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JUDICIAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: AN ANALYSIS OF NATIONAL APPROACHES AND THEIR EFFECT

Christopher Mbazira*

ABSTRACT

The objections raised to reject the justiciability of economic, social and cultural rights are slowly losing ground, which has seen a number of domestic jurisdictions incorporate the rights as justiciable constitutional rights. In Africa, different countries have adopted different approaches of doing this. Some have used the direct approach by including the rights as part of their bills of rights. Others have used the indirect approach, with the rights included only as part of the directive principles of state policy, in some cases with limited justiciability. For some, the hybrid approach has been adopted whereby a few rights appear as part of the Bill of Rights while others are part of the directive principles as has been the case in Uganda. Kenya has adopted the directive approach. What remains interesting though is that judicial jurisprudence enforcing the rights is growing in all these jurisdictions. The difference still stands, though judges in countries with the directive approach are enforcing the rights with more ease compared to the indirect or hybrid jurisdictions. This is demonstrated using the case of Uganda and Kenya. The article uses these two countries to showcase the approaches to the enforcement of the rights while highlighting the challenges that all are facing.

I. INTRODUCTION

One of the fastest growing areas of international human rights law is in the area of the protection and realisation of economic, social and cultural rights (ESCRs). This has been reflected in the proliferation of international and regional instruments protecting various categories of ESCRs and in some cases adapting these to particular groups such as women,[1] children,[2] migrant workers,[3] and persons living with disabilities,[4] among

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1. See for instance, Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, and Protocol to the African Charter on

others. It could be argued that with these developments, the controversies surrounding the justiciability of ESCRs have been overcome. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) completes the justiciability of rights at the international level.[5] The OP-ICESCR gives the United Nations Committee on Economic, Social and Cultural Rights (CESCR) powers to judiciously adjudicate complaints alleging violation of the Covenant rights by states parties. Similarly, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights gives the African Court wide powers to adjudicate a full range of rights protected by the Charter and other instruments, including ESCRs.[6]

In spite of the above, however, the protection of ESCRs and their judicial enforcement at domestic levels has not uniformly been asserted.[7] It should be noted that international human rights law does not prescribe a specific approach that should be used to give effect to ESCRs. For instance, with respect to the ESCRs in the ICESCR, the CESCR has indicated that the Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. According to the Committee, there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law.[8] The Committee had added, however, that although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.[9]

Human and Peoples' Rights on the Rights of Women in Africa.

2. *See*, Convention on the Rights of Children, adopted and opened for signature, ratification and accession by the UN General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, and the African Charter on the Rights and Welfare of Women.

3. *See*, International Convention on the Rights of Migrant Workers and Members of Their Families, adopted by UN General Assembly resolution 45/158 of 18 December 1990.

4. *See*, Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly, 24 January 2007, A/RES/61/106.

5. Adopted by the UN General Assembly Resolution A/RES/63/117, on 10 December 2008.

6. *See*, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

7. See generally, M. LANGFORD (ed), SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (2008).

8. *See*, UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, *The Domestic Application of the Covenant*, E/C.12/1998/24, para, 1.

9. *Id*.

The practice of countries shows that different domestic jurisdictions are at different levels and have taken different approaches in giving effect to the ESCRs in the ICESCR. The approaches oscillate from a spectrum of outright rejection on one end to full justiciability on the other. There are countries which have given ESCRs a place in their constitutions as fully justiciable rights enforceable on the same basis as the civil and political rights. One could argue that this is the most ideal way of giving effect to these rights and has been described as the direct protection of ESCRs as justiciable subjective rights.[10]

On the African continent, examples of countries that have adopted this approach include South Africa, Rwanda, Togo, Gabon, The Gambia, Mali, Niger, Chad and Kenya, among others. Along the spectrum are jurisdictions which have selectively protected the rights by including only a few rights as fully justiciable in their bills of rights. In some of these countries, the bulk of the rights are protected in a "non-justiciable" way as part of national objectives/directive principles of state policy. Examples of African countries in this category include: Uganda, Ghana, Ethiopia, Malawi, Namibia, Swaziland, and Tanzania.[11] In some countries, the rights, or elements of these, are purely protected as part of the national objectives. Yet in others, the rights or elements thereof do not appear anywhere in the constitution but in some cases appear indirectly in ordinary statutory law as is the case in Botswana.

What is interesting though is that ESCR litigation and adjudication is happening in all these jurisdictions, irrespective of the place of the rights in the national legal system. Resort to litigation has, among others, resulted from the increasing adoption of litigation as a strategy to fight poverty especially by civil society actors. The outcomes of this litigation though have varied; it has been characterised with successes and failures alike across jurisdictions with different conceptual approaches.[12]

Another interesting thing is that as the jurisprudence in this area grows, a trend is emerging characterised mainly by judicial approaches with courts becoming more inclined to using human rights-based approaches in adjudication. This has, among others, arisen from the transboundary judicial dialogue which is happening on the African continent, driven mainly by jurisprudence being churned out by the South African Constitutional Court. This jurisprudence has even influenced constitutional

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10. D. Chirwa and L. Chenwi *The Protection of Economic, Social and Cultural Rights in Africa*, in THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL AND NATIONAL PERSPECTIVES (Danwood Chirwa & Lilian Chenwi, eds., 2016), at 8.

11. *Id.,* at 9-10.

12. *See*, CENTRE FOR HOUSING RIGHTS AND EVICTIONS, LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES AND STRATEGIES (2003).

review processes in some parts of the continent, which has resulted into greater protection of ESCRs in some countries.[13]

It is on the basis of the above that this article uses two countries Kenya and Uganda to showcase how ESCRs jurisprudence is growing, irrespective of the approach of domestication taken. Kenya has adopted the direct approach while Uganda is a hybrid jurisdiction. Kenya and Uganda share similar political histories. Both countries were colonised by the British and attained independence around the same time - 1962 for Uganda and 1963 for Kenya. Yet within its 2010 constitution, with its wide range of justiciable ESCRs, Kenya has leaped beyond Uganda as far as jurisprudential trends are concerned. Kenya is moving at a terrific pace and needs to be watched. In a short period of time, Kenyan judges have made bold ESCRs decisions. Interestingly, in spite of the geographical proximity, the Kenya jurisprudence has so far had a limited impact on Ugandan judges. One question that could be asked is whether, unlike the Kenyan judges freed by the direct approach, Ugandan judges are still hindered by the hybrid constitution.

This article begins in part II by unpacking the direct application approach, using the example of the jurisprudential trends in Kenya, yet questions whether the cases have had an impact on ending deprivation. Part III deals with the hybrid approaches by focusing on the successes and challenges of Uganda as far as ESCRs enforcement is concerned.

II. UNPACKING THE DIRECT APPLICATION

There is no internationally prescribed approach for giving domestic effect to the international human rights standards pertaining to ESCRs. In its General Comment No. 9, the United Nations Committee on Economic, Social and Cultural Rights, while emphasising as central the obligation to give effect to the rights in the ICESCR, indicates flexibility in this regard:

> By requiring Government to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.[14]

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13. Examples here include the 2010 Kenyan Constitution as well as the 2013 Zimbabwe Constitution.

14. UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, *The Domestic Application of the Covenant*, E/C.12/1998/24, para, 1.

The above observation notwithstanding, states are still legally obliged to give effect to their international human rights obligations, particularly those arising from the treaties they have ratified. A study of legal systems shows ascription either to monism or dualism. The former looks at international law and domestic law as one and the same system, with the effect that international instruments once ratified become part of national law without the need for domestication. The latter is the reverse and looks at national and international law as two separate systems, requiring that international law is transformed through domestication to gain national legal force.[15] These differences notwithstanding, recent state practice shows that increasingly even monist countries are finding it necessary to transform international law.[16] It is beyond the scope of this paper to explore the reasons for this. What needs to be stressed though is the increasing importance of giving international legal norms a place in the national constitution as the supreme law in many countries. It is in this context that the desirability of giving human rights standards constitutional status should be understood.

Indeed, bills of rights in national constitutions have been mirrored to the international bill of rights. This is to the extent that they both perform the same basic function of stating limits on the roles of governments within their jurisdiction.[17] As a matter of fact, recent constitutional drafting practices around Africa indicate that states have gone beyond simply incorporating the rights as part of the bill of rights to giving general international law a place in the constitution and as a source of law for its adjudication. This is what some of the countries with direct protection of ESCRs have done. South Africa's constitution compels courts to consider international law in its interpretation.[18] In this section, however, focus will be kept away from South Africa. This is because there is a plethora of literature discussing the South African approach in enforcing ESCRs, with its successes and failures displayed.[19] On the contrary, the focus is on a new entrant, Kenya, and one which has powerfully embraced the judicial enforcement of ESCRs. Nonetheless, reference will be made to the experiences of South Africa. This is because the drafting of the Kenya constitution and its

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15. *See*, M. Killander & H. Adjolohoun, *International Law and Domestic Human Rights Litigation in Africa: An Introduction*, in INTERNATIONAL LAW AND DOMESTIC COURT IN AFRICA (M. Killander ed., 2010), at 1.

16. *Id*.

17. S. Gardbaum, *Human Rights as International Constitutional Rights*, 19(4) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (2008), at 750.

18. Constitution of South Africa, 1996, section 39(b).

19. See the most recent comprehensive exposition by S. Liebenberg, *Direction Constitutional Protection of Economic, Social and Cultural Rights in South Africa*, in Chirwa & Chenwi, *supra* note 10, at 305.

jurisprudence has greatly been influenced by the South African constitution and case law.

A. Kenya, the new kid on the block

Kenya has had a checkered constitutional history, characterised by a self-liberation from the jaws of colonialism, among others, through the Mau Mau rebellion, progressing to building a new republic yet falling into the hands of Daniel Arap Moi's dictatorship. The 1990s reversion to multi-party democracy introduced competitive elections but which were not free and fair,[20] and was followed by protracted struggles for a new constitutional order. The August 2010 adoption of a new constitution was celebrated as phenomenal and even described as the launch of a "Second Republic" after the first republic born on attainment of independence in 1963.[21]

Four things have been identified as rendering support to the new constitution: First, the introduction of a system of decentralisation with a devolution of powers; second, the restructuring of the organs of the state by reinforcing checks and balances; third, the elaborate protection of human rights including ESCRs; and fourth, the introduction of national values and principles of governance and a devotion to standards of integrity in public service.[22] It is against this background that the direct protection and enforcement of ESCRs in Kenya should be understood.

The most authoritative discussion of Kenya's approach to the protection and enforcement of the ESCRs in the 2010 constitution is by Godfrey Odongo and Godfrey Musila.[23] The two authors trace the history of the recognition of ESCRs in Kenya and critically discuss the emerging ESCRs jurisprudence in the country. The argument is made thus:

> [T]he Constitution evinces an attempt to regard poverty as a human rights issue that not only requires the involvement of political organs of the state for its resolution but also accords victims of poverty legal rights to demand an account from the state on the measures it has taken

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20. G.R. Murunga, D. Okello and A. Sjögren, *Towards a new constitutional order in Kenya: An introduction,* in KENYA: THE STRUGGLE FOR A NEW CONSTITUTIONAL ORDER (Murunga *et al*, eds., 2014), at 2.

21. B. Sihanya, Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects Friedrich Ebert Stiftung Occasional Paper No. 5 (2011), at 1.

22. *Id*, at 2 – 3.

23. G. Odongo and G. Musila, *Direct Constitutional Protection of Economic, Social and Cultural Rights under Kenya's 2010 Constitution*, in Chirwa & Chenwi, *supra* note 10, at 338.

to facilitate and provide access to basic necessities of life.[24]

Unlike the case in countries such as South Africa and Uganda, the inclusion of ESCRs in the Bill of Rights during the constitution making process in Kenya was not characterised by controversy.[25] Odongo and Musila attribute this to domestic pressure to "compel government to take bolder action to address the prevailing widespread poverty and inequality."[26] This is in addition to the fact that "other African countries such as South Africa had already recognised these rights and produced a burgeoning body of jurisprudence and literature on the judicial enforcement of the rights."[27]

A review of the Bill of Rights in chapter four reveals an interesting grafting process, characterised by stems from the South African constitution and jurisprudence, the ICESCR and its general comments and contemporary constitutional drafting. The South African influence is so strong to the extent that the Bill of Rights tried to overcome some of the pitfalls which have baffled South African judges. This is the case as far as dealing with the daunting issue of resources and the role of the court in adjudicating on the same is concerned. In the early jurisprudence, the South African courts navigated away from the issue of resources, choosing instead in an unprincipled manner to be deferential.[28] The drafters of the Kenyan constitution confronted the issue head on, as is reflected in Article 20(5):

> In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—
>
> (a) It is the responsibility of the State to show that the resources are not available;
>
> (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

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24. *Id.*, at 339.
25. *Id*., at 345.
26. *Id*.
27. *Id*.
28. J. Klaaren (ed), A Delicate Balance The Place of The Judiciary in a constitutional Democracy (2006) (Proceedings of a symposium to mark the retirement of Arthur Chaskalson, former Chief Justice of the Republic of South Africa).

> (c) The court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

The choice of rights is also interesting; it goes beyond the traditional ESCRs in the ICESCRs and human rights treaties to include such rights as consumer rights,[29] the rights of older members of society, among others, to pursue their personal development and to receive reasonable care and assistance from their family and the state,[30] and the rights of youth to affirmative action, to access relevant education and employment, and to be protected from harmful cultural practices and exploitation.[31]

The analysis of Kenya's ESCRs jurisprudence results in a number of conclusions. It is clear from the decisions that the courts have taken the justiciability of ESCRs seriously. With the exception of one early case,[32] the courts have not even entertained discussions on the question of the justiciability of the rights. As indicated in the review of jurisprudence by Odongo and Musila, the courts have used every opportunity to emphasise the justiciability of the rights. Justice Ngugi is quoted dismissing the argument that ESCRs cannot be claimed at this point, holding that it ignores the fact that "no provision of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations."[33] The judge observes further that while the rights are progressive in nature, this does not warrant the standard objection on justiciability but rather to show the measures taken or intended to be taken to realise the rights.[34]

Thus far, the most litigated of the ESCRs has been the right to housing, which arises from article 43(1)(b) which guarantees everyone the right to accessible and adequate housing, and to reasonable standards of sanitation. The jurisprudence shows that much as the courts have drawn heavily from the South African jurisprudence in

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29. Article 46 provides that (1) Consumers have the right— (a) to goods and services of reasonable quality; (b) to the information necessary for them to gain full benefit from goods and services; (c) to the protection of their health, safety, and economic interests; and (d) to compensation for loss or injury arising from defects in goods or services. (2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising. (3) This Article applies to goods and services offered by public entities or private persons.

30. Article 57.

31. Article 55.

32. *See*, *Charoo Yaa v. Jama Abdi Noor & Ors*, Miscellaneous Application No. 8 of 2011, High Court Mombasa. In this case, the Court had stated that the right to housing was not a final product for dispensation but an aspirational right.

33. Ngugi J in *Mitu-Bell v. Attorney General & Ors,* Petition No. 164 of 2011, (2012) eKLR.

34. *Id*.

giving meaning to this right, reliance has also greatly been placed on general comments of the CESCR.

In *Satrose Ayume & Ors v. Registered Trustee of the Kenya Railways Staff Retirement Benefits Scheme & Ors*,[35] seemingly frustrated by the absence of legislation on forced evictions in Kenya, Justice Leanola transplants and applies General Comments No. 4 and 7[36] on housing and forced evictions, respectively, as if they are part and parcel of the law on Kenya. The judge held that these are the starting points and "are crucial in clarifying the interpretation of the right to adequate housing and the State Parties' obligations…"[37]

Furthermore, to justify the relevance of General Comment No. 7, the judges state that Kenya "does not have a law governing evictions whether forced or otherwise. Consequently, I must look to international law and the jurisprudence emerging from other countries to discern the ideal situation …."[38] In this, the courts have responded to earlier criticisms of the South African jurisprudence for its failure to give the rights substantive content by determining what each right entails.[39]

Kenya's growing ESCR jurisprudence has also embraced other rights, including education, water and health. In the field of education, the cases the courts have considered so far have raised such questions as setting quotas for admission to national secondary schools in ways which limit the quota to only 14% for learners from private schools as discriminatory.[40] The petition failed, among others, on the ground that the quota system was legitimate affirmative action. In *Gabriel Nyabola v. Attorney General & Ors*,[41] the petitioner also used the equality provision to argue that the extension of funding and other incentives to public secondary schools and not the private ones is discriminatory. While the court rejected the petition, having established that the differentiated treatment was rational, it made some interesting observations

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35. Petition No. 65 of 2010, (2011) eKLR.

36. See for instance, D. Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance*" 119 SOUTH AFRICAN LAW JOURNAL (2002), at 484. The bolder reference to the international instruments is motivated, among others, by the place of international law in the Constitution. Article 2 while affirming the supremacy of the Constitution makes general rules of international law part of the law of Kenya. The provision also states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

37. Leanola J in *Satrose Ayume & Ors v. Registered Trustee of the Kenya Railways Staff Retirement Benefits Scheme & Ors*, Petition No. 65 of 2010, (2011) eKLR, para. 68.

38. Bilchitz, *supra* note 36, para 79.

39. *See*, *Id.,* at 36.

40. *John Kabui & Others v. Kenya National Examination Council & Ors*, Petition No. 15 of 2011, [2011] eKLR.

41. Petition 72 of 2012 [2014]eKLR.

regarding the nature of the right to education and the attendant obligations. It relied heavily on international instruments, including the Convention on the Rights of the Child, as well as General Comment No. 11 of the CESCR.[42] The court also clarified that the "realization of the right to education over time, that is 'progressively', should not be interpreted as depriving States parties' obligations of all meaningful content." According to the court, [p]rogressive realisation means that States parties have a specific and continuing obligation *"to move as expeditiously and effectively as possible"* towards the full realization of the right." The court added: "The State is therefore obliged to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights".[43] On this same issue, the court concluded:

> As concerns the right to education, progressive realisation does not mean mere paper policies but deliberate and concrete steps taken to achieve free basic education for all on a non-discriminative basis, deployment of maximum available resources to ensure realization, avoid retrogressive measures and monitor enjoyment of the right. As Bemih Kanyonge notes in *Promoting Education as a Human Right in Kenya (Hilde Back Education Fund, 2013), p. 11*, *"It calls for more than just election campaign declarations and subsequent setting up of unsustainable projects in order to be seen to have fulfilled campaign pledge .."*[44]

A few cases have also been filed to enforce the right to health. The most prominent of these is *Patricia Asero & Ors v. Attorney General & Anor*.[45] In this case, the court had to determine whether the provisions of the Anti-Counterfeit Act of 2008 contravened the constitution, among others, on the right to health. It was argued that some provisions of the Act in effect made generic drugs, including AIDS drugs, inaccessible in economic terms, thereby affecting the right to health. In accepting the petition, the judge noted that the rights to health, life and human dignity are inextricably bound and that there can be no argument that without health the right to life is in jeopardy. The

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42. United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 13: The right to education (art. 13)*, Twenty-first session (1999). General comment No. 13: The right to education (art. 13).

43. Para 38.

44. Para 40.

45. Petition No. 409 of 2009, [2012] eKLR.

judge added that moreover where one has an illness that is debilitating as HIV/AIDS, self-worth and the right to take care of oneself is compromised.[46] In defining the obligations of the state, Judge Mumbi Ngugi held that the state obligation encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines. The judge noted that any legislation that would render the cost of essential drugs unaffordable to citizens would be in violation of the state's obligations under the constitution.[47]

Perhaps the boldest approach by the Kenyan courts has been with respect to remedies, by which they have in some cases made far reaching orders from the separation of powers and counter-majoritarian perspective. This is in addition to availing themselves of the South African-born relief of *meaningful engagement*. Some judges have readily used the structural injunction and even ordered for restitution in eviction cases as well as compensation.

In the *Satrose* case,[48] for instance, the court ordered the state to file an affidavit within 90 days detailing out existing or planned state policies and legal framework on forced evictions and demolitions in Kenya generally and whether they are in line with acceptable international standards. This is in addition to filing an affidavit detailing out the measures the government has put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of article 43(1)(b) of the constitution. Additionally, the court ordered the managing trustee of the first respondent to convene a meeting with the petitioners within 21 days, where a programme of eviction of the petitioners shall be designed taking into account all the factors clearly outlined in the judgment.

In the *Ibrahim Sangor v. Minister of State for Provincial Administration & Ors*,[49] the court ordered thus:

> I find that the Petitioners are entitled to the declarations in (a), (b), (c), (d), (e), (f), (g) and (i). Further, by order of mandatory injunction, the Respondents are compelled to return the Petitioners to the land from which they were evicted. The Respondents are further commanded to reconstruct reasonable residences and/or alternative

46. Para 56.
47. Para 66.
48. See *supra* note 35.
49. Constitutional Petition No. 2 of 2011.

> accommodation and/or housing for the Petitioners. Such residences, accommodation and/or housing should have all the amenities, facilities and schools that were subsisting on the land at the time of the evictions and demolitions, or should be mutually agreed upon.[50]

The Kenyan jurisprudence, as young as it, is blossoming at a relatively high speed. This has been facilitated by a number of factors. Principal of these has been the progressive constitution, which fully codifies ESCRs, and, as seen above, in some respects goes beyond what is envisaged by international human rights law. The courts have indeed perceived the 2010 constitution as one whose "transformative agenda looks beyond merely guaranteeing abstract equality." That "[t[here is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resource [and] to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources."[51]

Second, there has been progressive comparative jurisprudence, especially from South Africa, which has formed the basis for the development of Kenya's jurisprudence. Third, the practice of referring to international human rights law instruments such as the general comments of the CESCR has also played a role.

What needs to be established though is whether the jurisprudence is making an impact and how the same is affecting the judiciary-executive relations. This is because Kenya has a history of a lack of commitment to the rule of law and disrespect for judicial processes. In 2007, the then Chief Justice of Kenya, Hon. Mr. Justice J. E. Gicheru, observed that the relationship of the members of the executive and legislative institutions of the government with the judiciary has been characterised by three attitudes: the first is taking the court as a necessary step before extra-judicial (and illegal) mass action to justify the subversion of rule of law in the pursuit of the litigants' interests. The second, according to the CJ, is that the process of the court and its decisions have been held in outright contempt and have been disobeyed by factions of the executive and the legislature that are adversely affected. Thirdly, the legislature has arrogated itself the role of a supervisor of the discharge by the court of its judicial function.[52]

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50. At p. 11 of Judgment.

51. *Kabui* case, *supra* note 40.

52. J. E. Gicheru, *Independence of the Judiciary: Accountability and Contempt of Court*, 11 KENYA LAW REVIEW (2007), at 1.

