is not prosecuted within 180 days would be reviewed by the chief judge or judge designated by him in the jurisdiction for that purpose, with a view to releasing the defendant on Bail or unconditionally. The purpose is to ensure that there is judicial oversight of pre trial detention of the defendants.

As regards managing of remand proceedings, the bill[50] provides that:

> (i) Any person arrested for an offence for which the magistrate has no jurisdiction to try shall within a reasonable time of arrest be brought before a magistrate for remand.
> 2(a) An application for remand under this section shall be on notice and should made in the prescribed "report and request for remand form" as contained in Form 8, first schedule to this Act.
> (b) The application shall be verified on oath and shall contain reasons for the remand request
> 3. Upon service of the application for remand on him, the person arrested shall be entitled to respond to the application by way of a counter affidavit or may be heard orally on oath.[51]

Worthy of note is the innovative concept of plea bargain which is not entirely new to the Nigerian legal system,[52] but modified in a way as to serve the interest of justice. An identifiable merit of plea bargaining is the fact that it may approximate the outcomes of true adjudication at lower cost since the adversary procedure and the law of evidence have made trial procedure so costly that it can only be used in respect of serious crimes.

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50. Section 272 (1) (2) (a) (b) of the Draft Bill.

51. Section 274 to 278 of the Draft Bill regulate remand proceedings and provides that such application for remand will be granted if probable case" is disclosed in the application for seeking to remand the person, and the factors to consider in deciding when such probable case is shown are itemized in section 273 (2). For section 273 (2) where probable case is disclosed the magistrate court may order for remand of the person in a civil prison and such order shall be for a period not exceeding 100 days in the first instance and the case shall be returnable within the said period of 100 days. Section 275 provides that on the return date, the prosecution may seek an extension of the remand for a maximum period of 30 days after showing "good cause" for the request for extension. On a subsequent return dates must be within the 30 days extended period, if the trial of the person remanded has not commenced, the court shall issue a notice to the appropriate prosecuting authority, to show cause within further 30 days why the person shall not be discharged. If the prosecution shows cause on the return date for further extension of the remand of the person the person may be remanded for further and final period of 30 days at the end of which the person must be discharged and released or conditionally released. In effect, no person shall be remanded on awaiting trial custody for a period of more than one hundred and eighty days from date of arrest in all circumstances. The writer agrees with Obiagwo as he posits that the aforementioned provision is aimed at eliminating the holding charge practice under which defendants are remanded without trial indefinitely without any effective return dates or end to the remand custody.

52. *See*, A. O. Alubo, *The American Plea Bargain System prescription for Nigerian Criminal Justice System New Vistas*, 1 UNIJOS (2002), at 26.

Plea bargain could also save time.[53] The draft bill[54] is to the effect that the court may accept a plea bargain from any defendant or his legal representative by way of an offer to to plead guilty to a lesser offence than that charged. The Attorney General has the responsibility to accept such plea bargain if it is in the interest of justice, the public interest and public policy. However, plea bargain shall not be permitted in cases of a person:

> (a) charged with capital offences or any offence involving the use of violence; or (b) persons who had, in the last ten years, been convicted and sentenced to any such offence involving grievous violence or sexual assault.[55]

Sections 427,[56] 428,[57] 377[58] and 388[59] deal with community service as an alternative to custodial punishment, strengthening the existing provisions for suspended sentences and probation and introduces a parole system whilst itemizing the objectives of sentencing and the procedure for sentencing hearing after conviction.[60]

A more fruitful framework for the examination of a criminal justice system is one that perceives it within the economic, political and social contexts in which it has developed and/or in which it exists.[61] Such a framework takes into account the type of ideology underpinning the economic organization of the society in question and which inherently informs the character, form and emphasis of the whole of the criminal justice system, the substance, equitability and limits of the criminal laws as instruments of social control; the volume, types, seriousness and trends of violations of the laws; the

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53. *Id.,* at 261-262.
54. Section 250.
55. Obiagwu, *supra* note 4, at 89; and Section 25 (2) Draft Bill ACJ.
56. *Id.*
57. *Id*.
58. *Id*.
59. *Id.*
60. Other provisions of the administration of the criminal justice bill include Section 23 which deals with clarifying and enhancing the duties of the citizens in crime prevention, Section 103(g) which broadens the process of the administration of criminal justice commission or committee. Section 104 and 105 deal with quarterly prison reports on persons remanded by the Chief Judge. Section 280 provides for protection of witness and victims, compensation to the victim and his family members. Section 323 provides for mandatory legal aid to defendants unless they decline such service. Section 366 provides for modalities of service of processes, the use of registered courier companies, service of trial notices on witnesses.
61. Anabi, *supra* note 43, at 370.

socio- economic and geographical/regional distribution of the violators and their victims; the extent of the appropriateness and adequacy of the policies, measures and human and material resources available to the agencies of policing/law enforcement justice administration and offender correction; the extent of the efficiency, fairness and effectiveness with which these agencies perform their assigned functions; the extent of divergence between "standards" and "practice" in the functioning of these agencies; the extent of inter-sub system harmony or coherence in the operation of these agencies relative to their common objectives; approach to and policy for the main objectives of the system; and the extent of the wisdom, foolishness of the people's attitude and behavioral reactions to the concepts and realities of crime and justice are all important attributes that make the criminal justice system worth its salt.

## VII. CRIMINAL JUSTICE REFORM AND ECONOMIC DEVELOPMENT

No criminal justice reform would make meaning to the ordinary man if it is not rooted in economic development and empowerment. Bayo Ojo posits that a further challenge of development is that of fashioning out the necessary legal mechanisms that would reflect commitment and hasten the realization of the millennium development goals (MDGS). Whilst any debt relief may be desirable, it is necessary to develop better and more equitable rules for the conduct of international trade. The rich must no longer prey on the poor. We must take the front seat in addressing the problems associated with global agriculture trade distribution and championing the creation of a better regime of international trade relations.

It is necessary and urgent to create market access for the exportable products of developing countries, remove export subsides and other trade-distribution domestic measures.[62] Justice is rooted in confidence.[63] Justice can be eroded when the economic structures are in shambles and once it happens, the justice system crumbles and the rule of law ceases to have any meaning.[64]

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62. Ministerial Press Briefing 2006, *supra* note 38, at 22.

63. Administration of Justice in Nigeria; Role and Constraints of the Public and Private Bar (A paper presented at a World Bank Economic management Capacity Building Project(EMCAP) legal and judicial reform component workshop at Shiroro Hotels, Minna, Niger State, August 23, 2012).

64. This Day Vol 12 No 4381 of 20th April, 2007 at 2 reported that the fast track system had been introduced and in the words of President Obasanjo: the introduction of the fast tract court system into the Nigerian Court System is a manifestation of the need to align the administration of justice in Nigeria with the imperatives of a fast-globalization, knowledge and information driven world. The system is designed to afford litigants to speedy and efficient, disposition of cases thus contributing to the decongestion of not only the court system but also our prison system whose over population comprises a

## VIII. CONCLUSION

The Nigerian democratic experience since 1999 has taken the criminal justice by the horn. An efficient justice system must be at the heart of any truly democratic society. What is left is the passage of the administration of criminal justice bill into law. If this is done, then it would be '*uhuru*' for criminal justice system in Nigeria. Whatever follows would be another continuum in the process of evolving a just, humane and equitable criminal justice system.

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dispassionately high number of inmates awaiting trial.