It would be important to determine the extent to which the 2010 constitution has changed this situation and how the ESCRs jurisprudence has been received, especially by the executive. With respect to judicial independence, the 2010 constitution is crafted with consciousness to the historical anomalies described by Chief Justice Gicheru above. This is evidenced by the fact that the constitution prescribes more transparent processes for the appointment of judges. Nonetheless, there are still tensions between the judiciary and the executive as is amplified by Oloka-Onyango:

> [I[t is important to flag the point that while there was much initial excitement over the new constitution and a post authoritarian honeymoon that lasted for a short time, tensions were not long in emerging between the executive and the legislature, on the one hand, and the judiciary on the other. In other words, not everybody—least of all Kenyan parliamentarians—read the 2010 constitution in the same way [Chief Justice] Mutunga does. In part, these anxieties have been generated by the belief that the latter has become too activist, but they also reflect a struggle pitting forces that have committed themselves to reform against entrenched bureaucratic interests that were fairly well ensconced in the ancient regimes. No doubt, that battle will manifest itself in different ways during the course of the next several years.[53]

Analyses which have reviewed the transformative achievements of the constitution as far as ESCRs are concerned have made conclusions based on the litigation approach which has been adopted in the judgments.[54] There is need to step outside the judgments and assess their effect. This though is not to undermine the litigation approach and the judgements. Indeed, Odongo and Musila allude to the existence of structural obstacles and demands and the deployment of general and specific policies to address systemic inequality and open spaces for all people. Yet to them, litigation makes availability of opportunities for aggrieved persons to seek remedies through the courts for any alleged violation.[55] With a seemingly determined judiciary, the struggles continue.

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53. J. Oloka-Onyango, *Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View*, (2015) THE GEO WASH INT'L L. REV, 62 at 295.

54. *See*, I.Nyarango, *Opinion on emerging jurisprudent from social economic rights cases decided by Kenyan courts*, in CASE DIGEST ON ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (M. Nderitu ed., 2014) 43, at 57.

55. Odongo & Musila, *supra* note 23, at 371.

III. HYBRID APPLICATION, UNPACKING UGANDA

For a long period of time, the name Uganda was perceived to be synonymous with dictatorship and war, even as late as 10 years ago, with the Lord Resistance Army (LRA) war in northern Uganda. The paradox though is that the name has also been associated with economic recovery and political stability. Uganda is indeed home to thousands of refugees from the Great Lakes region. In 1995, Uganda promulgated a new constitution in a move which, at the time, was believed to have ended the history of constitutional abrogation and disregard for human rights.

As I have indicated elsewhere,[56] during the drafting of the constitution, the subject of the inclusion of ESCRs in the Bill of Rights attracted specific consideration, with the Constitutional Commission arguing that "civil and political rights are of little use if the economic rights of the people are not guaranteed. People who are hungry, poor and diseased cannot enjoy civil and political rights."[57] Nonetheless, the Commission was skeptical whether the state would afford the wide array of ESCRs on coming into force of the constitution. For this reason, the Commission recommended the inclusion of only a few ESCRs and relegating the rest to the National Objectives and Directive Principles of State Policy (NODPSP). It is on this basis that Uganda is characterised as a hybrid model as far as the protection of ESCRs is concerned.[58] The body of the constitution in the Bill of Rights protects such ESCRs as the right to education,[59] the right to a clean and healthy environment,[60] and labour rights, including the right to form and join trade unions, the right to practice one's profession, and the right to maternity leave and collective bargaining.[61]

Other ESCRs include the right to found a family and equal rights in marriage,[62] affirmative action in favour of marginalised groups such as the aged, those with disabilities and others disadvantaged by history,[63] children's ESCRs to parental care and protection from denial of medical care, education and social or economic exploitation

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56. C. Mbazira, *Uganda's Hybrid Constitutional Protection of Economic, Social and Cultural Rights*, in Chirwa & Chenwi, *supra* note 10, at 447.

57. The Report of the Uganda Constitutional Commission: Analysis and Recommendations (May 1993), para. 23.4, at 633.

58. *See*, Mbazira, *supra* note 56.

59. Article 30.

60. Article 39.

61. Article 40.

62. Article 31.

63. Article 32.

and hazardous employment.[64] Persons with disabilities are guaranteed respect and human dignity and for the state to ensure their full mental and physical potential.[65] The right to practice and profess culture is also guaranteed.[66] This is in addition to the right to a clean and healthy environment.[67] With respect to women, the state is among others required to provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.[68] This is in addition to protecting women and their rights, taking into account their unique status and natural maternal functions in society.[69]

In contrast, the bulk of the ESCRs in Uganda's constitution are protected as elements of the NODPSP. The objectives protect elements of such rights as shelter,[70] education,[71] food,[72] health,[73] water[74] and social security.[75] Indeed, objective XIV, to quote *verbatim*, provides:

> The State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that—
>
> (a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and
> (b) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

As has been illustrated elsewhere,[76] the drafting language varies from objective to objective, with questions arising regarding the extent to which they attribute rights or simply define obligations of the state but not in language that confers rights. The

64. Article 34.
65. Article 35.
66. Article 37.
67. Article 39.
68. Article 32(2).
69. Article 32(3).
70. Objective XIV.
71. Objective VIII.
72. Objective XXII.
73. Objective XX.
74. Objective XXI.
75. Objective XIV (b).
76. Mbazira, *supra* note 56, at 450.

example is given of the objective related to water, which simply requires the state to take practical measures to promote a good water management system.[77]

One of the most progressive aspects of the constitution is with respect to judicial constitutional review. In the first place, the constitution relaxes the rules of *locus standi*, allowing any person who alleges violation of any of the rights in the Bill of Rights to approach a competent court to enforce it and provide redress.[78] The persons seeking to enforce the Bill of Rights need not be the victim[79] and include artificial persons.[80] The constitution also establishes a specialised Constitutional Court[81] with jurisdiction to interpret the constitution and annul as void any legislation or conduct deemed to be inconsistent with the constitution.[82] It is these powers that the courts have used to interpret provisions of the constitution related to ESCRs.

One important question with respect to ESCRs is related to the legal status of the NODPSP. The objectives themselves are not express on their legal status. Objective I(i) provides that the objectives shall guide all organs and agencies of the state, all citizens, organisations and other bodies and persons in applying and or interpreting the constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

In 2005, parliament enacted article 8A which requires the legislature to take measures to give effect to the NODPSP.[83] The provision in its second part requires parliament to adopt "laws" to give effect to the first part.[84] An interpretation of these provisions establishes the fact that the NODPSP are not merely for guidance's sake and can be disregarded. It establishes a requirement for accountability by both the legislature and the executive, which must at every moment illustrate that any measures taken or legislation adopted actually promotes realisation of the objectives.[85] Indeed, it is argued that article 8A requires parliament over time, through legislation, to progressively make the elements of ESCRs in the NODPSP justiciable.[86] Nonetheless, the absence of specific legislation does not denude the value of the objectives. The

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77. *Id*.
78. Article 50.
79. See, *Greenwatch v. Attorney General & Anor,* High Court Misc Application No. 140 of 2002.
80. *Id*.
81. Article 137(1) and (2).
82. Article 137.
83. Article 8A(1).
84. Article 8A(2).
85. Mbazira, *supra* note 56, at 455.
86. *Id*., at 457.

judiciary is duty bound to consider the objectives as it interprets the provisions of the Bill of Rights.[87]

At the moment, the judiciary is yet to interpret article 8A and to determine the legal status of the objectives. The Supreme Court has hinted on the need to determine the legal import of the article. While referring back to the Constitutional Court the case of *Center for Health, Human Rights and Development & Ors v. Attorney General*,[88] the Supreme Court invited the Constitutional Court to be guided by objective I, which as indicated, provides that the objectives shall guide all organs of the state. The Supreme Court added that the Constitutional Court should also consider article 8A.[89] In this case, the Constitutional Court had ruled that the adjudication of ESCRs is beyond the jurisdiction of courts since these are policy matters, which by virtue of the political question doctrine, are beyond legal determination.[90] This case arose out of tragic events that had led to the death of a mother at a public health facility due to neglect by medical personnel when an indigent mother could not afford a bribe to help her deliver safely. Indications that the mother required emergency obstetric care were ignored. In dismissing the case, the Constitutional Court had held:

> Much as it may be true government has not allocated enough resources to the health sector in particular the maternal health services, this court is, with guidance [of the political question doctrine] reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies of Government, for inter-alia, the good governance of Uganda. This duty is a preserve of the Executive and no person or body has the power to determine, formulate and implement these policies except the Executive.[91]

The above finding made as recently as 2011 was a reversal of small gains made as far back as 1997 and on which the court should have built. In 1997, the same court had used the integrated approach to read elements of ESCRs into the right to life in the case of *Salvatori Abuki vs Attorney*.[92] This case called into question the constitutionality of

87. *Id*.
88. Supreme Court Constitutional Appeal No. 1 of 2013.
89. *Id.*, at 17.
90. *Center for Health, Human Rights & Development & Ors v. Attorney General*, Petition No. 16 of 2011 (*CEHURD* Case).
91. *Id.*, at 14.
92. Constitutional Petition No. 2 of 1997.

provisions of the Witchcraft Act on the basis of which the petitioner had been banished from his village and home after serving a custodial sentence having been convicted of the offence of witchcraft. In finding the banishment unconstitutional, the court, among others, held:

> The version of this punishment in the Witchcraft Act has no avenue for ensuring that the necessaries of life of the person banished are taken care of. This is different from imprisonment. Under a sentence of imprisonment, the state is obliged to provide shelter, food and other necessaries of life, like medical treatment and clothing. An exclusion order in our circumstances may have the effect of threatening the right to life of a person banished. The only place where shelter and means of livelihood are available, at his home, are denied to the person banished.[93]

The court also looked at the case from the perspective of the right to human dignity and freedom from torture and degrading treatment or punishment. Justice Tabaro observed that a deprivation of one's means of subsistence was a threat to life and that "a threat to life is cruel and inhuman."[94]

In the *CEHURD* case, one would have expected the court to progress, among others, on the basis of article 8A, to give the right to health justiciability. Thus, the decision of the Supreme Court in October 2015[95] reversing the ruling of the Constitutional Court came as necessary reprieve. As has been summarised elsewhere,[96] the court held that the political question doctrine has limited application in Uganda given that the constitution empowers the courts to decide whether the executive or legislature has acted in accordance with the provisions of the constitution. According to the court, it is permissible for litigants to raise the question whether the executive or legislature has ful lled its human rights obligations arising from the constitution.[97]

It should be noted that even before the decision of the Supreme Court unclogging the political question doctrine, public interest lawyers had tried to bypass the doctrine by using article 50. This provision, as indicated above, allows for individual enforcement of rights and in some respects can be used to mirror tortious or

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93. *Id.*, at 5 of the Judgment of Justice Egonda-Ntende.
94. *Supra* note 92, judgment of Justice Tabaro, at 7.
95. *Supra* note 92.
96. Mbazira, *supra* note 56, at 470.
97. *Id*.

delictual claims. As has been illustrated,[98] this is what was done in the case of *Centre for Health Human Rights and Development, Mugerwa David, Nantongo Gloria and Others v. Nakaseke District Local Administration and Another*.[99] In this case, the petitioners, among others, sought damages arising from the death of a mother at a public facility as a result of obstructed labour resulting from neglect. Although the decision of the court has its limits, mainly arising from the failure to fully engage with the content of the right to health and its obligations,[100] it also demonstrates the potential of enforcing ESCRs through individual claims. In this case, the judge used principles of tort to find liability on the part of the public hospital and to award damages to the family of the deceased in what appears to set a precedent that could be used in other cases.

The recent shift away from the exclusive focus on civil and political rights by civil society to embrace ESCRs and litigation as strategies to enforce these rights is seeing a steady stream of cases on ESCRs in the courts. Activists have greatly been encouraged by the Supreme Court rejection of the political question doctrine. However, the progress to be achieved from these cases depends largely on how the judiciary receives them and the reaction of the executive to the decisions of court. Generally, the approach of the courts as far enforcement of ESCRs has been mixed and incoherent. It has been illustrated that although Uganda has fairly progressive public interest decisions, some of these decisions have not had an impact on the body politic, "either because the state defied them and reintroduced legislation to thwart the decision[s], or because the courts themselves were not very clear in terms of the remedies they stipulated."[101]

In addition to civil society pressure, the recent opening provided by the Supreme Court for the participation of *amicus curiae* in public interest litigation is likely to have an impact on the quality of jurisprudence generated by the courts across a wide array of rights, including ESCRs.[102] In an unprecedented manner, a group of nine law academics from the School of Law, Makerere University, filed an *amicus curiae* application in the 2016 Presidential Elections Petition of *Amama Mbabazi v. Yoweri Kaguta Museveni & Ors*.[103] The law dons sought, among others, to reverse a

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98. *Id.*, at 471.

99. Civil Suit No. 111 of 2012.

100. Mbazira, *supra* note 56, at 473.

101. Oloka-Onyango, *supra* note 53, at 798.

102. *See*, J. Oloka-Onyango and C. Mbazira, *Befriending the Judiciary: Behind and Beyond the 2016 Supreme Court Amicus Curiae Rulings in Uganda,* 1 AFRICAN JOURNAL OF COMPARATIVE CONSTITUTIONAL LAW (2016), at 1.

103. Presidential Elections Petition No. 1 of 2016.

Supreme Court decision that a person can only participate in a case as *amicus curiae* at the invitation of court.[104] The substance of the application was to invite court to take into account previous recommendations it had made for electoral law reforms, which the state had ignored, and to cement these by issuing a structural injunction.[105]

The Supreme Court responded by reversing its decision that *amicus* is only at the invitation of court. The court after making a number of recommendations for electoral law reform also issued a structural injunction, directing the Attorney General to report on progress with implementing the recommendations in a period of two years from the date of the judgment. It is envisaged that this decision will encourage the use of the *amicus* procedure in public interest cases in the coming years and if properly utilised by the courts will improve the quality of ESCRs jurisprudence.

IV. CONCLUSION

When Uganda promulgated a new constitution in 1995, it had set the bar high for other countries. The constitution was looked to as a model by countries in the region, including Kenya, which at the time had strong political forces holding back any prospect of constitutional reform. The tables have, however, been turned, with the 2010 Constitution of Kenya. As illustrated in this article, it is this new constitution that has spurred public interest litigation, with judges boldly enforcing the ESCRs protected by the Bill of Rights. The Kenyan constitution is now the model, setting the bar high for Uganda whose constitution for now requires derivative interpretations to achieve direct enforcement of ESCRs. Oloka-Onyango uses the imagery of cement to describe the Kenyan constitutional reforms as 'wet cement'[106] as opposed to Uganda which is at the 'old cement' stage.[107]

In Kenya, the constitution has been embraced by civil society activists who have maintained a steady stream of cases for the courts to decide.[108] By contrast, Ugandan civil society remains weak and is only consolidating itself now.[109] On a positive note, however, civil society in Uganda is beginning to embrace ESCRs and

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104. *Attorney General v. Silver Springs Hotel Ltd and others*, Civil Appeal No. 1 of 1989.

105. See, *In the Matter of Prof J. Oloka-Onyango and 8 other*s, Civil Application No 2 of 2016 Arising from Presidential Election Petition No. 1 of 2016, *Amama Mbabazi v. Yower Museveni & Ors*.

106. Oloka-Onyango, *supra* note 33, at 791

107. *Id.,* at 795.

108. *Id.,* at 793.

109. *See*, Christopher Mbazira *Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights*, HURIPEC Working Paper No. 24, February 2009, at 31 - 32.

taking on board litigation as a strategy to enforce them. The opening allowing for the participation of *amicus* in public interest cases also provides an opportunity for the improvement of the jurisprudence of the courts in ESCRs cases. The question though is whether progressive judicial decisions on ESCRs will result into policy reforms.

GOVERNANCE, CIVIL SOCIETY AND THE AFRICAN PEER REVIEW MECHANISM: A SURVEY OF ISSUES IN SELECTED COUNTRY REVIEW REPORTS

Sabiti Makara*

ABSTRACT

The African Peer Review Mechanism (APRM) is part of the African Union (AU) governance architecture. It is the AU's flagship programme for leadership accountability and good governance. Its process involves each individual country voluntarily agreeing to accede to the protocol, undertaking self-assessment, peer review and implementation of a programme of action. This essay outlines the context of APRM, assesses the critical role of civil society in the process, challenges and opportunities presented by APRM in improvement of Africa's governance processes. Through a synoptic review of APRM country reports, we are able to assess whether the APRM programme is achieving its original objectives. We pursue an argument that while the APRM is probably one of the most innovative self-initiated governance programmes that African leaders have undertaken in recent times, if the commitment of the leaders is less than desirable, APRM could as well end up as a window-dressing exercise, and business will continue as usual.

I. INTRODUCTION

The end of the cold war in the 1980s signalled a pointer to authoritarian rulers that they could no longer access and entrench themselves in power without the will of the people. People's power has been re-ignited and re-energised in the past two decades. It may not be exactly what the French revolution was, but the 1980s and 1990s witnessed the collapse of the Berlin wall, the success of the Polish workers movement, the collapse of the Soviet Empire and the demise of African strongmen, which signified that people's power is invincible.

The African Governance Report notes that most African states have been struggling to democratise their polities, even if reluctantly.[1] The report specifically notes: "A positive shift in attitude towards democratic change of governments is now

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1. UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, AFRICAN GOVERNANCE REPORT (2009).

aboard in Africa."[2] Although elections are still largely imperfect in most African states, there is a new consensus that elections are the best means of changing political regimes. The African Charter of Democracy, Elections and Governance requires member states of the AU to recognise and ensure universal suffrage, constitutional rule and transfer of power.[3] The struggles for democratisation in Africa are growing strong: demanding respect for human rights, forcing re-introduction of democratic pluralism, pressing for equality of opportunity and gender equity, better public services, and accountability. There is a conscious campaign against corruption, favouritism, racism, discrimination and conflicts.

Civil Society in Africa and other colonised societies has a history of acting as a vanguard for people's liberation from the yoke of colonial rule. In all colonised societies, it was the resistance, civil disobedience and armed struggles that helped the people to regain their rights and freedoms. Negative forms of civil society manifested in the wake of nationalist struggles for independence. These included factions based on tribalism, racism, discrimination and ethnicity. In some countries, such weaknesses were advanced by the colonisers as indicators of failure by the Africans to govern themselves.[4] The continuation of intermittent conflicts, deepening poverty, lack of respect for human rights, social discrimination, xenophobia, high incidence of diseases and illiteracy have combined to haunt the people of the African continent, four decades after independence. This state of affairs in Africa is deplorable. It is an irony in comparative terms, for it is during the same period that all other equally poor regions of the world (Eastern Asia, China and to some extent Latin America) were able to make great economic strides. The pertinent question is: what happened to Africa? We have no illusion that there is one good answer. However, most analysts of the African social condition tend to concur that Africa's main problem is poor governance.[5]

II. BACKGROUND TO THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT (NEPAD) AND THE APRM

The NEPAD came into existence as a direct response to the questions of development inertia and the quality of governance in Africa. NEPAD's four primary objectives are to eradicate poverty, promote sustainable growth and development, integrate Africa in

2. *Id.,* at 17.

3. AFRICAN UNION, THE AFRICAN CHARTER OF DEMOCRACY, ELECTIONS, AND GOVERNANCE, adopted 30th January 2007, entered into force 15th February 2012.

4. M. MAMDANI, CITIZEN AND SUBJECT (1996).

5. AFRICAN DEVELOPMENT BANK (ADB), PUBLIC SECTOR MANAGEMENT IN AFRICA/ AFRICAN DEVELOPMENT REPORT (2005); THE WORLD BANK, ENTERING THE 21ST CENTURY: WORLD DEVELOPMENT REPORT 1999/2000; G. HYDEN & M. BRATTON, GOVERNANCE AND THE STUDY OF POLITICS (1992).

the world economy, and accelerate the empowerment of women. It is based on the underlying principles of a commitment to good governance, democracy, human rights and conflict resolution; and the recognition that maintaining these standards is fundamental to the creation of an environment conducive to investment and long-term economic growth. APRM is NEPAD's most ambitious and innovative governance program. It seeks to create opportunities for African civil society to dialogue, influence and shape the outcomes of APRM processes. It is intended to provide an opportunity for civil society to participate fully in the debates and policy dialogues shaping the governance of their public concerns.

APRM is a voluntary compliance process amongst member states of the AU who wish to submit themselves to the review process. The purpose of APRM as summarised in the base document is to foster adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development, mitigation of conflicts, regional integration, and mechanisms that promote good governance or best practices.

The APRM is a unique African instrument that has great potential as a tool to promote and strengthen good governance in Africa. It is African in origin, African-inspired and African-owned. The experiences emerging out of the APRM implementation process are encouraging. It is clear that the process has been empowering in ways that were not envisaged at the time it was conceived. The interactive nature and inclusiveness of the process has spawned and strengthened a culture of political dialogue in member countries. The willingness of African governments to engage the civil society and deliberate on national challenges of governance and to seek solutions for them is profoundly significant and should be consolidated. Likewise, the willingness to let outsiders examine national findings and express a view on how a country is governed is equally a new experience that should be encouraged.

The APRM provides real opportunities to strengthen the institutions and systems of governance in the continent. It is making it possible for countries to benchmark good governance in Africa on shared African and international norms and standards as well as for citizens to participate in the evaluation of how they are governed. Through the APRM, African countries are able to learn from each other and to deepen African solidarity. Capacity is being developed and partnerships within and with external partners are being created, facilitating greater advocacy for the APRM and showcasing Africa's innovative thinking in governance. The APRM has contributed to a refocus of world attention on Africa. Yet, with the attention comes the expectation for the mechanism to deliver and demonstrate that Africa is serious about tackling the governance challenges that stand as obstacles to its development.

The APRM is founded on the key concepts of good governance and accountable leadership. This can be ensured by competent, accountable and transparent states. Such states are capable of steering sustainable development, managing their economies efficiently, and are willing to rule democratically, to minimise conflicts and to fight corruption. The ADB Report notes that the cornerstone of African development is the harnessing of good governance and domestic institutions, observing that weak institutions, civil strife, and lack of accountability and transparency have contributed to the pervasiveness and weak governance in several countries, undermining growth and development.[6] It further notes that good political governance is a prerequisite for good economic and corporate governance.[7]

Civil Society is critical for promoting good governance and increasing accountability and empowering communities. Civil society organisations have taken the lead in the fight against corruption, monitoring government actions, and advocating for rights and freedoms. They empower citizens through their active participation in the governance processes such as elections, contributing to the government policy agenda, enabling their membership to be self-sustaining. Civil society involvement in policy processes increases the chance of policy success. Countries where civil society operates relatively freely with limited government interference have experienced stability, democracy, development and good governance.[8]

It may be argued that APRM is the very first continental governance effort to use a wide participatory approach to solicit popular views of how the people wish to be governed. However, this in itself may be misleading. In some African countries, the "political issues" are not matters of public discussion; they are left to exclusive groups of selected elite. In others, the constitution is perceived as a mere "piece of paper" which is changed at will by the ruling elite to suit their political interests (some seeking to stay in power for life). Yet in others, the idea of organising free and fair elections is shrouded in myth, while in others, women's participation is highly circumscribed to the wishes of the regime. In recent years, several regimes have used anti-terrorism and national security excuses to enact laws that strip the people of their freedom to privacy and speech. For example, Uganda enacted the phone tapping law and other Trojan horse laws that curtail the political opposition to organise freely and pose a serious challenge to the incumbent regime.[9]

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6. ADB Report, *supra* note 5, at 184.

7. *Id.*

8. *Id.,* at 198.

9. *See,* Regulations of Interception of Communications Act (2010). The Interception of Communications Act was passed by Parliament into law on July 14, 2010.

A few African states have built strong internal mechanisms in their constitutions and have strived to govern democratically. Good examples include Mauritius, Botswana and Cape Verde. This is indeed a good indicator. However, one would be interested in why their experiences have not had a demonstration effect on the countries plagued by conflicts and intolerance. The pertinent question then is: is the APRM an appropriate vehicle for transmitting such lessons of experience?

Optimists of the APRM tend to insist that it provides lessons that will enable government and civil society to make the most of the opportunity. The sceptics on their part argue that the state-by-state review using a non-adversarial method, hoping that peer pressure could induce the reviewed state to do better, may not produce the desired result especially on political change. One may even assert, probably harshly, that for some authoritarian African leaders, the APRM could simply serve as a legitimating instrument for their stay in power or at least act as their public relations exercise. This point appears valid in the context of the fact that the APRM has no score board or ranking scales. Dictators wishing to score politically at home would present themselves for review only to return home and claim that they "passed the test."

The important issue for the success of APRM is to find ways to manipulators from undermining the good intentions of the process. We take a cautious note from Anyang' Nyongo's remarks, who advises that we should look at the APRM as a contested terrain and avoid being romantic about it, for an African government may decide to take it either way – to be open-minded to the concerns of civil society or to control and eschew the whole process.[10] At all costs, the best option will be one which washes the baby without throwing her out with the bath water.

III. EXAMINING THE IDEA OF CIVIL SOCIETY

The idea of civil society has a long history in the traditions of Western political thought. Resurrected in the 1970s in the struggles of the Polish Workers Movement and the state apparatus, the concept has in recent years been central to political debates in the contemporary world. The concept of civil society has come to mean different things to different people. This has created some ambiguity and confusion.[11] Despite the differing theoretical perspectives, the idea of civil society remains attractive to political thinkers because of its assumed thesis of private and public good. It is an arena where individual pursuits either harmonise or conflict with those of social good.[12] It is

10. R. HERBERT AND S. GRUZD, THE AFRICAN PEER REVIEW MECHANISM: LESSONS FROM THE PIONEERS, SIIA, JOHANNESBURG (2008), at 112.

11. A. SELIGMAN, THE IDEA OF CIVIL SOCIETY (1992), at ix.

12. *Id.,* at x.

characterised as that aspect of social existence beyond the direct control of the state. It rests on the legally free individual but also on the community of individuals.

Civil society is conceptualised in relation to its position vis-à-vis the state, placing emphasis on this relationship in either collaborative or competitive terms. Some philosophers, most notably John Locke and Thomas Hobbes, asserted that the state is in some sense accountable to and therefore should be identified with civil society, hence the two should not be seen as identical. Marxists like Antonio Gramsci argued that civil society should be understood outside of the power of the state, while de Tocqueville's liberal philosophy argued that civil society should be understood in at least partial, if not significant, opposition to the state. These perspectives of civil society provide a broadly encompassing view.

Recent political thinkers, notably Larry Diamond, have defined civil society as the realm of organised social life that is open, voluntary, self-generating, at least self-supporting, autonomous from the state and bound by legal order or set of shared rules.[13] This appears to be one the most elaborate definitions of civil society. For our purposes, civil society is characterised, among other elements, by being that realm of society that is organised voluntarily without a motive for profit, whose immediate interest is not to secure political power but to mediate between political power-holders and to promote the interests of those they represent besides their members and beneficiaries.

In respect to the market, civil society normally presses for fairness by playing a role on the side of those excluded by the market forces. As Held asserts, the free vote and free market are the key assumptions for guaranteeing that the collective good is achieved.[14] With civil society mediating between these two essential processes in society, the liberal-democratic element is cemented in the society as a whole. Whether one is contesting or confirming the potential of a liberal-democratic notion of the state in producing the collective good, the essential element is a clear understanding of what civil society can or cannot achieve.

A. Civil Society and the APRM

Significantly, at the early stage of the peer review process, the *APRM: Organisation and Process* document outlines the importance of a fully inclusive consultative process. The importance of the participation of civil society in the APRM is strongly reinforced by the core document of the mechanism. Section 1.3 of the 2003 APRM document

13. L. Diamond, Civil Society and the Development of Democracy, Working Paper no.101 (1997), at 6.

14. D. HELD DAVID, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995).

titled 'Objectives Standards, Criteria and Indicators for the African Peer Review Mechanism' (OSCI) states:

> The overarching goal of the APRM is for all participating countries to accelerate their progress toward adopting and implementing the priorities and programmes of the New Partnership for Africa's Development (NEPAD), achieving the mutually agreed objectives and compliance with best practice in respect to the areas of governance and development. This can only be achieved through the sustained efforts of the country itself, involving all stakeholders. It requires that each country carefully develops a Programme of Action with time bound objectives and linked to notional budgets to guide all stakeholders in the actions required by all-government, private sector, civil society – to achieve the county's vision.[15]

Furthermore, Point 15 of the 2002 NEPAD's 'Declaration on, Political, Economic and Corporate Governance,' another of the key documents on which the APRM is based, notes that in order… "to promote human rights, we [the Heads of State and Government of the participating states] have agreed to: facilitate the development of vibrant civil society organizations, including strengthening human right institutions at the national, sub-national and regional levels"[16].

The AU requires each of its member states to promote and protect human and people's rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law; promote peace, security and stability on the continent; and found its actions on essential principles such as respect for the sanctity of human life, promotion of equality between men and women, and condemnation of impunity and unconstitutional changes of government.

The principle of non-interference in internal affairs was replaced by a principle of non-indifference to the problems facing African states and the right of the Union to intervene in the affairs of a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity, as well as to impose sanctions on states failing to comply with the policies and decisions of the Union.

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15. G. Masterson, *Defining Civil Society in the Context of the APRM*, in CHALLENGES OF CONFLICT, DEMOCRACY AND DEVELOPMENT IN AFRICA (K. Matlosa, J. Elklit and B. Chiroro, 2007), at 212.

16. *See*, NEPAD's Declaration on Political, Economic and Corporate Governance (2002), point no.15

Governments coming to power through unconstitutional means are not allowed to participate in the activities of the Union, and the Union is required to promote democratic principles and institutions, popular participation and good governance. For example, in 2013, Egypt was suspended from the AU when the military overthrew an elected government led by President Mohamed Morsi, installing a military-led government. Under the AU's rules, derived from the Lome Declaration of 2000, unconstitutional change of government means among others: replacement of an elected government by rebel forces, mercenaries, military forces and refusal by an incumbent government to relinquish power to a legitimately elected political party and its leaders.[17]

The emphasis in NEPAD's Declaration is that civil society is central to governance and that citizen participation should be at the core of the reviews. In the section that follows, we look at country cases and assess civil society's role in the APRM.

B. The APRM Process and Civil Society in Uganda

Historically, the NGO sector in Uganda used to be small, and to a large extent, dominated by religious groups engaged in charity and provision of social services. This picture changed in the 1990s when the NGO sector expanded rapidly. For example, a study of NGOs in Uganda revealed that there were 3,499 organisations registered with the NGO Board in 2000. According to the Executive Director of the Foundation for Human Rights Initiative (FHRI), today there are about 15,000 organisations registered by the National NGO Board.[18] Despite their important role, the number of community-based organisations (CBOs) in the country is unknown. Also, whereas NGOs have proliferated in recent years, what they do, how they do it, with what means, is not well-known. This notwithstanding, there is a widespread consensus at government policy level that civil society plays a significant role in the development process.[19]

The Uganda APRM process was guided by clear terms of reference and a code of conduct developed by the APRM Commission. This followed the appointment by the president of 21 members from various backgrounds to constitute the National APRM Commission. In order to maximise working efficiency and participation, eight working sub-committees were established. These consisted of four thematic area sub-

17. See also, Article 4p of the AU Charter. Article 4h provides that AU may intervene in any country for humanitarian reasons. For a detailed reading, see P.D. Williams, From non-intervention to non-indifference: origins and development of AU's security culture (2007), vol.106, 423, 253-279.

18. Personal communication with Dr. Livingstone Ssewanyana, Executive Director, Foundation for Human Rights Initiative.

19. A. Barr, M. Fafchamps & T. Owens, Resource and Governance of NGOs in Uganda, Working Paper No. 6 (2004).

committees: programmes and contracts, media and publicity, report writing, and finance and logistics. All the sub-committees were headed by a chairperson and vice chairperson and participated in the report writing.

As part of peer learning, the commission and secretariat visited Kenya and Rwanda for experience-sharing at the initiative states. In addition, the commission also visited the APRM Secretariat in South Africa and interacted with the staff, which enhanced relationships and support during the country self-assessment. Furthermore, they also attended various experience-sharing forums including APRM summits, APRM conferences, and the peer review of Kenya, Rwanda, South Africa and Algeria, among others.

During the course of the country self-assessment process, some members of the commission moved from the constituency or interest group that had elected them initially. Replacements were sought from their constituencies, but the commission also decided to retain such commissioners to maintain continuity and utilise the accumulated APRM work experiences they had acquired to avoid upsetting the dynamic.

The country self-assessment process was a national exercise steered by the Uganda APRM National Commission by engaging the public sector, civil society, private sector entities and the public at large as stipulated in the APRM Guidelines. The Uganda National APRM Commission carried out the self-assessment. The Commission had three processes: pre-Assessment, assessment and post-Assessment. Pre-assessment phase involved creating awareness of the APRM country self-assessment to enhance participation by all, identification of stakeholders, mobilisation of stakeholders and domestication of the questionnaires.

Various appropriate media were used to reach out to stakeholders through strategic interest group meetings, workshops, TV, radio, publicity materials, newspapers and public presentations. These stakeholder groups included government, civil society, the private sector, academia, religious institutions and various interest groups. The Commission held various consultative meetings with stakeholders to domesticate and tailor the APRM questionnaire to the Ugandan context. Care was taken to adhere to the original questionnaire and not alter content but to add Uganda-specific issues. The next phase was assessment. Based on the APRM questionnaire, four APRM research instruments were used, namely: desk research, expert panel interviews, focus group discussions and a national sample survey. In addition, the Commission carried out public hearings and received memoranda from various interest groups.

Secondary information was collected from various documents including government and research reports, previous assessments and journal articles. The data collected was content-analysed according to themes as provided in the APRM

questionnaire. The qualitative method was used to gather information using three instruments: expert interviews, focus group discussions and citizens' presentation of views.

The Uganda Bureau of Statistics (UBOS) conducted a survey comprising 1,588 households in 69 districts. Data obtained was quantitatively analysed using tables and graphs. The results were used to corroborate information from desk research, expert interviews, public hearings and memoranda from interest groups. Perceptions of the general population on issues of governance were quantified in this sample survey and informed the preparation of the country assessment report and the programme of action. The APRM sample size was determined based on the number of households as per the 2002 population and housing census. The standard statistical formula for calculating optimum sample size was used. It was proved statistically that a sample of 1,600 households would be adequate to provide estimates at national and regional levels.

As per the APRM guidelines, the Country Self Assessment Report (*CSAR)* and programme of action were validated by national stakeholders. A summary of the issues arising in the report for validation was produced and advertised in the both print and electronic media and also sent to participants to enhance participation. The Commission held five one-day workshops, one at the national level and four in the regions, each with four thematic area break-away sessions to ensure adequate feedback. In these workshops, a cross-section of stakeholders including CSOs, government and private sector were involved to ensure ownership.

C. Challenges Experienced during the Peer Review Process

1. The case of Uganda—Delay in mobilising resources impacted on the timeframe for sensitising, contracting consultants, thus leading to late commencement of the field research. National elections in February 2006 slowed down momentum. There was limited interest in the APRM process in the beginning. It was a new concept and people felt it was complex, but as the assessment progressed, people realised it was an important exercise. Some of the public constituencies did not have any of their governance interface issues reflected directly in the questionnaire, such as the media, the NGOs and the private sector. Nonetheless, memoranda were sought from these groups.

The National Sample Survey process took longer than was expected, hence delays in the completion of the CSAR. The APRM Commission did a good job, producing a 591-page CSAR. However, the contribution of civil society has to be understood within the historical context of the state functions during the colonial and post-colonial periods. The colonial state did not perceive civil society as a partner in

development but as a competitor. While the current government has allowed civil society to operate freely in various civic roles such as election monitoring, fighting against corruption, suggesting alternative policies, advocating for good governance in areas of public accountability, research, advocacy, pro-poor actions, human rights and service delivery, mutual mistrust still exists between CSOs and government. The most recent legislation, the NGO Registration (Amendment) Act 2016, is considered to have rolled back and restricted the space for NGO operations.

Civil society in Uganda was deeply involved both as members on the APRM Commission and free participants. Several memoranda were received by the Commission from CSOs. At the request of the APRM Commission, the umbrella civil society body, the Uganda National NGO Forum, produced a very informative report on all issues of governance. Many of the views expressed in their report are reflected in the CSAR.

2. APRM Process in Rwanda—The participation of civil society in the APRM process in Rwanda was significantly limited. It is observed that the APRM National Commission composed largely of civil servants and other state officials representing government departments. However, civil society was represented as a minority on the APRM National Commission. Civil society was also consulted in the public meetings. The final country review report prepared by the APRM panel includes some civil society viewpoints that do not necessarily coincide with those of the government, particularly in relation to the assessment of democracy and political governance.

The discussions held in the framework of the APRM meetings were relatively free and participatory. However, civil society representatives were not given enough time to sufficiently prepare their contributions through prior discussions and research within their organisations during the self-assessment phase. Following the comments of the APRM technical support mission in June 2004, the Rwandan NEPAD Secretariat became aware of the need for more significant civil society involvement in the process. Until that time, self-assessment had consisted of answering the questionnaire essentially according to the viewpoints of the government. That is why civil society training/awareness only began six months after the process was launched.

Although the APRM process was launched in March 2004, except for a few members of the National Commission, civil society was not really involved in the process until late September, when the South African Institute of International Affairs (SAIIA), invited by the National NEPAD Secretariat, facilitated a civil society training/information workshop on the APRM. This was just two months prior to the validation on the final self-assessment report on 17 December 2004. The training helped to attract civil society interest in participating in the process. While the initiative

was positive, the civil society organisations outside the capital Kigali expected the government to extend awareness activities to the provinces and districts in order to reach the grassroots organisations.

Civil society participation in APRM bodies and meetings was not broadly representative. The process was dominated by the technical committees. Dialogue which is supposed to be the gist of APRM was secondary in the case of Rwanda. Perhaps, because of the history of genocide and the scars it left on society, Rwandan civil society did not participate effectively in the process. Most meetings that took place in the provinces were largely dominated by local officials.[20] Because of the limited civil society consultations, the self-assessment report relies mostly on positions and statistics drawn from official documents, suggesting that the public archives were the main source of answers to the questionnaire. Most answers to the questions required references to legislative texts, administrative decisions, statistics and research work, and the government databases as the principal sources of information.

It is even noted that during the processing of the questionnaire, the cart seems to have been put before the horse. For example, when the APRM questionnaire was distributed with the involvement of the National Commission in June 2004, it had already undergone initial processing by the technical teams.[21] Thus, the information about the APRM process was not necessarily passed on to grassroots organisations and opinions on the answers to the questions were not obtained from ordinary people.

Being a government-driven process in Rwanda, the recommendations produced by the APRM process have already been taken into consideration and policies adapted or adopted. This may be good for government but it would have been better with serious input of the civil society.

3. The APRM Process in Kenya—In Kenya, the APRM process seems to have suffered from a lack of internal transparency that reinforced its state-centric nature. The process was highly controlled by a group of state representatives. Although there is a vibrant civil society network and a strong human rights and social justice movement in Kenya, the APRM process did not mobilise them effectively. This was because of government's reluctance to relinquish control of the process to all stakeholders.

The 15-member NEPAD National Steering Committee comprised representatives of government agencies including nine permanent secretaries of ministries and two NGO representatives. Until the continental secretariat of APRM intervened in the Kenyan process, the APRM had been exclusively taken over by the

20. Masterson, *supra* note 15, at 217.

21. OSIEA/AfriMap, Critical Review of the Peer Review Mechanism Process in Rwanda (January 2007), at 14.

government officials. It took the lobbying of the CSOs to get them directly involved. However, civil society was widely consulted through open forums, focus group discussions and national survey questionnaire. The self-assessment pointed out the key issues that affect the ordinary Kenyan such as high levels of poverty, ethnicity, persistent corruption and neglect of some regions in national development.

It has been observed that there seems to be a fundamentally erroneous assumption that the African states that acceded to the APRM process support the paradigm and philosophy of open government, which assumes that government is the agent and that members of the citizenry are the principals.[22] It is assumed in the Declaration on Democracy, Political, Economic and Corporate Governance that the government and the state in question are well-organised, well-designed and intent upon realising human and political rights and improving the welfare of the citizenry.

From the Kenyan experience and most other countries, this has not always been the case. It is observed that the approach used by the APRM assessment tends to be "developmentalist" in orientation.[23] This could be the reason that the self-assessment report submitted by Kenya to the APRM country review team presented poverty rather than rights and freedoms as the problem for Kenyans. By so doing, the impoverished people such as the slum dwellers, squatters and street vendors are presented as the problems. Furthermore, neither the self-assessment nor the country review report presents information on the various struggles that Kenyans have undertaken, both privately and publicly, to demand greater freedom. The popular democratic movements that have shaped the political landscape in Kenya are given little attention. The NEPAD economic programme in practice has also lacked a human rights agenda. Issues of systematic exclusion and violation of human rights such as land grabbing are not thoroughly examined.

The Program of Action notes the strong state-centric tendencies in implementation. There is a need to deal with the current pattern of exclusion of critical stakeholders. The report notes that the media as well as the political parties need to be carried along as stakeholders in examining the policy implementation level. Ignoring them or treating them as foes was likely to be counter-productive.

4. The APRM Process in Ghana—Ghana presented a solid example of how civil society could effectively participate in the APRM process. This is attributed to its civil society having a vibrant relationship with various governments since independence. The key factors are cited as the pluralistic character of the Ghanaian

22. S. Akoth-Ouma, The APRM Process in Kenya: A Pathway to a state? OSIEA/ AfriMap (March 2007), at 17.

23. *Id.,* at 18.

society, high levels of civil society activism, and a constitutional culture that allows freedom of association.[24]

It is further noted that unlike many African countries, Ghana has not had serious ethnic or religious divides. Besides, the country enjoys relatively high levels of literacy. For example, between 2008 and 2012, primary enrollment averaged 83.9 percent for males and 84.8 percent for females. For youth between the age of 15 to 24 years, literacy averaged 88.3 percent for males and 83.2 percent for males and females, respectively.[25] It has been pointed out, for example, that the Ghanaian APRM model stood out because of flexibility, absence of political manipulation, and involvement of civil society groups and ordinary citizens.[26] Despite the strong involvement of civil society, there were some sentiments that the consultations were inadequate.

However, the concerns of civil society were taken care of during the process of conducting the surveys as three of the four institutions commissioned to undertake the exercise were civil society organizations[27]. Although the composition of the seven-person National APRM Council raised criticism from civil society groups, it was noted that their appointment was based on their individual social standing than political or other considerations.[28] Moreover, most the work was done by the technical research institutes. These adopted the methodologies for data collection data and sensitised people in all strata of the population. The findings were validated by meetings of key stakeholders who critically examined and discussed the reports.

The appointments of the four research institutes, though competent, were hand-picked by the Governing Council. Since there were a number of possible alternatives, many wondered about the basis on which the choice was made. The Governing Council had determined that since these were national institutions, they were part of civil society. However, civil society did not see it that way and did not feel that it was engaging in the process as a partner.

Civil society was engaged in public awareness-raising activities and consultations. It was in this area that it seemed to have had the greatest number of issues with the process adopted by the NAPRM-GC. It was noted that the public awareness-raising exercise had not reached out to as much of the country as it should have.

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24. A. Bing-Pappoe, *Reviewing Africa's Peer Review Mechanism*, in PARTNERSHIP AFRICA CANADA (2010).

25. See www.unicef.org/infobycountry/g/ghana-statistics.htm (accessed on 15 May 2017).

26. A. Bing-Pappoe, Ghana and the APRM: A critical assessment (June 2007), The Open society Initiative for West Africa/ AfriMap.

27. The institutions included: Ghana Centre for Democratic Development (CDD-Ghana), Centre for Policy Analysis (CEPA), Private Enterprise Foundation (PEP), and Institute of Statistical, Social and Economic Research (ISSER).

28. *Id.*

Sensitisation did not take place in advance of the evaluation process but in parallel with it. This led to some situations where people first heard of the APRM from the interviewers sent by various consultants rather than having first heard about the country self- assessment process from the NAPRM-GC. In some instances, the field researchers reached the citizenry before the NAPRM-GC did, and in one instance a decision was taken to withdraw the field staff until the sensitisation and awareness-raising had been conducted. Secondly, the consultation on the country self-assessment report and the programme of action were thought by some to be very cursory, and left people not really fully briefed about the documents they were evaluating. They also had no way of knowing how their suggestions were used, if at all.

More fundamental than the sequencing of the sensitisation and evaluation process was the nature of the sensitisation and consultation exercise itself. Although the APRM guidelines are silent on the penetration level that would constitute a satisfactory level, it was noted that in the case of Ghana only about 0.5 percent of the adult population was consulted or sensitised, leaving the majority of the people unaware of the APRM process and its benefits. However, the Ghana APRM process stands out as a generally well-done exercise, especially because of the hands-off stance taken by government. This probably explains the country's ability to hold free and fair elections and to peacefully change leadership.

5. The APRM Process in Nigeria—Perhaps because of its diversity, the APRM process in Nigeria innovatively focused on local government units. To ensure a participatory and transparent national process, it was agreed that the self-administered questionnaires, elite interviews, mass household surveys and focus group discussions take place at local government levels. In each state, one local government from two of the three senatorial districts was chosen.[29] One of the local governments would be in the senatorial district where the state capital is located. The local government would be one furthest from the capital or considered on other demographic factors. In each of the selected local governments, two communities would be selected for sampling. The sampling itself would consider cultural, rural-urban and other demographic factors. The APRM country guidelines emphasised the need for collaboration with the stakeholders in drawing a road map on participation in the APRM, which should was widely publicised.

In organising the APRM process in the country, the African Peer Review National Focal Point (NFP), which was the Secretariat coordinating the process, had to ensure the integration and active participation of non-state actors. This was a critical

29. D. Jinadu, The African Peer Review Process in Nigeria The Open society Initiative for west Africa / AfriMap (July 2007).

dimension of ensuring the ownership of the process by Nigerians.

> From the outset, the selection of non-state actors to participate in the APRM structures - and in particular the National working group - was problematic. Although a fairly wide range of organizations were eventually included the NGW in late 2007, most of the APRM self-assessments process took place under the guidance of a group of organizations selected by the executive.

The NFP, in collaboration with the APRM-NWG, non-state stakeholders and international development partners and donor agencies, embarked on a series of intersecting dissemination activities, including establishing a website and media task force, and conducting sensitisation seminars and training workshops.

The NFP set up a media advocacy task force to devise advocacy and dissemination strategies to popularise the APR process and to sensitise the general Nigerian public about the significance of the APR process to good governance and development in the country. To this end, the NFP also developed materials such as an APRM information digest, an APRM handbook, flyers, stickers, handbills, posters and billboards for distribution and display throughout the country, and also jingles that were aired by radio and television stations on various aspects of the APR process.

Although it did not feature in the country self-assessment report, one issue that intrigued researchers was their zeal to track oil revenues and expenditure. Despite a lot of efforts, it proved difficult to gain access to budget and other financial information. A freedom of information bill had been debated for several years in the National Assembly, and it was adopted before the 2007 elections but not signed into law by the then President Olusegun Obasanjo. A new version of the bill was voted down in the House of Representatives in April 2008. For the APR process and other reforms to be credible, it was important for the government to improve both public access to and the reliability of information and data on public affairs.

6. The APRM Process in Mauritius—There has been a slow progress of the APRM in Mauritius.[30] This is attributed to a number of factors among which were: the lack of interest on the part of the political leadership, the failure to mobilise resources, weaknesses of the National Economic and Social Council (NESC), which is the focal point for coordination of the process in the country, poor participation of civil society, difficulties in accessing information, failure to popularise the questionnaire (including

30. S. Bunwaree, The African peer review Mechanism in Mauritius: Lesson from Phase 1, Open society Initiative for southern Africa / AfriMap (june 2008).

by translating it into Creole), and a weak communications strategy.

At the outset of the process, the government failed to provide the necessary political leadership, including a clear vision of the objectives of the self-assessment exercise and the implementation process that should be followed. As a consequence, stakeholders did not have a unified vision of the APRM, and were left with different views and perspectives.

Most of those involved took a functional approach rather than perceiving the self-assessment as a tool for the consolidation of democratic governance. As one government official noted, "When we went into the exercise, we were attracted by the idea that we may be able to use it to highlight our democratic state of affairs and perhaps attract donors, but we did not realize the extent of resources required to make the exercise meaningful."[31]

Another factor which hampered the process was its timing. The process commenced in the year prior to general elections, when the attention of the key political players was focused on campaigning. Given the client relations between the state and some segments of society, individuals were hesitant to express their views.

The most visible indication of insufficient political interest in the APR process was the failure of the government to mobilise funds for the exercise. The NESC failed to conduct a technically sound assessment of the costs, reflecting a serious lack of planning. The United Nations Development Programme (UNDP) provided a grant of US$ 20,000 to the NESC for the APRM process in the first quarter of 2004. That was the only financial backing given to the NESC for implementation of the initial stages of the review. The Mauritian government did not make available the financial commitment required. It was expected that the government would provide additional funds to close the shortfall, but this did not happen.

The self-assessment process was further weakened by the lack of quality participation by civil society organisations, in part due to their own internal weaknesses and in part due to poor mobilisation by the NSC and NCS.[32] While there is a vibrant civil society in Mauritius, the reality is that the country's civil society organisations are fairly apathetic with little popular debate.[33] Although the NCS was eventually enlarged to include civil society organisations willing to participate in the exercise, most of the responses submitted to the APRM were from government ministries and departments. Only a few civil society groups responded, including the Mauritius Labour Congress, the Senior Citizen Council and the Union Mauricienne Party. None of the 72 political parties made a submission to the APRM self-assessment. The poor representation and

31. *Id.,* at 13.
32. *Id.*
33. *Id.*

general weakness of civil society has been underscored by a number of observations and participants to the process. The Mauritius Council of Social Services (MACOSS), an umbrella organization for Non-governmental Organisations in the country, is largely dependent on the state for its funding, a factor which affects its independence. It is reported not to have a culture of debate and barely engages in advocacy work, and its leaders do not necessarily connect with the people at the grassroots.

Observers of the Mauritius governance landscape conclude that the country might be a victim of its own economic success. Its Prime Minister is quoted to have noted thus "…We have good governance, we have institutions…we have used the advantages that we have …but punished for our success."[34]

IV. CONCLUSION AND SUGGESTIONS FOR EFFECTIVE PARTICIPATION OF CIVIL SOCIETY IN THE APRM PROCESS

Despite the strong emphasis on civil society involvement in the APRM process, the reviewed case studies suggest a weak linkage between their effective participation and the outcomes of the APRM process. To a great extent, as the case studies show, civil society either forced its way in or it was marginalised altogether. The problematique around civil society is that its exact definition and composition remains elusive. This is not helped by the fact that most civil society in Africa remains poorly organised, weak and lacks resources to act with sufficient independence.

The most visible element of the APRM is that the states which agreed to the peer review lack adequate democratic credentials. There is a temptation to believe that some of the governments under review wanted the APRM to legitimatise their rule rather than advance an agenda for greater democratisation of their societies. This is, however, not to say that the process did not leave a mark on the governance situation in those countries because serious commitments were made in their Plan of Action. Besides, some levels of popular participation were achieved, with civil society involvement at certain stages. This is likely to have some impact in the long run.

A critical point to note is whether or not the African states under review have the will, vision and the resources to translate plans of action into tangible benefits for their societies. Most of them are donor-dependent, raising a possibility of entrenching more borrowing to implement the plans. It is a double tragedy because both the African states and civil society depend on donors and their dictates. Moreover, the more worrying issue is whether the momentum of civil society engagement that was been spurred by the consultations could be maintained in the process of implementation.

34. *Id.,* at 18.

There is really no guarantee that this is likely to happen, considering the nature and character of most African states. The convenience of a honeymoon might be over. While some believe that a new CSO–state "partnership" has been engendered by the APRM process, the *modus operandi* for its sustenance is not clearly outlined in all the reports.

Given the above critical points, it is pertinent to suggest modalities for continued SCO-state engagement. It is therefore recommended as follows:

(a) There is need for building on the trust that has been created by APRM engagement between the state and civil society.

(b) An effective communication strategy between the state and civil society needs to be put in place.

(c) Resources (basket fund) need to be found and put aside for empowering civil society organisations so that it does not directly depend on the donors or the state (as is the case in Mauritius).

(d) It is important for peer reviewed countries to uphold their commitments in their Plans of Action, short of that there will be a clash with civil society organisations, hence the collapse of the newly-formed "partnership." There is a need for a transparent course of action. It is imperative that this is written in ink because the African state can change the rules of engagement at its convenience.

UNLOCKING THE RIGHT TO INFORMATION IN UGANDA: ON THE PRIMACY OF SOCIO-POLITICAL FACTORS

Julius Kiiza*

ABSTRACT

This article examines the right to information (RTI) discourse in Uganda against the backdrop of the global crusade for access to information as an instrument of accountable government. The enabling constitutional provision (article 41), the Freedom of Access to Information Act (2005), and the associated regulations (2011) are all highlighted to contextualise our analysis. The ability of these pieces of legislation to gain traction is subjected to scrutiny in the light of the repressive laws such as the Official Secrets Act (Cap 302), the semi-authoritarian political context, and the fragilities in Uganda's society. Navigating past the dominant legalistic approach to RTI, which celebrates the mere passage of 'enabling' laws, this article presents a case for the primacy of socio-political factors in the enjoyment of the right to information, or the lack thereof. The main conclusion is that the enactment of 'enabling' laws is a necessary but not sufficient condition for unlocking the right to information. What is needed is due attention to the primacy of socio-political factors – whether an assertive citizenry exists and the degree to which the political regime is really accountable to the citizenry.

I. INTRODUCTION

The last few decades have witnessed rising interest in the right to information globally, regionally and in certain national contexts. The watershed moment was Sweden's 18th century enactment of the Freedom of the Press Act of 1766, which granted Swedish citizens the right of access to government-held documents. Progress on the right to information (RTI) journey literally stagnated for 200 years till President Lyndon Johnson signed into law USA's Freedom of Information Act on 4 July 1966.

Since then, several countries have adopted RTI laws guaranteeing citizens access to government-held information subject to certain country-specific exemptions. By 1997, 22 countries had passed RTI laws. Thereafter, growth accelerated

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exponentially. In 2014, Paraguay became the 100th country to pass an right to information law. By early 2017, another set of countries had joined the RTI crusade, signifying that over 50 percent of the world's 195 nation-states currently have 'enabling' legislation whose object is to promote the right to information.[1] In Africa alone, 19 of the continent's 54 countries had by early 2017 enacted RTI laws.

The tendency in today's right to information discourse is to narrowly conceptualise the obstacles to this right as *legislative* obstacles, and to record or even celebrate the mere passage of freedom of information (FoI) legislation as a major milestone. Little attention, if any, is given to the level of implementation or the real 'spirit' of the RTI legislation particularly in semi-authoritarian contexts such as China, Zimbabwe, Rwanda and Uganda. This article argues that the right-to-information obstacles are fundamentally socio-political, not just legalistic. It is in the socio-political realm – whether the governance systems are democratic or repressive and whether the configuration of societal norms prioritises citizen-led demands for accountable government – that we must locate the struggle to unlock the enjoyment of the right to information.

It follows, therefore, that the passage of enabling laws is a necessary but not sufficient condition for the right to information to gain traction. Enabling legislation, while important, is only a baby step in the uphill struggle for the right to information enjoyment. Thus, contemporary (legal) scholarship and advocacy work appear to have committed two errors – one of commission and the other of omission. The error of commission lies in emphasising the legislative-cum-supply side of the right to information. The error of omission lies in the virtual neglect of the context-specific socio-political dynamics that shape the demand side of the right to information. It is to the correction of this compound error that this article is devoted. Given the voluminous amount of work on the supply side of the right to information,[2] this write-up adds value to the existing discourse by highlighting the political and societal norms, which contextualise the right to information enjoyment or the lack thereof.

In what follows we first outline, in section 2, the conceptual and historical significance of the right to information. Section 3 summarises the scholarship on the legislative obstacles to the right to information in Uganda. It is noted that the so-called

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1. This number excludes Taiwan, which enacted its Freedom of Government Information Law in 2005. Post-war 'Taiwan, China' (as it is officially known) has had a functional state since 1949 when Chairman Mao's Communist Party defeated Gen Chang Kai-shek's Nationalist Party (or Kuomintang), forcing it to 'relocate' to the little island. However, Taiwan is not recognized internationally as a sovereign state. Under the 'One-China' policy, Taiwan is treated as part of Mainland China.

2. Human Rights Network – Uganda (HURINET-U), An Analysis of Laws Inconsistent with the Right of Access to Information (2010), retrieved from <http://www.right2info.org/resources/publications/uganda-analysis-of-laws>, (accessed 20 May 2017).

'legalistic' obstacles to the enjoyment of the right to information are essentially socio-political in substance. Section 4 highlights the politics of the right to information in Uganda. Section 5 outlines the social underpinnings of information access. Section 6 crowns our write-up with a set of conclusions and recommendations.

II. CONCEPTUAL AND HISTORICAL SIGNIFICANCE OF THE RIGHT TO INFORMATION

The conceptual significance of the right to information is simple but not simplistic. The classical view is that the right to information is a fundamental human right which is, by definition, neither granted by monarchs to their subjects nor by the republican state to its citizens. Like other fundamental human rights, the right to information is arguably inherent and inalienable.

Along these lines, the gravity of public opinion has increasingly tilted in favour of transparency in the conduct of governmental affairs. Additionally, information disclosure has increasingly been emphasised. As Abid Hussain, the former UN Special Rapporteur on the Freedom of Opinion and Expression, elaborated in his 1995 Report to the UN Commission on Human Rights: "Freedom will be bereft of all effectiveness if the people have no access to information... The tendency to withhold information from the people at large is therefore to be strongly checked."[3]

Today's human rights discourse re-images this viewpoint in two distinctive ways. First is the 'extraordinary rights' perspective. The claim is that the right to information is an extraordinary right that simultaneously places positive demands and negative burdens on the state to (a) proactively disclose information and (b) remove obstacles to information access, for example, by disseminating government-held data in machine-readable and reusable format.[4]

The second perspective qualifies the first. It summarises the widely held view that access to information is not just a fundamental human right. It is the basis for accessing all other rights whether they are the first-generation civil and political rights or the second-generation economic, social or cultural rights. Variously known as the 'freedom of information' (FoI) or the 'right to know,' today's right of access to information is arguably a leverage right for the realisation of other rights. The very first

3. Report of the UN Special Rapporteur on the nature and scope of the right to freedom of opinion and expression, and restrictions and limitations to the right to freedom of expression, UN Doc. E/CN.4/1995/32, para. 35.

4. R. Ward and K. Stone, Twenty Years of South African Constitutionalism: A Critical Analysis of the Journey of the Right of Access to Information in South Africa (2014), retrieved from <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ward-and-Stone.pdf>, (accessed 26 June 2016).

session of the UN General Assembly of 1946 adopted Resolution 59(I) asserting that: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[5]

Inspired by the contemporary human rights discourse, the right to information has gained currency as an instrument of open government. By open government is meant a system of rule where state officials exercise transparency, accountability, and answerability to the citizenry by granting citizens access to data held by those in authority. The underlying philosophy is simple and clear: "Information held by public authorities is not acquired for the benefit of officials or politicians but for the public..."[6] This echoes the official position of the African Commission on Human and Peoples' Rights, namely, that "Public bodies hold information not for themselves but as custodians of the public good…"[7]

I hasten to add that open government furthers the principle of government by the consent of the governed. This implies that government without the will of the governed is tyranny. It signifies that government is good if, and only if, it is by the consent of the governed, defined herein as an informed citizenry whose consent is voluntary, not induced by authoritarian politicians.

Today's FoI laws seek to activate citizen agency, that is, the ability of the public to hold government officials to account for their commissions or omissions. The aim is to simultaneously check formal power with people power and subject public politics and officialdom to the demands, priorities and rights of the *wananchi* (a Swahili word for "ordinary citizens"). The intermediate goals include, but are not limited to, preventing arbitrary rule, fighting corruption, and activating government responsiveness. The ultimate goal is to improve service delivery via accountable, transparent and open government.

Thus, the demand for the right to information is essentially a demand for good government. It is a demand for the rule of law rather than the rule of tyrants. It is an effort to prevent a system of governance where one or a few state elites dominate decision-making and the allocation of public resources such as tenders for public works.

Desirable as it is, the right to information is a process not an event. Moreover, it is a product of struggles, not favours from public authorities. From Sweden's Freedom of the Press Act of 1766 to the more recent pieces of legislation (some of

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5. UN General Assembly Resolution 59(1).

6. M. Toby, Freedom of Information as an Internationally Protected Human Right (2010), retrieved from <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>, (accessed 21 June 2016).

7. African Commission on Human and Peoples' Rights (ACHPR), Declaration of Principles on Freedom of Expression in Africa, Banjul, The Gambia, October 2002, Principle IV(1).

which are still bills not acts), a political tension seems to exist between citizens and government. Where citizens demand for open, accountable and transparent rule, government elites typically supply opaque, unaccountable and non-transparent rule. Citizens demand for unfettered access to government-held data, government elites (especially in the executive arm) tend to be calculative and often manipulative, for example, by enacting regime-friendly laws that prioritise the interests of the ruling elites. Where citizens demand for full disclosure; governments typically supply secrecy or, at best, partial disclosure.

The citizen-versus-government tension has resulted in one distinctive problem. The existing narrative on FoI is dominated by legal scholarship which primarily looks at the supply side not the demand-side of the right to information. With a few notable exceptions, legal scholars predominantly associate the non-enjoyment of the right to information with restrictive legislation such as Uganda's Official Secrets Act (Cap 302) or the Oaths Act Cap 19 which are on the supply side. What is hardly asked is a more basic political science and socio-legal question: Where do 'bad' laws – or the 'good' laws for that matter – come from? To ask this question is to underscore the significance of the underlying *societal* and the country-specific *political* configurations.

Our point of departure is that politics and the underlying societal norms are central determinants of the demand side of the right to information. Where politics – democratic, authoritarian or a hybridisation of the two – determines the character of laws (whether they are accommodative or repressive), societal norms shape what becomes the socially acceptable benchmarks of legislation. This is not to deny the importance of the supply side of legislation. What is worth emphasising is that today's legalistic lamentations on the limited supply of 'good' laws typically miss out on the underlying socio-political variables that contextualise access to information. This arguably explains why the demand side of the right to information is wanting.

The point at issue is simple. The socio-political side of the right to information is the base or infrastructure upon which Uganda's superstructure of restrictive legislation is constructed. It is to the articulation of Uganda's socio-political infrastructure that we must devote our analytical energies. First, however, is to present an outline of the legislative obstacles to the right to information.

III. LEGISLATIVE OBSTACLES TO THE RIGHT TO INFORMATION IN UGANDA

Uganda is a signatory to several international instruments that promote the right of access to information. Notable among these is the Universal Declaration of Human Rights (UDHR), which is widely recognised as a watershed moment in the history of

human rights. Proclaimed in December 1948 in France at the global headquarters of *liberté, égalité*, and *fraternité* [French for liberty, equality and fraternity), the UDHR, in Article 19, asserts that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information* and ideas through any media and regardless of frontiers" (emphasis added).

Admittedly, the UDHR is not legally binding on nations. However, it is part and parcel of international customary law from which all other rights spring. Thus the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights to which Uganda is a signatory also guarantee the right to information in a language that echoes the substance and spirit of the UDHR.

On the African continent, Article 9 of the African Charter on Human and Peoples' Rights provides that every individual shall have the right to receive information, express an opinion, and disseminate his [or her] opinion within the law. This position is echoed in the 2008 Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information. Principle 4 of the Atlanta Declaration inter alia asserts that:

> a. Access to information is the rule; secrecy is the exception; and
> b. The right of access to information should apply to all branches of government (including the executive, judicial and legislative bodies, as well as autonomous organs) at all levels (federal, central, regional and local) and to all divisions of international [intergovernmental] bodies…

In the same spirit, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information implore countries to guarantee the right of access to information, including, but not limited to, information relating to national security. Principle 11, for example, asserts as follows:

> Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

The Johannesburg Principles have since been exported into the realm of international human rights law. They were adopted by the globally influential UN Commission on Human Rights and upheld as an integral part of the right to freedom of expression in the African Charter on Human and Peoples' Rights.

Inspired by the international and regional human rights dispensation, as well as its own history of human rights violations (particularly under the repressive presidency of Idi Amin in the 1970s), Uganda promulgated a new constitution in 1995 manifestly providing for the right to information. Article 41(1) stipulates that "Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State…" The only constitutionally defined exception to this provision is where information disclosure "is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."[8]

Article 41(2) directed parliament to pass a law specifying the information categories that may be disclosed or withheld (as the case may be) under Article 41(1), and the procedures for accessing the information that is permissible. To operationalise Article 41, the Parliament in Uganda enacted the Freedom of Access to Information Act, 2005 (that is, 10 years after the constitutional provision). However, the Act was a product of a struggle, not state favours.[9] It came after a spirited campaign by civil society organisations coordinated under a pro-rights umbrella institution termed the 'Coalition on Freedom of Information' (COFI).

The purpose of the Freedom of Access to Information Act was to: (a) promote an efficient, effective, transparent and accountable government; (b) promote transparency and accountability in all organs of the state by providing the public with timely, accessible and accurate information; (c) to protect persons disclosing evidence of contravention of the law, maladministration or corruption in government bodies, as emphasised by the Whistleblower's Act; and (d) empower the public to effectively scrutinise and participate in government decisions that affect them.[10]

It is worth noting that section 5(1) of the Act transplants, root and branch, Article 41(1) of the constitution, namely, that citizens have a right of access to government-held information "except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."[11] Each information officer is obliged to provide accurate

8. Article 41(1).

9. D. Ngabirano, The Uganda Freedom of Information Campaign: Stuck in the Mud? (Paper presented at the OSIEA East African Regional Consultative Meeting on the Right to Information, 4 May 2012, Dar-es-Salaam, Tanzania, Unpublished).

10. Section 3.

11. Section 5(1).

and up-to-date information.[12]

Six years after the enactment of the Freedom of Access to Information Act, Uganda passed the enabling regulations of 2011. However, it is only in July 2016 that Frank Tumwebaze, the information minister, announced that government would organise "monthly day–long "barazas" [a Swahili term for public meetings] for ministers to explain government programs to Ugandans."[13] It is too early to know whether the barazas will turn out to be genuine platforms for activating responsive government or mere public relations avenues for disseminating government propaganda.

A key challenge exists for unlocking the enjoyment of the right to information in Uganda. And that is the incredibly long list of exemptions that are legalised under the Freedom of Access to Information Act. The exemptions for which a citizen may be lawfully denied access to government-held information include cabinet minutes;[14] information whose disclosure would breach the right to privacy of an individual;[15] commercial or proprietary information;[16] confidential information supplied by a third party, whose disclosure could, for example, prejudice future supply of such information;[17] where disclosure could "reasonably endanger" a person or property (such as an important building);[18] and if disclosure could prejudice law enforcement, legal proceedings, or the security/sovereignty of the state.[19] This rich array of exemptions could be exploited by Uganda's semi-authoritarian state elites to breach citizens' right to information.

The good news is two-fold. Uganda's right to information legislation is an historical achievement even though it is a baby-step in the protracted journey to active citizen agency. Second, the Freedom of Access to Information Act, 2005, has a public interest override provision. Section 34 explicitly provides for mandatory information disclosure in the "public interest". It states that:

> [A]n information officer shall grant a request for a record of the public body otherwise prohibited under this [Act] if:
> (a) the disclosure of the record would reveal evidence of (i) a

12. Section 5(2). The information officer is defined under Clause 4 of the Act as the Chief Executive of a public body.

13. *Ministers to address monthly barazas on work - Tumwebaze*, DAILY MONITOR, 8 July 2016.

14. Section 25.

15. Section 26.

16. Section 27.

17. Section 28.

18. Section 30.

19. Section 32.

> substantial contravention of, or failure to comply with the law; or (ii) an imminent or serious public safely, public health or environmental risk; and [where]
> (b) the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.[20]

The challenge for the override provision is that the act does not define what does or does not constitute "public interest". This has been an obstacle to the demand for mandatory disclosure. A case involving two journalists, *Angelo Izama & Charles Mwanguhya v. Attorney General,*[21] is worth referencing here. These two journalists, in their effort to exercise citizen agency, sought to access the details of the Production Sharing Agreements (PSAs), that is, the oil contracts that Uganda signed with foreign oil companies that are conducting oil-related development work in Uganda's Albertine Graben (in the great Western Rift Valley). The complainants asserted that the oil contracts may have breached the public interest since they were concluded and signed in an atmosphere of secrecy. The Chief Magistrate's Court ruled that the petitioners had failed to prove that a public interest *existed;* and that the public interest in the disclosure was greater than the harm that was feared. The prayer for mandatory disclosure was accordingly denied.

Another key obstacle to the enjoyment of the right to information in Uganda is the continued existence of draconian neo-colonial laws on Uganda's law books. A case in point is the Official Secrets Act (Cap 302). This Act came into force on 30 December 1964. Its stated objective was to safeguard the security of the state by regulating the interaction between foreign powers or their agents and prohibited government documents and/or installations.

A key outcome of the Official Secrets Act is that it considerably prohibits information access or disclosure. The Act also entrenches a culture of secrecy in the conduct of public affairs in Uganda. Section 2 provides, inter alia, that: Any person who, for any purpose prejudicial to the safety or interests of the territories of Uganda "approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place" commits an offence. The assumption is that all persons local and foreign, literate or illiterate, will know where the state's 'prohibited' areas are, and understand what exactly *approaching* or being in the *neighbourhood of* prohibited installations means. Whether this 'neighbourhood' means a couple of metres, kilometres or miles is not even specified. One is also deemed to have committed an offence if one: ...

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20. Section 34.
21. Misc. Cause no. 751 of 2009, Chief Magistrates Court.

> obtains, collects, records, or publishes or communicates in whatever manner to any other person any secret official code word, or password or any sketch, plan, model, article, or note, or other document or information which is calculated to be, or might be, or is intended to be directly or indirectly useful to a foreign power…[22]

The most restrictive or even intimidating part of the law is that:

> It shall not be necessary, on a prosecution under this section, to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of Uganda and, notwithstanding that no such act is proved against him or her, the accused person may be convicted if, from the circumstances of the case, or his or her conduct, or his or her known character as proved, it appears that his or her purpose was a purpose prejudicial to the safety or interests of Uganda.[23]

But that is not all:

> Where any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or anything in such a place, or any secret official code word or password is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the territories of Uganda unless the contrary is proved by the person accused.[24]

These kinds of laws are injurious to media freedoms, which are central to the struggle for information disclosure to the citizenry.

Another draconian law is the Penal Code Act (Cap 120). Section 41 of the Act restrains the citizenry and the mass media from discussing social ills and governance deficiencies in Uganda. This restrictive law does not just contravene the spirit of the Access to Information Act; it has catalysed fear in the general public and resulted in self-censorship by journalists and media houses that would otherwise help in the

22. Official Secrets Act 1964, section 2(3).
23. Section 2(2).
24. Section 2(3).

struggle against official corruption, including but not limited to the misallocation of public resources, mis-procurement in the awarding of public tenders or, more generally, the abuse of office.

Other restrictive laws include the Evidence Act[25] and the sedition provisions under the Penal Code Act. A detailed treatment of these is not possible given this article's space constraints. Three issues must be emphasised. First, most of the provisions, particularly under the Penal Code Act, are broad in scope thereby blocking the free flow of information from official sources. Second, the Act carries severe criminal sanctions for contravention of any of the provisions. Third, the draconian laws cannot stand constitutional scrutiny. Nor are they consistent with today's access to information dispensation. As the Human Rights Network- Uganda (HURINET-U) notes, "These [archaic] laws act as a cloak for duty holders to unjustifiably withhold information…'"[26] What is needed, it appears, is to harmonise these laws with the constitution, the Access to Information Act, and the global discourse on information access as a fundamental human right. This harmonisation appears to be a necessary precondition for creating spaces for full information access.

The so-called *legalistic* obstacles to the enjoyment of the right to information are essentially *political* obstacles. For example, on 25 August 2010, the Constitutional Court nullified sections 39 and 40 of the Penal Code, which define seditious crimes. Yet, court decisions have not been implemented, thanks to the vested interests of top political elites in non-compliance with court orders. Thus, several journalists, human rights defenders and political activists (such as Siraje Lubwama, Andrew Mwenda, Musa Kigongo, and John Njoroge), continued to face charges under the sedition provisions of the Penal Code Act, notwithstanding the nullifications.

Moreover, certain opposition politicians such as Robert Kanusu of the Uganda People's Congress (UPC) and Betty Nambooze of the Democratic Party (DP) faced comparable charges.[27] In the same vein, certain journalists such as Henry Ochieng and Angello Izama of the Daily Monitor newspaper faced court cases and were charged under section 179 of the Penal Code, which establishes charges of criminal libel for supposedly releasing 'defamatory stories.' The two were charged with criminal libel at the Makindye Chief Magistrates Court over an article which allegedly defamed President Yoweri Museveni.[28] A clear lesson that emerges is the primacy of politics in

25. Cap 6 *Laws of Uganda* 2000.

26. HURINET-U, *supra* note 2, at 3.

27. ARTICLE 19 and Coalition for the Freedom of Information (COFI), Submission to the UN Office of the High Commissioner for Human Rights on the Occasion of the Universal Periodic Review for Uganda (2011), retrieved from <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/JS4-JointSubmission4-eng.pdf>, (accessed 20 May 2017).

28. *Id.*

the supposedly *legislative* obstacles to the enjoyment of the right to information in Uganda.

A. Politics of Access to Information

As already hinted, a fundamental obstacle to the enjoyment of the right to information in Uganda is the non-implementation of certain legal and policy provisions, particularly those that do not suit the utilitarian interests of the top political elites. Uganda's political elites are a perfect audience for Kahlin Gibran's poetic complaint, viz:

> You delight in laying down laws,
> Yet you delight more in breaking them.
> Like children play by the ocean
> Who build sand-towers with constancy
> And then destroy them with laughter...[29]

The breach of the law by the elites who passed Uganda's 'enabling' law appears to be aided by the country's politics (which contextualises the enjoyment of the right to information, or the lack thereof). Tripp describes Ugandan politics as being neither democratic nor authoritarian.[30] It is a hybridisation of democratic tendencies *and* authoritarian practices. The hybrid regime has metamorphosed from a regime of overt human rights violations during Amin's reign, through the pseudo-democracy of the Obote II administration to President Museveni's phase of 'no-party democracy' or what critics call a disguised one-party dictatorship (1986-2005). The current political dispensation, which is still presided over by Museveni (1986–to-date), is widely deemed to be semi-authoritarian, that is, hybridising democratic elements (such as regular elections) with strong dozes of repression (typified by the criminalisation of opposition politics).

One point is worth emphasising. Uganda has made important strides on the path of democratisation and human rights. For example, the re-adoption of a multiparty political dispensation in the run-up to the 2006 elections augured well for democratisation and human rights. The regularity of elections since 1993, the domestication of international human rights instruments, and the enactment of enabling legislation such as the Freedom of Access to Information Act, 2005, all augured well for Uganda's political development.

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29. G. KAHLIN, THE PROPHET (1923).
30. A.M. TRIPP, MUSEVENI'S UGANDA: PARADOXES OF POWER IN A HYBRID REGIME (2010).

However, the country has since had democratic reversals signifying the resurgence of semi-authoritarian rule. The authoritarian practices are typified by vote rigging, repressive laws such as the Public Order Management Act, 2013, and the persecution of opposition politicians such as Dr Kizza Besigye who after the February 2016 presidential elections spent over four months either under house arrest or at Luzira Maximum Prison on charges that were widely deemed to be fictitious and politically induced. In short, while Uganda was by mid-2000s making credible progress on the human rights and democratisation front, politically-induced fetters to the enjoyment of civil, political and economic rights have since resurfaced. But what societal configurations permit a semi-authoritarian, even repressive, regime to have staying power? And what social norms have become fetters to the enjoyment of the right to information?

B. Social Underpinnings of Access to Information in Uganda

The social underpinning of access to information in Uganda is as interesting as it is depressing. The authoritative Uganda Bureau of Statistics (UBoS) reports in its National Population and Housing Census 2014 that almost 80 percent of Uganda's 34.6 million people are rural-based agriculturalists who still live in an information vacuum. A significant proportion, that is, 69 percent of the people, directly derive their livelihood from peasant farming. From the Marxian philosophical perspective, such peasants are, like their crops, rooted in the soil. They are, ipso facto, oblivious of the existence of government-held information on the proverbial 'websites' of government ministries, departments and agencies (MDAs).

This signifies that peasants are largely uninformed – or even unbothered – about what happens in the wider political economy beyond their villages. They are predominantly unaware of today's rights-based discourse on access to information. As Ngabirano notes: "[T]he greater public who stand to benefit from the right of access to information remain ignorant about the existence of this right …"[31]

What compounds matters is the main source of information for the average citizenry. According to UBoS,[32] radio is the most important source of information and increased its share from 49 percent in 2002 to 55 percent in 2014. The second most important source of information is, unfortunately, 'word-of-mouth.' However, the share of word-of-mouth declined from almost 48 percent in 2002 to 20 percent in 2014.

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31. Ngabirano, *supra* note 9, at 2-3.

32. UGANDA BUREAU OF STATISTICS (UBOS), NATIONAL POPULATION AND HOUSING CENSUS (2014), at 41.

Table 1: Percentage Distribution of Main Source of Information in Households, 2002/2014

Source of information	**2002**	**2014**
Radio	49.2	55.2
Word of mouth	47.8	19.7
Television	0.6	7.2
Telephone	0.7	0.4
Community announcer	0.1	0.1
Community meetings	0.8	0.1
Internet	0.6	7.3
Print media	na	2.1
Post mail	na	0.5
Hand mail	na	4.6
Other	0.2	2.9
Total	**100.0**	**100.0**

Source: UBoS, 2016, at 41

Three challenges are worth underlining. First, word-of-mouth, while declining in importance, still commands a respectable position as a source of information. This underscores the daunting task at hand. Riddled with inaccuracies, inconsistencies and distortions, word-of-mouth evidence can hardly galvanise citizen action against unaccountable government officials. Armed with word-of-mouth evidence, citizens are vulnerable to ridicule, trivialisation or psychological torture in the face of under-performing but better informed state elites. Thus, to advance the citizen empowerment agenda for accountable governance, the pro-information campaign has to push for a shift from word-of-mouth to more credible sources of information.

The second challenge is more disturbing. The internet is widely presented as the major avenue for accessing government-held data under the ongoing open data 'revolution' backed by the use of government website. However, internet accounts for only seven percent as a source of information notwithstanding the recent deepening of mobile telephony.

The third issue is with reference to what has already been hinted, that is, radio as a source of information. The rising importance of radio is attributed to three interrelated developments, viz, the liberalisation of the media since the 1990s; the proliferation of FM stations; and the relative increase in media freedoms in Uganda in comparison, for example, to Rwanda. However, what dampens the empowerment credentials of these developments is that most of the FM stations are owned and

controlled overtly or covertly by top elites of the ruling National Resistance Movement (NRM) party or their close business allies. These elites preferentially design and communicate regime friendly media content.

Table 2: Top 10 Richest Radio Owners in Uganda

Name of Radio	Owner	Comments
KFM and Dembe	The Agha Khan	Has cosy relations with NRM party elites. Owns Diamond Trust Bank, Serena Hotel, NTV Kenya, NTV Uganda, East African and Monitor newspapers, and Nation Media group.
Sanyu FM	Sudhir Ruparelia	'Owns' a string of businesses - Munyonyo Resort Hotel; Speke Hotel, Kampala Parents Primary School; and real estate/buildings.
Radio One and Kabozi Ku Biri	Maria Kiwanuka	Former Finance Minister in NRM government; owns, together with her husband, Oscar Industries
Capital FM; Beat FM	William Pike (co-owner: Patrick Quarcoo)	Former CEO of the Vision Group (which is closely allied to the NRM party). In Kenya, he has a stake in Kiss FM and Daily Star
CBS (Central Broadcasting Services)	Godfrey Kaaya Kavuma	Monarchist allied with Buganda Kingdom.
Power FM	Gary Skinner	Owns the powerful Watoto Church (former Kampala Pentecostal Church).

Rwenzori FM (Ibanda district)	Patrick Bitature	Chairman of Umeme; Owns Protea Hotel (Francise) and other businesses
Capital FM and Beat FM	Patrick Quarcoo	Co-owns, with William Pike, Capital and Beat FM and Kenya-based Daily Star
Buddu FM (Masaka) and Digida FM	Segawa Gyagenda	Undersecretary, Ministry of Health.

Moreover, Uganda's FM owners and controllers hardly, if ever, air issues whose goal is to promote the objective empowerment of the citizenry autonomous of the ruling NRM priorities. Xclusive UG, an online company in Uganda, lists the top richest radio owners, most of whom have cosy relations with NRM party elites, as our 'Comments' column in Table 2 shows.

In addition to the foregoing, certain rural communities perceive the right to information to be a right of the predominantly urban-based middle class as well as the media fraternity. Over the recent past, the media, particularly the FM stations, mobile telephony, and community radios have penetrated rural Uganda. These have undoubtedly increased the flow of information and enlightened certain rural dwellers. However, in some areas (such as Southwestern Uganda), the proverbial claim that 'information is power' has to contend with the socially-embedded norm best summarised as follows: *Omunaku tateisa* [The poor are voiceless even if they have the necessary information]. In the political anthropology of the Baganda people of central Uganda, *omwavu takiika mbuga* [the poor cannot be entrusted with political representation (in Parliament)].

Admittedly, Uganda's economy has grown at a rapid rate of 7.3 percent between 1992 and 2010, and at a slower but reasonably good rate of roughly 4.5 percent between 2011 and 2016. Over the same period, income poverty has declined 'considerably' from 56 percent of the population to 19.7 percent.[33] Unfortunately, these rosy socio-economic figures are hardly reflected in ordinary people's lives. For example, no fundamental socio-economic transformation has taken place. Uganda's

33. Background to the Uganda Budget for the year 2016/17. A re-calculation using the World Bank's international poverty estimate of US$1.90 per person shows that over 34 percent of Ugandans are below poverty.

'rosy' economic growth has simply by-passed the *wanjiku*. Moreover, 65 percent of the youth aged 15 – 30 years are unemployed, according to the Ministry of Gender, Labour and Social Development. These depressing socio-demographics are, in large part, a product of state failure to deliver what Elizabeth Thurbon and Linda Weiss call 'transformative' developmental outcomes.[34]

Thus, while Uganda has had annual rituals celebrating political independence since 1962, an age-old Swahili maxim best summarises the political economy of the problem at hand – *Uhuru bila nguvu ya kiuchumi ni hewa kabisa* [Political independence without economic empowerment is empty). This maxim underscores the importance of economic empowerment as a precondition for citizen empowerment. It signifies that citizen empowerment will hardly gain traction unless the struggle for rights is broadened to include economic rights such as the right to a decent, rewarding, and preferably formal sector job. A commentator who spent months working with the economically deprived Batwa (pygmy) people of southwestern Uganda summarised the central message of leading Batwa people as follows: "the poor eat food, not abstract human rights."[35]

Another critical area of importance is access to education. The Uganda constitution defines education as a human right[36] and basic education as an entitlement for all school-age children.[37] Uganda adopted the policy of Universal Primary Education and Universal Secondary Education in 1997 and 2007 respectively. These are seen as tools for the socio-economic and political empowerment of the citizens.

At the time of the 2014 population census, roughly 87 percent of the school-age children (6-12 years) were in school. However, 1 in every 10 school-age children had never been to school. Moreover, 22 percent of the secondary school-age children (13-18 years) had left school prematurely (Uganda, *Population Census*, 2014). As Table 3 shows, 18.9 percent of the total population (or roughly seven million Ugandans) had never been to school at all, and 58.4 percent had only completed primary education. Given the Twaweza/Uwezo studies showing low literacy and numeracy skills for primary school children, the problem for civic competence is clear. Those that completed primary school and those that had no formal schooling at all are united by one common denominator, that is, limited capacity to assert citizen agency.

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34. E. Thurbon and L. Weiss, *The developmental state in the late twentieth century,* in HANDBOOK OF ALTERNATIVE THEORIES IN ECONOMIC DEVELOPMENT (E.S. Reinert, J. Ghosh, R. Kattel eds., 2016), at 637-650.

35. Interview with a former employee of Care Uganda, Kampala, June 2016.

36. UGANDA CONST., 1995 (Amended), Article 30.

37. *Id.,* Article 34(2).

Table 3: Distribution of Population Aged 6 Years and Above by Highest Grade/Class of Formal Education

	2002			2014		
Level Completed	**Male**	**Female**	**Total**	**Male**	**Female**	**Total**
None	18	29	24	15.8	21.6	18.9
Primary	64	59	61	59.1	57.8	58.4
Secondary	14	10	12	20.2	16.9	18.5
O Level	12	9	11	16.4	14.6	15.4
A Level	2	1	1	3.8	2.3	3.0
Tertiary	4	2	3	4.8	3.7	4.3
National	100	100	100	100.0	100.0	100

Source: Uganda Population Census 2014, at 26.

In the light of the above context-specific realities, the widespread claim that citizens in Uganda demand for information, while government elites withhold it is only partially true. Admittedly, government secrecy is a deeply entrenched culture of public service (or dis-service) in Uganda. It is also true that elite journalists made an unsuccessful effort to demand for the disclosure of Uganda's secretive oil contracts. Certain rural citizens even become boldly assertive whenever they see teachers of rural primary schools loitering in local markets during class hours. However, these are only cases of 'positive deviance'. The majority of Uganda's *wananchi* are mere spectators of what goes on in the national political economy. The point at issue is simple. Today's socio-legal obstacles to information disclosure are mere symptoms of a greater underlying problem which is simultaneously social and political.

IV. SUMMARY AND CONCLUSIONS

This article set out to examine the challenges associated with unlocking the enjoyment of the right to information in Uganda in the broader context of the global, regional and national demand for accountable, responsive and open government. We briefly scrutinised and found wanting today's RTI discourse, which narrowly conceptualises the right to information obstacles as *legislative* obstacles. We have also expressed discomfort with activists who register or even celebrate the mere passage of FoI legislation as a major milestone in the struggle for citizen agency. Our discomfort springs from one critical reality. A substantial number of countries that have enacted RTI laws such as China, Zimbabwe, Rwanda and Uganda have repressive undemocratic regimes.

The main conclusion emerging from this study is that the RTI obstacles are fundamentally socio-political, not just legalistic. The restrictive legislative framework is undoubtedly important. The passage of Uganda's Access to Information Act was, without a doubt, kick-started with litigation. However, resorting to litigation to enforce compliance with the act might deliver short-run outcomes (such as a court judgment). However, the judgment might remain unimplemented, thanks to the politics of 'no change' among the ruling elites worsened by the sense of powerlessness among the citizenry.

This signifies two things. In the struggle for rights, the socio-political DNA matters very much. For one thing, politics, and in particular, semi-authoritarian politics, determines the nature and content of legislation that succeeds or fails. For another thing, the culture of secrecy, which predominates in the conduct of public affairs, is not just technocratic. It is political. The configuration of social norms dominated, in Uganda's case, by a predominantly rural, peasant society living in an information vacuum, limits the degree to which society can assert its demand for open data. This is not to deny the expansion of the urban population to almost 20 percent of the population. Nor do we deny the rising importance of modern telephony and the digital revolution. The point, however, is that the demand for government-held information is constrained by Uganda's peasant society, which is technologically challenged.

An enabling legislation, while important, is merely a baby step in the uphill struggle for enjoyment of the right to information. To the extent that civil society struggles are essentially struggles against repressive legislation, rather than the socio-political infrastructure that constrains citizen agency, they are unlikely to deliver durable human rights. For the RTI to gain traction, we need to transcend the passage of enabling laws, and address the underlying socio-political factors whether the governance systems are democratic or repressive, and whether citizens are empowered socially (for example, with quality education) and economically (via gainful formal sector jobs). Without citizens' social, political and economic empowerment, unlocking the right to information becomes an uphill task.

A major recommendation emerging from this study is that RTI advocates must adopt a digital-PLUS strategy. This signifies two things. First is the continued, even intensified, use of 'smart' information sharing channels such as the internet and social media platforms such as WhatsApp, Twitter, and Facebook. 'Smart' information sharing channels are extremely important for Uganda's techno-savvy youthful population. They are unstoppable precisely because the ICT revolution is unstoppable.

However, Uganda must grapple with the relatively limited breadth and depth of internet access, bandwidth and mobile telephony. Thus, the second aspect of digital-

PLUS strategy is the continued use of older but effective avenues for reaching citizens who still live in an information vacuum. One such avenue, given the widespread religiosity of the citizenry, is the multi-faith Interreligious Council of Uganda (IRCU). The IRCU offers much hope precisely because it represents all the major faiths in Uganda including Catholics, Anglicans, Seventh Day Adventists, and Muslims. Moreover, the institutional infrastructure of the IRCU spreads from the national and regional levels to virtually every village. Thus, to unlock the right to information in Uganda, IRCU should be sensitised and activated to embrace, deepen and institutionalise the RTI crusade as its own. Without such creative approaches, the RTI crusade will take ages before it gains traction in semi-authoritarian, poverty-stricken, political economies such as Uganda.

VICTIM-CENTEREDNESS AND DEVELOPMENTAL RIGHTS IN ACHOLILAND, UGANDA

Ginamia Melody Ngwatu*

ABSTRACT

With the end of the conflict in northern Uganda, it was time for the region that had been marred with gross human rights violations and stagnated development to pick up its pieces. To this end, the Uganda government came up with Peace Recovery and Development Programme (PRDP) through which the region could be rehabilitated. Worth noting is that there were previous interventions undertaken by the government to rehabilitate the region. These include the Northern Uganda Reconstruction Programme (NUREP) and the Northern Uganda Social Action Fund (NUSAF) which, currently in its third phase, has been incorporated within the third phase of PRDP. With regard to PRDP, a lot of focus was placed on its formulation and implementation as a special programme targeting human rights-related issues, including access to justice and enjoyment of socio-economic rights. There is, however, concern that much as there has been an attempt to realise the right to development (RTD), victims' voices have not been given due consideration in the policy formulation process and their contribution is minimal in the policy implementation. This article seeks to highlight the plight of victims of the northern conflict, thereby necessitating a push for their recognition and their inclusion in the development, formulation and implementation of government programmes aimed at achieving the right to development.

I. INTRODUCTION

Northern Uganda experienced conflict that stretched over two decades from 1986 to 2007. The conflict was between the Uganda government and various rebel groups notably the Lord's Resistance Army (LRA).It had a devastating effect on the enjoyment of human rights. Much as the region was engaged in various conflicts in the post-independence era, the most brutal was the LRA rebellion which occurred after the military takeover by the National Resistance Army (NRA). The LRA rebellion was a response to what was perceived as targeted revenge killings by the NRM government,[1] abusive conduct of the government army in 1986, severe restrictions on movement and

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1. B. WAIRAMA, UGANDA: THE MARGINALISATION OF MINORITIES 11 (2001).

widespread detentions without trial of civilians on suspicion of rebel collaboration, among others.[2] The LRA consisted of what were initially remnants of General Tito Okello Lutwa's army and their civilian supporters, later turned into the Holy Spirit Movement led by Alice Lakwena, and finally morphed into the LRA which sustained the war till 2006 when the cessation of hostilities agreement was signed.[3]

The rebellion was characterised by a campaign by the LRA of mutilation, rape, kidnap and killing of civilians in northern Uganda,[4] with the Acholi sub-region being the most affected. The LRA in essence turned the entire northern region and the surrounding parts of eastern Uganda into a war zone.[5] At the height of the conflict around 1996, local communities were herded from their villages into internally displaced people's (IDP) camps for their protection by government soldiers under what was known as a "protected villages" policy.[6] This exercise was repeated in 2002 as well as 2004 when goverment's military operations against the LRA intensified.[7] Those previously residing in rural areas had to shift to areas near trading centres and military bases; while other civilians were ordered by the UPDF to move to IDP camps.[8] This forced migration of locals was done at short notice pursuant to a declaration by President Yoweri Museveni.[9] Consequently, any person who refused to move and remained in the village was to be considered a rebel and, therefore, subject to military attack.[10] These IDP camps were created as a strategy to remove the social base from which the LRA could find food and support from the local populace, rather than provision of security for the population.[11]

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2. Human Rights Watch, Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda, September 2005 Vol. 17, No. 12(A), at 8.

3. Northern Uganda: Major steps towards peace in a decades-old conflict, available at <http://www.un.org/events/tenstories/07/uganda.shtml> (accessed on 19 June 2017).

4. WAIRAMA, *supra* note 1.

5. *Id.*

6. International Discplacement Monitoring Centre, Uganda Report 2009, retrieved from <http://www.internal-displacement.org> (accessed 17 January 2017).

7. *Id.*

8. *Id.*

9. F.O. Adong, Recovery and Development Politics: Options for Sustainable Peacebuilding in Northern Uganda, Discussion Paper 61 (2011), at 12.

10. *Id.*

11. H. Tornberg, *Ethnic Fragmentation and Political Instability in Post-Colonial Uganda: Understanding the Contribution of Colonial Rule to the Plights of the Acholi People in Northern Uganda* (2012), in UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA (Human Rights Watch, September 20, 2005), at 68-69.

An estimated 1.8 million people in the region were displaced during the conflict.[12] However, the herding of local communities into IDP camps did not have the desired result as government failed to provide security, thereby leaving the locals at the mercy of LRA rebels.[13] Due to inadequate security, various Acholi lost their lives while living in IDP camps at the hands of the very LRA they were to be protected from.[14] Consequently, some Acholis could not access and till their land for security reasons.[15] The failure to enjoy land and user rights was not only due to the insecurity at the villages but also due to the 'scorched earth policy' that the UPDF employed by conducting aerial bombings and burning all Acholi homes in the villages as well as sources of food to deprive the LRA.[16] Unfortunately, it is the locals that suffered the most as they could not enjoy their social and economic rights and became entirely dependent on humanitarian aid.[17] The economic and social prosperity in the southern part of the country could not be compared with the abductions, landmines, mutilations, rapes, theft of property and threats from the LRA that were active in northern Uganda, particularly in the districts of Gulu and Kitgum.[18]

In 2006, there were efforts to end the conflict and secure peace. Previous peace attempts that had been started in 1988[19] and others in 1994 had failed due to the refusal by LRA to adhere to President Museveni's ultimatum that they be disarmed within one week.[20] Following a peace process which started in 2006, a Cessation of Hostilities Agreement (CHA) was consequently signed as a result of which both the Uganda government and LRA agreed to cease all hostilities and other actions aimed at each other.[21] As a result of this agreement, relative peace prevailed in the northern region,

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12. Internal Displacement Monitoring Centre, Uganda: Internal displacement in brief as of December 2013, retrieved from <http://www.internal-displacenment.org/sub-saharan-africa/uganda/summary>.

13. Human Rights Watch, *Supra note* 2, at 4.

14. *Id*.

15. *Id*.

16. D. Haddad, Inhumanitarianism: The case of northern Uganda (2015), Capstones and Theses, Paper 476, at 6, retrieved from < http://digitalcommons.csumb.edu/caps_thes/476> (accessed on 17 June 2017).

17. *Id.*

18. WAIRAMA, *supra* note 1, at 7.

19. C. Lamwaka, The peace process in northern Uganda 1986-1990, Accord issue 11 (2002), at 39, retrieved from<http:llwww.c-r.org/accord-article/peace-process-northern-uganda-1986-1990-2002>, (accessed 22 June 2017).

20. J.M. Royo, War and peace scenarios in northern Uganda (2008), at 12, <http://www.escolapau.uab.cat/img/qcp/war_peace_uganda.pdf>, (accessed 8 January 2017).

21. Preamble to the Cessation of Hostilities Agreement between the Government of Republic of Uganda and the Lord's Resistance Army/Movement, Addendum I, available at http://peacemaker.un.org/uganda-addendum1-2006.

thereby creating a conducive environment for government to begin the process of ensuring that IDPs return home. However, this process of return also had its own challenges including the lack of social infrastructure in the villages.

Despite the return of relative peace, marginalisation and gross inequalities, particularly in the rural parts of the north where state resources barely reached, continued.[22] To address the problem of marginalisation and gross inequalities, the Uganda constitution enjoins the state to take affirmative action in favour of groups marginalised for the purpose of redressing imbalances which exist against them.[23] To this end, the Uganda government initiated various development programs aimed at addressing the socioeconomic imbalances in northern Uganda, including the two phases of PRDP. Admittedly, there has been some progress in Acholiland especially in terms of infrastructural development through road construction. However, the north still lags behind in terms of attainment of social and economic development of the local populace as compared to the other regions of the country.[24] This is bearing in mind the 20-year lull in attainment of developmental rights which include the limited enjoyment of the right to health, livelihood and general social and economic wellbeing of the people of northern Uganda. Questions have, therefore, remained on how victim-centred government programmes are in the quest to guarantee enjoyment of the RTD in post-conflict northern Uganda, particularly Acholiland which bore the brunt of the conflict.

In light of the impact of the northern conflict on human rights enjoyment, there was need for interventions to be undertaken by the government to promote the attainment of human rights, especially the right to development. The formulation and implementation of these interventions would require that a victim-centred approach is utilised to ensure that the social and economic wellbeing of the people of northern Uganda is addressed; while at the same time bringing the northern region at par with the rest of the country in terms of economic development. Before the concept of victim-centredness and its role in guaranteeing the right to development is discussed, it is imperative that the impact of the northern conflict on the enjoyment of human rights be discussed. The discussion on the impact of the conflict forms a foundation upon which the need for the right to development to be attained arises; and victim-centredness, as a concept, to be applied in the formulation and implementation of development processes to guarantee meaningful enjoyment of the right to development. These are discussed below:

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22. A. Perkins, Marginalisation in Uganda: An introduction, retrieved from < https://www.theguardian.com/katine/2008/aug/19/background.governance> (accessed on 5 July 2016).

23. UGANDA CONST., 1995, Article 32(1).

24. Perkins, *supra* note 22.

II. THE IMPACT OF THE NORTHERN UGANDA CONFLICT ON ENJOYMENT OF HUMAN RIGHTS

The impact that the northern Uganda conflict had on the local populace has been extensively written about; however, for the need for victim-centredness in attainment of the right to development to be put in perspective and appreciated, it is imperative that some of the critical outcomes of the war be highlighted. These include:

A. Massive violation/abuse of human rights

During the conflict, Acholiland did not escape massive human rights violations and abuses both at the hands of the Uganda People's Defence Force (UPDF) and the LRA. The UPDF committed a number of violations including violation of the right to life[25] and the right to freedom from torture, cruel, inhuman or degrading treatment or punishment[26] in instances where locals were deemed to have collaborated with the LRA. The local communities also had their property destroyed especially in the course of the scorched earth policy that aimed to deny rebels access to food supplies and assistance from the locals.[27] The LRA were also known to abduct, kill and mutilate civilians during their raids on villages and later IDP camps.[28] For instance, the Barlonyo massacre is an example of an attack by the LRA on displaced persons.[29] The attack took place on 21st February 2004 in the course of which the LRA massacred 330 people by burning them alive inside their huts.[30] Through this attack and other attacks, the local populace lost their right to livelihood through destruction of their property and were denied the right to development; neither could they benefit from investment efforts due to insecurity in the region. The conflict generally stagnated developmental efforts in the region.

B. 'Lost' generation

The conflict resulted in the emergence of a generation of youth that can best be described as the 'lost' generation. These are largely youth who were either children at the onset of the war or born during the war. These youth largely grew up in IDP camps

25. UGANDA CONST., 1995, Article 22.
26. *Id.,* Article 24.
27. Haddad, s*upra* note 16, at 6.
28. Human Rights Watch, s*upra* note 2, at 10.
29. *Id.*
30. *Id*.

and since some of them lost their parents and close relatives during the conflict, they did not know where their villages were. Acholi youth, particularly those that were born and raised in IDP camps have lacked opportunities for quality education or employment and have also suffered from the psycho-social effects resulting from the conflict.[31] It may be argued that there are opportunities for universal secondary education (USE) and university education for the Acholi at Gulu University; however, the quality of education in the USE schools has been lacking while at the same time, some of members of the local communities have been unable to support their children till university education.[32] It is estimated that as at 2006, only 9 percent of men and 1 percent of women had completed secondary school.[33]

Such youth would, therefore, find it challenging to participate in or contribute to attainment of the right to development with limited access to development interventions. Realisation of the right to participate in development interventions would require either individual participation or through a chosen representative.[34] One wonders how this category would meaningfully participate in and contribute to processes aimed at guaranteeing their RTD if they do not have access to basic education and resources.

Their ability to participate is equally clouded by the fact that they have been brought up in an environment where they would idle around trading centres and wait for food and other aid, as opposed to working and making a contribution to economic growth and development. The government has tried to implement the Youth Livelihood Programme nationwide to empower youth to utilise their socio-economic potential and increase self-employment opportunities and income levels.[35] Youth in northern Uganda have benefitted from the programme though there have been challenges in repayment of the loans given to youth groups. For instance, in Gulu district, Uganda shillings 690, 832, 300 million was availed to 94 youth groups but only

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31. ACCORD & Defence for Children International-Canada, A Lost Generation: Young People and Conflict in Africa (2007), at 70, retrieved from < https://www.africaportal.org/dspace/articles/lost-generation-youn-people-and-conflict-africa> (accessed on 27 June 2017).

32. A.S. Okello, Post-War Social Recovery in Governmental Organisations (LL.D. Dissertation, University of Birmingham, 2011), at 167.

33. E. BAINES, E. STOVER AND M. WIERDA, WAR-AFFECTED CHILDREN AND YOUTH IN NORTHERN UGANDA: TOWARD A BRIGHTER FUTURE: AN ASSESSMENT REPORT, May 2006, at 13, retrieved from <https://www.macfound.org/media/article_pdfs/UGANDA_REPORT.PDF> (accessed on 3 July 2017).

34. UGANDA CONST., Article 38.

35. Ministry of Local Government, Youth Livelihood Programme, retrieved from < http://www.mglsd.go.ug/programmes/youth-livelihood-programme-ylp.html> (accessed on 2 July 2017).

Uganda shillings 138, 166, 460 shillings (37%) was repaid.[36] The situation was no different in Pader district where Uganda shillings 444, 880, 900 was availed for 65 youth groups and only Uganda shillings 88, 110, 396 million (22%) paid back.[37] This shows that such interventions though well-intended can be derailed if the beneficiaries are not adequately prepared to participate in development programmes. These youth essentially at best had low education levels at the end of the conflict as well as limited skills. They were, therefore, unprepared for the post-conflict era where they had to fend for and develop themselves. Government interventions aimed at attaining the right to development ought to have considered the *status quo*.

C. Stagnation of development efforts

Widespread insecurity in the northern region impeded economic activities thereby affecting attainment of the right to development. With a huge population of an estimated 1.8 million people having been displaced and not allowed to access their gardens, some of the local populace were reduced to being beggars as they solely relied on food rations from humanitarian organisations.[38] As a consequence of this reliance on food aid, a culture of dependency was created.[39] Additionally, the conflict brought about destruction of the available infrastructure. These included homes as well as basic social services like health centres and schools. This contributed to the decline in the welfare indices for northern Uganda as compared to the rest of the country.[40] The income poverty in the region remained high while literacy rates remained low and access to social services poor.[41] With an insecure region, no investor, whether local or foreign, would risk investing in Acholiland due to high probability of abductions and looting of their merchandise in the course of routine ambushes by rebels. Consequently, development efforts in the region came to a halt.

Through the implementation of government policies to promote attainment of the right to development, effort should have been placed on tackling the issue of

36. Edison Akugizibwe, Youth Livelihood Programme Funds Repayment Hits 50 %, retrieved from < http://www.theugandatoday.com/business/2017/02/youth-livelihood-programme-funds-repayment-hits-50/> (accessed on 3 July 2017).

37. *Id.*

38. Number of IDPS obtained from Uganda: Internal displacement in brief as of December 2013, retrieved from <http://www.internal-displacement.org/sub-saharan-africa/uganda/summary> (accessed on 27 June 2017).

39. E.M. Cagney, Post-Conflict Cultural Revival and Social Restructuring in Northern Uganda (2011) at 12, retrieved from < http://trace.tennessee.edu/utk_chanhonoproj> (accessed on 1 July 2017).

40. S. Opinia and F. Bubenzer, Gender Justice and Reconciliation in Northern Uganda, JRP-IJR Policy Brief No. 4, August 2011, at 5.

41. *Id*.

poverty among victims of the conflict. Such efforts would include activities that seek to improve the social and economic wellbeing of local communities. Admittedly the Uganda government has tried to undertake activities at the national level to alleviate poverty, though the focus has largely been on infrastructural development whose impact does not necessarily trickle down to the ordinary Acholi.

D. Increase in poverty levels

Poverty levels in Acholiland were exacerbated by the over two-decade conflict and made even worse by the over 10 years the locals were confined in IDP camps. Local communities had been reduced to abject poverty as they could not engage in gainful employment or any form of production as they were unable to till their land due to insecurity. Further, the scorched earth policy employed by the UPDF as an intervention to defeat the LRA led to the destruction of property and crops of local communities;[42] thereby causing further impoverishment. The scorched earth policy was a military intervention in 1991 implemented under what was called 'operation north'.[43] The operation involved the use of various military strategies in the course of which there were reports of arbitrary arrests and detentions and blanket cordon and search operations intended to net the so-called rebel collaborators as well as the burning of huts and gardens to cut down support to the rebels.[44] This, however, affected the livelihood of local communities. Government has, through programmes such as PRDP, attempted to revamp the region and reduce the poverty levels. However, the poverty levels have remained high.[45] Reports indicate that the number of poor persons in northern Uganda increased from 4.7 million in 2005/006 to 5.1 million in 2012/2013.[46] As a result, northern Uganda became the region with the highest poverty level in the country.[47]

Despite implementation of the PRDP and other development interventions for at least 10 years, the northern region has remained the poorest in the country.[48] It is

42. F. Kisekka-Ntale, *Roots of the Conflict in Northern Uganda*, 32 JOURNAL OF SOCIAL, POLITICAL AND ECONOMIC STUDIES (2007), at 436.

43. *Id*.

44. *Id.*

45. MINISTRY OF FINANCE, PLANNING AND ECONOMIC DEVELOPMENT (MOFPED), POVERTY STATUS REPORT 2014, at vi.

46. E. Ainebyoona, *Poverty on the Rise in Northern Uganda-Report*, DAILY MONITOR, December 18, 2015, retrieved from <http://www.monitor.co.u/News/National/Poverty-on-the-rise-in-northern-Uanda-report/688334-3000650-14126ilz/index.html> (accessed 24 January 2016).

47. *Id.*

48. MOFPED, *supra* note 45*,* at vi.

worth noting that although poverty level reduced from 73.5 percent in fiscal year 1992/93 to 43.7 percent in 2012/13, it is still more than twice the national average.[49] Poverty and exclusion from mainstream development policies and programmes result in vulnerability; and vulnerable groups in this instance would include children, the elderly, persons with disabilities, the youth, orphans and other vulnerable children, persons living with HIV and AIDS, poor families, and refugees and displaced persons.[50] These categories would require special consideration in the formulation of policies aimed at guaranteeing enjoyment of the RTD.

E. Emergence of child-headed families

The northern conflict led to the emergence of children/orphans that headed families due to loss of adult members of their families. These children/orphans have since the end of the conflict now grown into young adults. It should be observed that in the course of the conflict, these were essentially children taking care of their younger siblings. Given that the conflict had destroyed close ties among extended family members, young members of the family were deprived of support.[51] The eldest children often had to fend for themselves and take care of their younger siblings. A large number of such child-headed households were exposed to threats of deprivation, food insecurity, child labour, sexual exploitation and marginalisation.[52] Consequently, children living in child-headed households had a higher chance of being out of school than those that were living in a household where there was one or more adults aged 20-59 present.[53] It is estimated that 50% of children that lived in households headed by children were out of school, as opposed to only 23 percent of children living in adult-headed households.[54]

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49. *Id.,* at 11.

50. B. Gawanas, *The African Union: Concepts and Implementation Mechanisms Relating to Human Rights,* in HUMAN RIGHTS IN AFRICA: LEGAL PERSPECTIVES ON THEIR PROTECTION AND PROMOTION(A. Bösl & J. Diescho, eds., 2009), at 149, retrieved from <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf?> (accessed on 11 May 2016).

51. F. Ogola, Orphaned Children Struggle to Survive, 14th February 2010, retrieved from < http://iwpr.net/global-voices/orphaned-children-struggle-survive (accessed on 19 January 2017).

52. CIVIL SOCIETY ORGANISATIONS FOR PEACE IN NORTHERN UGANDA (CSOPNU), NOWHERE TO HIDE: HUMANITARIAN PROTECTION THREATS IN NORTHERN UGANDA, December 2004, at 9.

53. B. Sylla, C. Omoeva and A. Smiley, Child vulnerability and educational disadvantage in Uganda: patterns of school attendance and performance, August 2012, at 15, retrieved from <https://www.fhi360.org/sites/default/files/media/documents/Uganda_Vulnerability.pdf> (accessed on 10 June 2017).

54. *Id.*

The responsibility of taking care of their siblings forced these child-heads to drop out of school and obtain odd jobs to fend for their siblings.[55] In addition to this responsibility, such children were vulnerable especially when it came to inheritance of property, which they could only do through guardians.[56] According to reports, relatives of such orphans would grab their land and property in rural areas.[57] The situation was not helped by the communal land tenure system that is dominant in northern Uganda as land could be redistributed by the clan head upon death of a family head. Development opportunities for such children with low levels of education and limited resources were therefore dim despite interventions by some civil society organisations including availing of social services, assisting with reintegration of ex-combatants and displaced persons, among others.[58]

Unless specifically targeted, opportunities for attainment of the right to development for such child-heads were limited. A victim-centred approach to government policies would have ensured that such child-headed families were adequately catered for to enable them attend school. Attending school and having an education would guarantee the participation of such children in development activities as well as adequately cater for interventions that would enhance their capacity to attain and enjoy the right to development.

F. Shift in gender roles

Given that a number of men and boys were either killed or abducted to serve in the LRA during the conflict, women had to take up roles that would ordinarily be performed by men in a bid to fend for their families as well as other dependants.[59] The males that survived the conflict were either old or too young to make any meaningful contribution.[60] Those that were able-bodied became accustomed to drinking a lot of alcohol due to frustration and redundancy and subsequently passed on the burden of looking after their homes to women.[61] These roles were taken on by women despite the

55. Ogola*, supra note* 51.

56. According to section 27 of the Administrator General's Act cap 157, court may appoint a father, mother of other suitable person to receive the share of a minor under a will or distribution of an estate.

57. L.L Rose, Children's property and inheritance rights and their livelihoods: The context of HIV and AIDS in Southern and East Africa, LSP Working Paper 39 (2006), at 5.

58. P. Omach, *Civil Society Organizations and Local-Level Peacebuilding in Northern Uganda*, 51 JOURNAL OF ASIAN AND AFRICAN STUDIES (2016), at 79.

59. Opinia & Bubenzer, *supra* note 40, at 3.

60. UNDP, UGANDA HUMAN DEVELOPMENT REPORT (2007), at 96.

61. R.S. Esuruku, *Horizons of peace and development in northern Uganda*, AFRICAN JOURNAL OF CONFLICT RESOLUTION, 111, 119 (2011).

physical and sexual violence they underwent during the conflict.[62] Sexual violence particularly rape was the most common tactic of warfare to instill terror as well as sex-slavery through which abducted women and girls were systematically raped.[63]

Despite the shift in gender roles, patriarchy still informed issues of land access and the ability of women to enjoy access rights. It should be noted that in northern Uganda, land is an important resource upon which families get their economic livelihood as well as their individual and social identity.[64] It would have been expected that with a shift in gender roles in the post-conflict era, women would easily enjoy land and access rights to enable them fend for their families. This has not been the case as discriminatory customary practices that do not recognise women as land owners have continued to be observed. Upon the death of a husband, an Acholi widow has various options including continuing to live in her marital home without remarrying, returning to her maiden home, or picking an inheritor within her husband's family or from outside the family.[65] This traditional practice of widow inheritance is a forum through which Acholi custom protects widows.[66] The male relative of the deceased that inherits the widow is expected to assist her by, among others, protecting and giving her and her children support.[67] Consequently, in instances where a widow opts to return to her maiden home, she may not be able to easily access land. In light of this, any development that seeks to assist the people of northern Uganda to recover from the impact of the conflict ought to offer protection for such categories of victims of the war.

G. The land issue in northern Uganda

An estimated 93 percent of land in northern Uganda is held under customary land tenure.[68] Under the customary land tenure system, land is not individually owned; but rather, it is placed under the stewardship of a clan elder who holds it on behalf of a

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62. A.J. Reinke, *Gendering Peacebuilding in Post-conflict Northern Uganda*, 10 JOURNAL OF GLOBAL INITIATIVES: POLICY, PEDAGOGY, PERSPECTIVE (2016), at 72.

63. CSOPNU, *supra* note 52, at 6.

64. Landesa Rural Development Institute, Women, Land and Northern Uganda, available at <https://www.landesa.org/what-we-do-/womens-land-rigts/women-land-and-northern-uganda/ (accessed on 27 June 2017).

65. L. Hannay, Women's Land Rights in Uganda (2014), retrieved from <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-rights-in-Uganda.pdf> (accessed on 25 May2017).

66. *Id*.

67. *Id*.

68. UN Office of the High Commissioner for Human Rights-Gulu Office, Land & Rights: Laws, Institutions & Conflicts (Focus on northern Uganda & displacement) (2009).

wider family.[69] This land management system was affected by the prolonged conflict, as some of the clan elders died while others could not recall the clan's land boundaries as a result of the displacement. This breakdown in the traditional structures made it possible for both indigenous and foreign ethnic groups to take advantage of the situation[70] and grab land.[71] The resultant effect was land disputes both between communities and among individuals.

Land disputes in Acholiland have also been perpetuated by attempts to divide communally owned land for personal use despite the fact that land use ought to be sanctioned by community/clan members.; Land disputes have also been exacerbated by the discovery of oil in the region.[72] To illustrate the gravity of the matter, 80% of all cases in northern Uganda are land-related matters.[73] In light of this, some of the key interventions by the government would have been to prioritise resolution of these land cases considering that they are at the heart of development for an ordinary Acholi. In light of these land disputes and the slow justice process, people have not only lost their lives but also opportunities for attainment of developmental rights as they lack rights to access and use the disputed land. As a result, some of their land was grabbed by both indigenous and foreign ethnic groups who take advantage of the situation[74] to grab land.[75]

Land conflicts in the region are not helped by the backlog of cases in the judiciary. A report by the Case Backlog Reduction Committee, a committee instituted by the judiciary to investigate and make recommendations on how to reduce case backlog in Uganda's courts, revealed that there are over 378,727 cases clogged in the judicial system. The Gulu High Court had 337 land matters that were pending as at 31st January 2017.[76] Case backlog has been attributed to various factors including corruption, unofficial absence of judicial officers and poor case management.[77] With no access to land or land rights, ordinary people would not have a source of livelihood

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69. Land and Equity Movement in Uganda (LEMU), Landlessness Policy discussion paper 3A.

70. J. El-Bushra & G.M.I. Sahl, Cycles of Violence: Gender Relations and Armed Conflict (2005), at 33, cited in Reinke, *supra* note 62, at 80.

71. *Id.*

72. UNITED RELIGIONS INITIATIVE (URI) AND ACHOLI RELIGIOUS LEADERS' PEACE INITIATIVE (ARLPI), MITIGATING LAND BASED CONFLICTS IN NORTHERN UGANDA: A MUST GUIDE FOR STAKEHOLDER MEDIATION, SENSITISATION AND RECONCILIATION PROCESSES, VOLUME IV (2012), at 17.

73. J.A. Lule, *Land wrangles account for 80% of cases in northern Uganda*, THE NEW VISION, November 12, 2014, retrieved from <http://www.newvision.co.ug/new_vision/news/1314754/land-wrangles-account-80-northern-uganda> (accessed on 14 January 2017).

74. El-Bushra & Sahl, *supra* note 70.

75. *Id.*

76. The Judiciary, A report of the Case Backlog Reduction Committee, 29th March 2017, at 35.

77. *Id*., at 45.

thereby affecting their opportunities to enjoy the RTD. Consequently, survivors of the conflict were left in a dilemma as they had nowhere else to return in the post-conflict era.

H. Extremely Vulnerable Individuals

One of the consequences of the war was the creation of extremely vulnerable individuals (EVIs).[78] These EVIs in this instance would include children, the elderly, persons with disabilities, the youth, orphans and other vulnerable children, persons living with HIV and AIDS, and poor families.[79] The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates put the number of EVIs in IDP camps requiring special assistance within Gulu district during the conflict at 1,898.[80] EVIs in Amuru district, which is also part of Acholi sub region, were estimated to be 3,407.[81] According to estimations by The Aids Support Organization (TASO), a local non-governmental organisation providing care and support services, about 50 percent of persons living in the camps by around 2007 were infected with HIV/AIDS.[82] Persons living with HIV and AIDS have an increased vulnerability, which can be heightened by poverty and exclusion from mainstream development policies and programmes.[83]

Such increased vulnerability would affect the enjoyment of socioeconomic rights and subsequently enjoyment of the right to development. These categories often require special consideration in the formulation of policies aimed at guaranteeing enjoyment of the right to development due to their vulnerable position in society. This is bearing in mind the fact that these are the categories advertently or inadvertently discriminated against. In the pre-conflict era, the elderly were respected, honoured and taken care of by family members and the clan. This changed during the conflict and further worsened after the conflict as common cultural values like unity were abandoned as each individual sought to determine their path in the post-conflict era.

In light of these and other human rights concerns arising out of the conflict, it was crucial that victims' voices be heard, considered and their wishes implemented

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78. Norwegian Refugee Council (NRC), Norwegian Refugee Council's 'Country Programme in Uganda: Humanitarian and Political Context', retrieved from <http://www.nrc.no/?aid=9167601> (accessed on 19 June 2017).

79. Gawanas, *supra* note 50, at 149.

80. NRC, s*upra* note 78.

81. *Id*.

82. P.E. Hetz, G. Myers & R. Giovarelli, Land Matters in Northern Uganda: Anything Grows; Anything Goes Post-conflict "conflicts" lie in Land (2006-2007), at 11, retrieved from <http://www.ardinc.com/upload/photos/6264_Hetz_Brief_FINAL.pdf> (accessed on 19 June 2017).

83. Gawanas, s*upra* note 50, at 149.

during the conducting of developmental efforts. This is in light of the fact that their developmental needs are unique to their status and ought to be taken into consideration in the development interventions.

In light of the human rights implication of the northern Uganda conflict on the local communities, it was imperative that a victim-centred approach be employed in the formulation and implementation of government interventions aimed at guaranteeing attainment of the right to development in the region. As already noted, development interventions have been conducted especially in post-conflict northern Uganda though with little success in improving the socioeconomic wellbeing of the local populace. As a prelude to an analysis of the factors that could have affected attainment of the right to development, it is necessary that the concept of victim centredness is explained and its relevance in guaranteeing the right to development.

III. THE CONCEPT OF VICTIM CENTREDNESS AND ITS RELATIONSHIP WITH THE RIGHT TO DEVELOPMENT

At the end of every conflict, it is expected that peace and recovery efforts are undertaken and that in these recovery efforts, victims of the conflict are at the core of all developmental policies affecting them. In light of this, a victim-centred approach ought to be adopted,[84] which in essence means that in any post-conflict setting, the central objective of transitional justice would be to 'serve the interests of the victim'.[85] The need for a victim-centred approach is hinged on the notion that at times, victims of conflict often feel unsupported. In the northern Uganda context, the need for victim centredness begun right as early as 2006 from the Juba peace talks between government of Uganda and LRA[86] while the government of South Sudan mediated the talks. While the debate raged on, the Uganda government opted to undertake a development approach through the PRDP under which core issues like transitional justice and reparations that had emerged during the peace talks were not captured.[87]

The concept of victim-centredness in the implementation of development programmes in northern Uganda is premised on the notion that with the return of relative peace, all human rights, including the RTD, can be enjoyed; and for this right

84. Foundation for Human Rights Initiative (FHRI), Back home but not really home: Towards a victim-centered approach to justice-An analysis of Uganda's 5th Draft Transitional Justice Policy, November 2015, at 1-2.

85. *Id*.

86. Lino Owor Ogora, Why Victims 'Feel Abandoned' by the Ugandan Government, May 30, 2017, retrieved from <https://www.ijmonitor.org/2017/05/why-victims-feel-abandoned-by-the-ugandan-government/?>(accessed on 17 June 2017).

87. *Id*.

to be enjoyed, the views of those that suffered during the war and its accompanying effects should be the primary consideration when deciding development for the region as a whole and how to guarantee enjoyment of the RTD.

The need for a victim-centred approach is premised on the notion that transitional justice processes and the mechanisms through which they are implemented often follow a top-down approach[88] which disadvantages the actual victims. A victim-centred approach, therefore, seeks to ensure that victims' needs are addressed to the fullest extent while at the same time ensuring that the transitional justice agenda is not hijacked by the elite.[89] In post-conflict northern Uganda, having borne in mind the various ways the war impacted the enjoyment of human rights, the formulation of PRDP would have been reflective of the human rights needs of local communities including the payment of reparations for harm done.[90] The considerations of interventions like reparations would not only assist the local populace to be restored to their pre-conflict state, but it would also be cognisant of the Acholi culture which views reparations as an integral step towards recovering from the conflict.[91]

For victim's needs to be considered in development processes, a victim-centred approach would require an involvement of the victims of the northern Uganda conflict, directly or through their chosen representatives in all levels of planning and implementation.[92] An interpretation of the victims' version of what the future should hold in terms of enjoyment of human rights must be incorporated.[93] For the people of northern Uganda, transitional justice mechanisms are crucial and would, therefore, form part of any development process. The effectiveness of a victim-centred transitional justice process would then be assessed in terms of whether it was able to adequately address victims' needs.[94] To this end, a multi-faceted approach would have to be employed in government's promotion of the RTD considering that both implementation of development plans and transitional mechanisms would be crucial in ensuring that victim's needs are not forgotten.

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88. S. Robins, *Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post conflict Nepal*, 5 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE (2011), at 76.

89. *Id.,* at 77.

90. Uganda Human Rights Commission (UHRC) & UN Office of the High Commissioner for Human Rights (OHCHR), "The Dust Has Not Yet Settled" Victims' Views on The Right to Remedy and Reparation: A Report from the Greater North of Uganda, at xv – xvii.

91. P. Tom, The Acholi Traditional Approach to Justice and the War in Northern Uganda, available at http://www.beyondintractability.org/casestudy/tom-acholi, (accessed on 20 November 2016).

92. Robins, s*upra* note 88, at 77.

93. *Id.,* at 78.

94. *Id.,* at 77.

The term development has been assigned different meanings including "improvement of well-being."[95] This definition has been further expounded on to include the realisation of human rights and fundamental freedom in a rights framework.[96] As a result, the RTD would include both the right to the process and the outcomes of the development process.[97] With regard to the victims of the conflict in northern Uganda, the RTD would include being part of the process of formulating policies like PRDP and directly benefitting from policy implementation. This is where the concept of victim-centredness comes in. This concept of victim-centredness is indeed linked to RTD as defined under the United Nations Declaration on the Right to Development (UNDRD). Under the Declaration, the RTD is defined as "a comprehensive economic, social, cultural and political process which aims at the constant improvement of all individuals on the basis of their active, free and meaningful participation and development in the fair distribution of benefits resulting there from."[98]

In line with the preceding discussion on the need for a victim-centred approach, an all encompassing development plan for the people of Acholi would involve an attempt to ensure that their social, economic and cultural human rights needs arising from the conflict are addressed within post-conflict development policies. Further, article 1 of the Declaration on the RTD renders the RTD an inalienable human right that would entitle all those that were affected by the northern conflict to participate in, contribute to, and enjoy economic, social, cultural and political development, in a way that guarantees that their rights and fundamental freedoms are fully realised.

From the wording of the United Nations Declaration on the Right to Development, the participation of local communities in northern Uganda is a critical element in the attainment of RTD.[99] These local communities are crucial in not only identifying their needs, but also individually or collectively contributing towards planning and implementation processes.[100] In all this, it should be noted that human rights are interdependent and interrelated. With the attainment of the RTD, other rights including the right to health, education and an adequate standard of living would be enjoyed.[101] However, considering that northern Uganda is yet to recover from the

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95. Measuring Well-Being For Development 2013, OECD Global Forum On Development 4-5 APRIL 2013 Discussion Paper, available at <https://www.oecd.org/site/oecdgfd/Session%203.1%20-%20GFD%20Background%20Paper.pdf>.

96. A. Sengupta, *The Human Right to Development,* 32 OXFORD DEVELOPMENT STUDIES (2004), at 181.

97. *Id*., at 183.

98. UN Declaration on the Right to Development, Article 1.

99. *Id.,* Article 2(1).

100. *Id.,* Article 2(2).

101. *Id.,* Articles 6 (2) & 9(1).

effects of the conflict especially in light of its impact on development, the need to attain the right to development would be immediate. This is in light of the notion that human rights are derived from the concept of human dignity;[102] which dignity can only be accorded to the local populace trough improvement of their economic and social wellbeing.

It should be observed that the UNDRD is a soft law and has not attained the status of *jus cogens* like the Universal Declaration of Human Rights under which all UN member states are obliged to adhere to. To this end, the level of enforcement of the provisions of the UNDRD would be dependent on the legal regime in each UN member state. In Uganda's case, it is discussed in the ensuing section. With regard to the northern Uganda conflict, it was expected that the people would take centre stage in all policies aimed at ensuring development and realisation of their RTD.[103] This calls for victim's participation in the determination of all policies affecting them as well as how the policies are to be implemented.[104] This is in line with the human rights-based approach to development which requires that existing resources be shared equally and that marginalised people be assisted to assert their rights to those resources.[105]

The constitution makes it an obligation for people to be involved in the formulation and implementation of development plans and programmes which affect them.[106] The right to participate, as noted earlier, is recognised and guaranteed under the constitution.[107] Given that the northern Uganda region experienced conflict, it is evident that the people ought to be at the core of any plans to ensure realisation of RTD in the sub-region. To this end, several government departments including JLOS institutions like the Uganda Human Rights Commission (UHRC) and the Uganda Law Reform Commission (ULRC) embarked on consultative meetings to determine the needs of local communities. Despite fatigue from being consulted over and over again, local ideas appear to have remained at the venues where the consultative meetings were held; yet that was to be a starting point of their involvement. Final policy outcomes would not even mildly resemble what was discussed. For instance, one of the key ideas pushed forward during consultative meetings is the need for truth telling. But it has

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102. A. Sengupta, *Realising the Right to Development*, 31 DEVELOPMENT AND CHANGE (2000), at 557.

103. GOVERNMENT OF UGANDA, PEACE RECOVERY AND DEVELOPMENT PLAN 2007 – 2010, at vii.

104. UGANDA CONST., 1995, Article 38.

105. A. Cornwall & C. Nyamu-Musebi, *Putting the 'Rights-Based Approach' to Development into Perspective*, 25 THIRD WORLD QUARTERLY (2004), at 1417.

106. UGANDA CONST., 1995, National Objectives and Directive Principles of State Policy (NODPSP), Principle X.

107. *Id.,* Article 38(1).

never been prioritised. If their views are not considered at the policy formulation level, how then can they be expected to be included and actively participate in the policy implementation process?

The situation in northern Uganda is not made better given that most of the planned activities under PRDP aimed at facilitation of local institutions as opposed to directly benefitting/addressing concerns of local communities including issues affecting land rights of vulnerable persons.[108] In a study conducted by Uganda Human Rights Commission and UN Office of the High Commissioner for Human Rights, the victims of the northern Uganda conflict want reparations which include various transitional justice mechanisms like adequate, effective and prompt reparations and truth telling.[109] The nature of people's participation in the formulation and implementation of policies that would promote realisation of their RTD appears to be cosmetic at best. This makes one wonder how best the local populace can be empowered to meaningfully and individually participate in the formulation and implementation of developmental interventions, and consequently attaining the RTD in accordance with their needs and aspirations as the victims of the conflict.

IV. LEGAL FRAMEWORK GUARANTEEING VICTIM-CENTRED APPROACH IN ATTAINMENT OF DEVELOPMENTAL RIGHTS

The victim-centred approach is not expressly recognised in the Uganda legal framework, but it can be implied from various legal instruments. The same applies to the RTD which some often argueis not to be justiciable in Uganda though on a careful reading of the 1995 constitution it is a justiciable right. This will be discussed during the analysis of the national legal framework. Where there is no express provision for a victim-centred approach in the pursuit of the RTD, or no formal recognition that the RTD does exist, these rights may be inferred/read-in from the already existing legal framework. These legal instruments include the following:

A. International legal framework

At the international level, there is no specific convention that guarantees the right of victims of conflict to participate in decision making on matters affecting them, or even a specific covenant guaranteeing the RTD. There are general provisions, for instance, in the International Covenant on Civil and Political Rights (ICCPR) and the

108. UNDP, UGANDA HUMAN DEVELOPMENT REPORT 2015: UNLOCKING THE DEVELOPMENT POTENTIAL OF NORTHERN UGANDA, (2015), at 115.

109. UHRC & UN OHCHR, *supra* note 90, at xv – xvii.

International Covenant on Economic, Social and Cultural Rights (ICESCR) that recognise the right to self-determination, by virtue of which people freely pursue their economic, social and cultural development.[110] The ICESCR also recognises the right to an adequate standard of living,[111] which includes adequate food, clothing, housing and continuous improvement of living conditions. Improvement in living conditions is necessary given the state in which local communities were left at the end of the conflict. In addition to the foregoing, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter: "UN Basic Principles") obliges states to avail adequate, effective, prompt and appropriate remedies for victims of conflict.[112] Much as this is soft law. The UN Basic Principles recognises the importance of victims of conflict being availed remedies and that such remedies be effective. To this end, General Comment No. 31 on the nature of legal obligations of states parties to the covenant[113] obliges states parties to make reparations, which include restitution, as a means of attempting to restore victims of conflict to their original state prior to violations. It should be observed that for the people of Acholi, reparations are part of their culture and an integral step towards recovering from the conflict.[114]

B. National legal framework

1. The Constitution of Uganda 1995—The 1995 Constitution of the Republic of Uganda does not expressly provide for a victim-centred approach in development planning for post-conflict societies; but does provide for the right to participate. To this end, the constitution obliges the government to undertake all efforts to create a conducive environment that allows the public to participate in all levels of governance.[115] In this, the state has a duty to take all necessary steps to involve the people in the formulation and implementation of programmes that affect them.[116] This would include the Acholi being empowered to participate in the determination, formulation and implementation of programmes that would lead to the attainment of

110. Article 1 of the ICCPR and ICESCR.

111. ICESCR, Article 11.

112. Principle VII & IX.

113. Human Rights Committee, General Comment 31paragraph 16, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc CCPR/C/21/Rev. 1/Add.13/ (2004), *cited in* UHRC & UN OHCHR, *supra* note 90, at xvii.

114. Tom, s*upra* note 91.

115. NODPSP, Principle II.

116. *Id.,* Principle X.

economic rights which include the rights to food, health, education and employment.[117] This is in line with article 38 (1) of the constitution which guarantees the right to participate in the affairs of government either individually or through representatives.

Considering that resources are necessary for implementing government interventions aimed at attaining the RTD, government has a duty to respect institutions that are mandated to protect and promote human rights by availing them adequate resources to enable them effectively fulfil their mandate.[118] Government has tried to fulfil this mandate by availing resources for implementation of PRDP. Although the resources are not adequate, the little that is earmarked under the programme has at times ended up being embezzled.

Principle IX goes ahead to recognise the RTD. To attain this right, the government is mandated to facilitate rapid and equitable development by encouraging private initiative and self-reliance.[119] This is where the success of government development programmes in northern Uganda like NUREP, NUSAF and PRDP was crucial especially in post-conflict Acholiland. As the government seeks to protect and promote the RTD, it is obliged to ensure that an integrated and coordinated planning approach is adopted.[120] Special measures are required to be undertaken in favour of the development of least developed areas.[121] In all, the government has a duty to ensure that fundamental human rights to social justice and economic are realised and that these development efforts seek to achieve maximum social and cultural wellbeing of the people.[122] So far, Uganda government has undertaken three main programmes specifically targeting northern Uganda. As highlighted earlier, these programmes include NUREP; NUSAF and PRDP which is currently in its third phase and has the third phase of NUSAF embedded within it.

It may be argued that with the exception of the right to participate, which is recognised under Principle II of the National Objectives and Directive Principles of State Policy (NODPSP) and guaranteed under article 38 of the constitution, the recognition of the RTD under the NODPSP is non-justiciable and cannot, therefore, be claimed by the people of Acholiland. There are proponents for and against the existence of development as a human right. In light of the legal regime in Uganda, the RTD would be recognised as a human right that can be claimed by the people of Acholiland by virtue of article 8A of the 1995 constitution which renders rights under

117. Sengupta, *supra* note 102, at 554.
118. NODPSP, Principle v.
119. *Id.,* Principle ix.
120. *Id.,* Principle xii (i).
121. *Id.,* Principle xii (iii).
122. *Id.,* Principle xiv (a).

the NODSP as being justiciable. This position is buttressed by the holding in the *State of Kerala v. N.M*, where it was held that the fundamental rights and directive state principles are complementary.[123] It follows, therefore, that Uganda is bound to recognise the RTD irrespective of the fact that it is not specifically contained in the bill of rights. This notion would have the effect of obliging the Uganda government to govern basing on principles of national interest and common good as enshrined in the NODPSP.[124]

The alternate view is that had the RTD been considered as a human right in the 1995 constitution, it would have been provided for in the bill of rights. The 1995 Uganda constitution, however, recognises the fact that the rights catered for in the bill of rights are not exhaustive; consequently human rights contained in international instruments that Uganda has ratified can be claimed.[125] Fortunately, Uganda is a signatory to the African Charter on Human and Peoples' Rights (1986) which guarantees the right to development at the African regional level.[126] The Uganda government is, therefore, bound by its regional obligations to ensure that the RTD is enjoyed by the people of northern Uganda.

Worth noting is that the UN Declaration on the Right to Development, the only international human rights instrument that specifically focuses on the RTD, has not attained the status of a *jus cogens* like the UDHR. However, in light of Uganda's constitutional provisions and its human rights obligations in guaranteeing the attainment and enjoyment of the RTD, the people of northern Uganda would rightly claim the RTD and have a say in how policies geared towards its realisation are formulated and implemented.

2. Juba Peace Agreement on Accountability and Reconciliation —Victim-centredness was indeed a central feature of the Juba Peace Agreement on Accountability and Reconciliation. The Juba Peace Agreement emphasised that the suffering of victims should be acknowledged and addressed.[127] The agreement also emphasised that attention be paid to vulnerable groups while at the same time promoting and facilitating their right to contribute to society.[128] The Juba Peace Agreement also obliges the government to promote effective and meaningful

123. V.R. Krishna Iyer, J. in State of Kerala V N. M. Thomas (1976) 2 SCC 310, para. 134, at 367, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>.

124. UGANDA CONST., 1995, Article 8A (1).

125. *Id.,* Article 45.

126. African Charter, Article 22.

127. Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan (2007), Clause 8.1.

128. *Id*., Clause 8.1.

participation of victims in accountability and reconciliation proceedings.[129] This is critical as it would require that all parties to the conflict be held accountable and reconciliation be promoted. This requirement has, however, not yet been fulfilled as enforcement of accountability and reconciliation is dependent on the existence of a transitional justice policy. The National Transitional Justice Policy is yet to be passed let alone implemented. The National Transitional Justice Policy is still in draft form and is yet to be discussed by Cabinet.[130] Consequently, there is no guide on how transitional justice mechanisms can be implemented in post-conflict northern Uganda.

Civil Society Organisations (CSOs), on their part, have been instrumental both during and post-conflict. CSOs attempted to fill the gap that the Uganda government did not fill. During the conflict, not only did they avail relief items but also provided other humanitarian assistance including psychosocial support. At the end of the conflict, CSOs were equally instrumental in ensuring that basic services that respond to enjoyment of the right to dignity and other human rights were availed including sinking of boreholes and opening of roads to enable formerly displaced persons access their villages. These CSOs have also been crucial in advocating for implementation of transitional justice mechanisms, particularly truth-recovery or inquiry; and emphasising the need for violations against women and children to be addressed.[131] The existence of a vibrant civil society is, however, no excuse for the Uganda government to abdicate its responsibility of ensuring that the people of northern Uganda are at least restituted to enable them enjoy basic socio-economic rights and the RTD.

To this end, the government can undertake development programmes to fulfil RTD for the Acholi sub-region since it heavily suffered from the impact of the conflict, let alone the missed development opportunities over the years. It should, however, be noted that the implementation of government development programmes like PRDP have not necessarily reflected a victim-centred approach in ensuring attainment of the RTD. This can be attributed to some of the factors discussed in the next section.

V. FACTORS AFFECTING PROMOTION OF VICTIM-CENTREDNESS AND ATTAINMENT OF THE RIGHT TO DEVELOPMENT

Despite the existence and implementation of legislation and government policies that seek to promote victim-centredness in the quest to attain the right to development for

129. *Id.,* Clause 8.2.

130. S. Okiror, Truth and Reconciliation in Limbo: Ugandan Cabinet Drags on Enacting Transitional Justice Policy, 2016, available at <http://letstalk.ug/article/truth-and-reconciliation-limbo-ugandan-cabinet-drags-enacting-transitional-justice-policy> (accessed on 26 June 2017).

131. UHRC & UN OHCHR, *supra* note 90, at xvii.

the Acholi, not much has been realised. The failure to realise victim-centredness in the implementation of development policies affects attainment of the right to development. This failure can be attributed to the following factors:

A. Failure to prioritise victims' needs

During the formulation of the policy document for PRDP, various consultative meetings were held at the regional and central government levels to establish victim needs. This is in line with HRBA and good governance practices which require that plans ought to be responsive to the needs of beneficiaries. There have, however, been concerns raised with regard to how the focus of PRDP I and II focus has primarily been on infrastructural development in total disregard of issues that have been raised on their functionality and inter-communal relations.[132] For instance, victims as well as victim-focused CSOs have been reported to have cited truth-recovery and reparation as one of the priority areas of action in the event any transitional justice mechanisms were undertaken.[133]

Further, the government has argued that there has been an improvement in attainment of the right to education in northern Uganda due to an increase in primary school enrolment since 2006 when the conflict ended.[134] The number of enrolled children under PRDP was put at 8.5 million as at 2012/2013.[135] However, this success appears to be exaggerated as it does not tally with the National Service Delivery Survey report which shows that 48% of children between the ages of 6 – 12 were unable to attend school due to various economic factors.[136]

This therefore points to the fact that there is a failure to make a connection between peace-building and development. Under Strategic Objective 4 of PRDP, peace-building and reconciliation are cited as very critical components in the development of the conflict affected region. However, the activities under this component include counselling, disarmament, demobilisation and reintegration, which do not take into account some of the areas that the locals have considered critical like truth telling.

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132. Refugee Law Project (RLP), Are We There Yet: Brainstorming the Successor Programme to Peace Recovery Development Plan (PRDP) II for Post Conflict Northern Uganda, Policy Brief No 1, February 2015, at 4.

133. UHRC & UN OHCHR, s*upra* note 90, at 59.

134. UNDP, *supra* note 60, at 3.

135. *Id.*

136. UGANDA BUREAU OF STATISTICS (UBOS), THE NATIONAL SERVICE DELIVERY SURVEY (2015), at 22.

B. Corruption

The Pinheiro's principles prescribe that all displaced persons have the right to full and effective compensation as an integral component of the restitution process.[137] Even where government has tried to make some form of restitution, these efforts are thwarted by some errant public servants and individuals involved in the process. For instance, under Acholi War Debt Claimants, efforts were made to compensate individuals who lost their property during the war. The government released Uganda shillings 12 billion towards these efforts between 2006 and 2011;[138] but the exercised was marred by claims of corruption. It was reported that there were instances of ghost payments and double payments being made to purported claimants,[139] thereby inhibiting genuine claimants from accessing their funds. Inability to access funds affects the ability of local communities to make a contribution towards to economic growth and therefore attainment of the RTD.

C. Failure to address gender concerns

All government entities are obliged to ensure gender mainstreaming during all planning and development processes.[140]Gender mainstreaming in policy analysis and development draws attention to the impact of policy on people and explores how this impact could vary for women and men, given gender differences and inequalities.[141] It also routinely seeks increased gender equality as one of the policy outcomes, along with growth, efficiency, poverty reduction, and sustainability. This requires the inclusion of gender perspectives at several points in the policy process.[142] The Gender Policy seeks to cater for and reduce gender inequalities at all levels of government by all stakeholders. Consequently, gender equality and women's empowerment ought to be an area for consideration during planning, resource allocation and implementation

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137. United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, Principle 21.1.

138. J. Owich, *War debt claimants told to account for shs 7b*, DAILY MONITOR, Wednesday 18 November 2015, retrieved from <http://www.monitor.co.ug/News//national/War-debt-claimants-told-to-account-for-Shsb/688334-2960192-15pho5/index.html>.

139. C. Makumbi, *War claimants lose hope foe compensation*, DAILY MONITOR, Friday 23 August 2013, retrieved from <http://www.monitor.co.ug/SpecialReports/War-claimants-lose-hope-for-compensation/688342-1964080-wcidtv/index.html>.

140. UGANDA NATIONAL GENDER POLICY (2007), at 14-15.

141. UN Office of the Special Adviser on Gender Issues and Advancement of Women, Gender mainstreaming: An overview, retrieved from < http://www.un.org/womenwatch/osagi/pdf/e65237.pdf> (accessed 12 January 2017).

142. *Id.*

of development programmes especially since women were disadvantaged not only by the conflict but also the already customary practices given that societies in northern Uganda are patriarchal in nature.

With regard to women and children, despite having borne the brunt of the conflict, they appear not to have been considered during the formulation of post-conflict development programmes. For instance, under PRDP I and II, there is barely any reflection of any attempts towards addressing matters affecting women, especially land. As alluded to earlier, land rights and access to land are some of the critical areas affecting woman as they are unable to access land since Acholi culture does not recognise women as potential land owners despite the passing away of male members of their households. This is contrary to article 33(5) of the constitution which guarantees women's rights to affirmative action in a bid to of redress the imbalances created by history, tradition or custom including effects of the violent past of northern Uganda on women, as well as the imbalances caused by the patriarchal nature of northern Uganda and its role in land and access rights for women. If not addressed, government would be complicit in promoting and further exacerbating gender discriminatory practices against women. Areas of focus would, therefore, include human rights protection, improved livelihood, and women's participation.[143]

D. Absence of victim's voices in policies

Several consultations were held but final policy is silent on victim's human rights concerns. Some of the critical land issues affecting local communities included land access rights as well as user rights but these appear not to have been addressed under government policies including PRDP phases I and II. Further, one of the areas, as already noted, that could have been catered for under PRDP is the need for reparations. General Comment No. 31 on the nature of legal obligations of states parties to the covenant[144] renders it an obligation for states parties to make reparations, which include restitution as a means of attempting to restore victims of conflict to their original state prior to violations. It should be observed that for the people of Acholi, reparations are part of their culture and an integral step towards recovering from conflict.[145] This has, however, not been considered in any of the three phases of PRDP. It should be remembered that these are people who were herded out of their villages and into IDP

143. UGANDA NATIONAL GENDER POLICY (2007), at 16.

144. Human Rights Committee, General Comment 31,paragraph 16, Nature of the General Legal Obligation on State Parties to the Covenant , U.N. Doc CCPR/C/21/Rev. 1/Add.13/ (2004); cited in UHRC & UN OHCHR, s*upra* note 90, at xvii.

145. Tom, s*upra* note 91.

camps in the mid 1990's for their protection. They were only able to return to their villages in 2007 during which time some found that their land had been grabbed. Child-headed families were equally challenged as some could not trace where their land was situated. The situation was not any better for widows whose in-laws would not want to grant them user rights due to the patriarchal nature of Acholi society.

E. Lack of political will

Like the former UN Secretary General, Koffi Annan, noted, we have the means and the capacity to deal with our problems, if only we can find the political will.[146] No government policy can be successfully implemented if there is no political will. Without government adding its weight behind ensuring the protection and promotion of RTD, the right to attain development will merely remain as lip service. So far, over one billion dollars has been sunk in northern Uganda in PRDP I and II alone but there is no tangible change in the livelihoodd of the local communities as they seek to enjoy RTD. Some Acholi believe that transitional justice mechanisms including truth telling and reparations a have to be undertaken for the northern region to close down the curtain on the past and move forward in terms of development. However, on its part, government has failed to put in place the National Transitional Justice policy 10 years since the return of relative peace in northern Uganda. Further, even where funds were diverted, apart from one senior accountant,[147] no other government official implicated in the theft has ever been brought to book. How then can it be claimed that there is total commitment towards ensuring realisation of RTD for the people of northern Uganda? Government must be seen to walk the talk.

F. Politicisation of transitional justice processes

As earlier observed, local communities in northern Uganda have often argued that there is need for truth telling, as one of the transitional justice mechanisms that Uganda government ought to facilitate so as to enable them have closure and move forward from the conflict. This is in line with the Juba Peace Agreement which clearly articulates victims' rights as including the need for victims to effectively and meaningfully participate in accountability and reconciliation proceedings,[148] as well as the right to truth telling and fact finding regarding the harms they and others suffered

146. On the UN's goal of cutting the level of global poverty in half by 2015, available at http://www.azquotes.com/quotes/topics/political-will.html?p=4.

147. *Uganda v. Geoffrey Kazinda* HCT-00-SC-0138-2012.

148. UHRC & UN OHCHR, *supra* note 90, at 34.

in the course of the conflict.[149] In this, it was hoped that truth telling would actually help survivors of the conflict by promoting psychological healing[150] and justice.[151] Additionally, from the experiences of victims of the conflict, it is hoped that official acknowledgment of the abuse they suffered is availed.[152] Truth telling is actually at the heart of Luo culture, particularly for the Acholi. This would be crucial in guaranteeing the RTD in the post-conflict setting since its realisation given that aid projects ought to take into account the local context and cultural setting in the planning and implementation process to guarantee success.[153]

The Uganda government, however, appears to be unwilling to move forward with implementation of transitional justice mechanisms, particularly truth telling. This could be attributed to the fact that government soldiers that participated in the conflict, the UPDF, would have to be subjected to truth telling as well. Consequently, the Acholi would not feel prepared to move forward considering that they have not been able to deal with the past.

G. Failure to apply principals of good governance

One of the pillars of good governance includes responsiveness. This would mean that public institutions ought to endeavour to meet the aspirations, expectations and needs of the community served. In light of this, local government is required to try to serve the needs of the entire Acholi community while balancing competing national interests in a timely, appropriate and responsive manner.[154] To this end, some concerns have been raised by the locals with regard to the gaps in PRDP II. For instance, what was lacking was support for youth groups to engage in agriculture and entrepreneurial ventures, absence of a reparations policy that targets individuals affected by conflict to

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149. *Id.*

150. L. Kriesberg, *Transforming Intractable Conflicts*, 10 DESAFÍOS, BOGOTÁ (COLOMBIA) (2004), at 188 - 199, retrieved from < http://revistas.urosario.edu.co/index.php/desafios/article/viewFile/659/590> (accessed 19 January 2017).

151. R.G. Teitel, Transitional Justice Genealogy, retrieved from <http://www.qub.ac.uk/home/Research/GRI/mitchell-institute/FileStore/Filetoupload,697310,en.pdf> (accessed 17 January 2017).

152. B. Hamber, Putting the Past in Perspective (Paper presented at the Putting the Past in Perspective Seminar, Canada Room, Queen's University Belfast, 17 May 2008), retrieved from <http://www.brandonhamber.com/publications/Paper%20Putting%20the%20Past%20in%20Perspective.pdf>

153. N. Ginsberg, *Determining the Context of an International Development Project*, 50 THE JOURNAL OF DEVELOPING AREAS (2016), at 432.

154. What is good governance?, retrieved from http://www.goodgovernance.org.au/about-good-governance/what-is-good-governance/.

enable them heal, reintegrate and reconcile as well as the need for each district to determine its key priorities for each year as opposed to the *status quo* where it is the Office of the Prime Minister that sets priorities.[155] For PRDP to be meaningful, key concerns raised by local communities ought to be considered and implemented not only to address their needs but also to guarantee ownership of developmental interventions and promote enjoyment of the RTD.

In light of these challenges, it would have been accepted that programmes under PRDP should be cognisant of these issues and seek to address them.

VI. CONCLUSION

The conflict and post-conflict era in northern Uganda has indeed been and remains fragile in nature. This stems from the simmering discontent of the local populace with how post-conflict interventions have been implemented without considering some of the key concerns affecting them. As has been shown in the discussion, victim participation has been limited and consequently affected the outcomes of development policies like PRDP on human rights enjoyment, especially the RTD. There is need for government to return to the drawing board and not only listen to the victims of the LRA conflict but also show a willingness to incorporate their views, priorities and human rights concerns in the formulation and implementation of developmental plans. This way, government would not only strive to rehabilitate the region but also afford the locals particularly victims of the conflict an opportunity to enjoy the right to a decent standard of living and the RTD. After all, this is what a rights based approach advocates for. With the current trend of paying lip service to local needs, there will be no ownership of government programmes which could undermine the sustainability and success of any development programme.

There is still room for government to review its policy formulation and implementation processes especially since development interventions like PRDP II are still running. Further, there is need for CSOs to aggressively engage government on the implementation of development plans. This way, government could be better held accountable in the event that victim rights are not addressed especially in the absence of a national transitional justice policy. In light of this, there is need for the passing of the draft National Transitional Justice Policy and its implementation to be expedited as it would pave way for some of the pressing needs of the local populace, including

155. Refugee Law Project (RLP), PRDP II: What Needs to Change? Views from Te-yat, (May 2012), retrieved from <http://www.refugeelawproject.org/resources/briefing-notes-and-special-reports/13-conflict-and-tj-special-reports/sprpts-ctj-accs/29-prdp-ii-what-needs-to-change-the-views-from-te-yat> (accessed 28 December 2016).

reparations and truth telling, to be addressed. This would avert some of the discontent that the local populace have had with how the post-conflict interventions have been implemented. For the Acholi, one cannot purport to move forward without addressing past wrongs.

POST TRIAL RIGHTS OF CONDEMNED PRISONERS: A CRITICAL APPRAISAL OF INTERNATIONAL LAW PRESCRIPTIONS

Olugbenga Akingbehin*

ABSTRACT

A condemned prisoner is a capital offender who has been convicted and sentenced to a death penalty by a court of competent jurisdiction, but yet to be executed and confined to the prison. Over time, there have been controversies whether a condemned prisoner still retains or is entitled to certain rights, since he has been condemned to death. However, the perspective of international law is that the prisoner still has certain inalienable rights, even up till execution. Hence, he should be allowed to die with dignity. This article attempts to identify the rights of a condemned prisoner and evaluate the level of compliance by member states vis-à-vis the international prescriptions.

I. INTRODUCTION

A capital offender comes into contact with the criminal justice system, usually on arrest and prosecution. The Nigerian Constitution[1] and other domestic legislations and international instruments empower the police to arrest whoever violates the criminal law or is suspected of having committed a criminal offence, which includes a capital offence. After the process of arrest, other criminal justice processes like detention, searches and interrogation follow. Thereafter, the capital offender is arraigned for trial.

Upon conviction, the court pronounces a death sentence and the convict is remanded in the prison custody pending the execution of the sentence of the court. However, there are certain constitutional law safeguards which are stipulated towards ensuring that a capital offender is justifiably convicted and even executed. These are the due process safeguards that permeate the pre-trial, trial and post-trial stages.

The scope of this article is, however, restricted to the post-trial rights of a condemned prisoner. A condemned prisoner is a capital offender that has been

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1. NIGERIA FEDERAL REPUBLIC CONST., 1999, section 35(1), Promulgation Act, Cap C.23, Laws of Federation of Nigeria 2004, as amended in 2010 and 2011. See also, Section 4 of the Police Act, Cap P.19 Laws of Federation 2004; and Sections 3 and 4 of the Administration of Criminal Justice Act 2015.

convicted of capital offence and sentenced to death but while awaiting execution is in the condemned prisoners' section of the prison. In some jurisdictions, the law specifies where a prisoner awaiting execution is to be confined. For example, in Ethiopia, the prisoner awaiting the confirmation of death or execution of the sentence is to be detained under the same conditions as a prisoner serving sentence of rigorous imprisonment like the lifers.[2]

In Swaziland, the law requires a condemned prisoner to stay on death row until execution warrant is signed.[3] In Nigeria, condemned prisoners are kept in an exclusive part of the prison with a well-fortified fence and gate.[4] It is common knowledge, therefore, that a condemned prisoner, despite his 'condemnation,' is still entitled to certain rights and as such the law requires a strict adherence to due process in such situations.

Sequel to the foregoing, this article aims at evaluating the extent of observance or denial of such rights across jurisdictions. The paper is divided into five parts. The first part introduces the paper. The second part analyses the rights of condemned prisoners to appeal to a higher judicial body. The third part appraises the rights to seek pardon or commutation and discusses the condemned prisoner's right to be subjected to minimum suffering. In the fourth part, the article discusses the attendant violations as reflected in the death row phenomenon, the methods of execution, and the publicity of executions. The article concludes in the fifth part with recommendations.

II. THE RIGHT TO APPEAL TO A HIGHER JUDICIAL BODY

Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR) states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to laws."[5] Consequently, the United Nations Human Rights Committee (UNHRC) has stated that the imposition of the death sentence without the possibility of appeal is incompatible with the ICCPR.[6] The right

2. See Article 117 of the Penal Code of Ethiopia 1957.

3. Report of the National Coordinator of Swaziland, George Vukor-Quarshie, presented at the First International Conference on the Application of the Death Penalty in Commonwealth Africa, in Entebbe, Uganda from 10 – 11 May, 2004.

4. Condemned Prisoners in Lagos are usually kept in the condemned cell of the Kirikiri Maximum Security Prison, Apapa Lagos.

5. For an overview of the International Safeguards pertaining to the right to appeal, see Amnesty International, International Standards on the Death Penalty, January, 2006. A. I. Index: ACT 50/001/2006. The UN Safeguard No. 6, as amended in 1989, also states: "Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction and steps should be taken to ensure that such appeals shall become mandatory.

6. See HRC, Uganda, UN Doc. CCPR/CO/80/UGA, 4 May, 2004 para 13.

to appeal in capital cases is also enshrined in the African Charter on Human and Peoples' Rights.[7] The right to appeal or review by a higher court, at the minimum, implies the opportunity to have adequate re-appraisal of every case and an informed decision on it.[8] Osipitan has also contended that the right to appeal against the decisions of trial courts and tribunals is a cardinal principle of the administration of criminal justice. He posited further that an appeal aims at the production of just results, compelling lower courts and tribunals to be judicial, reasonable and to apply the law uniformly.[9] Consequently, the severity of the punishment of the death sentence, therefore, makes it imperative for a condemned prisoner to be afforded a right of judicial review of his conviction.

The mandatory provision for appeal is not universal. While in most countries it is mandatory for death sentences to be automatically reviewed by a court of appeal on questions of law, procedure, fact and severity, in others it is not the case.[10] In Nigeria, in as much as there are provisions that entitle a condemned prisoner to apply for appellate review of his case, the review is not mandatory.[11] In most jurisdictions in America, the appellate review is at the expense of the state, aside from being mandatory. However, in Nigeria and some other countries, the capital offenders bear the cost of their appeals. Consequently, the right to mandatory legal representation in such jurisdictions does not extend to the post-conviction stage. The right of appeal to the country's higher court has not been upheld in the past. This has been witnessed in instances where the executions were carried out swiftly and also where the law setting up a court/tribunal did not provide for such right. In July 1984, Dafaru Oluwole and seven others were sentenced to death by the Robbery and Firearms Tribunal in Kwara State.[12] Despite their protests and claims of innocence, they were executed by firing

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7. Article 7 (1)(a) of the African Charter on Human and Peoples' Rights, adopted June 27, 1981, entered into force, Oct., 21, 1988, O.A.U Doc. OAU/CAB/LEG/67/3/REV.5 (hereafter: "African Charter"). Nigeria ratified the Charter on June 22, 1983.

8. See, *S. v. Ntuli* [1996] I BCLR, 141.

9. T. Osipitan, *Administration of Criminal Justice: Fair Trial, Presumption of Innocence and Special Military Tribunals*, in LAW AND DEVELOPMENT (J.A. Omotola and A.A. Adeogun eds., 1987), at 319.

10. For example, appellate review of the death penalty is automatic in the entire retentionist American States, as well as under Federal Law. However, appellate review of the death sentence is not automatic or mandatory in the retentionist countries like Barbados, Burundi, Jamaica, Guinea, Japan, Morocco and Nigeria, *inter alia*. *See*, Official Records of the General Assembly, 55th session. Supp. No 40. (A)/55/40 para 110.

11. *See*, NIGERIA CONST., 1999, section 272, 241(e) and 233(d) for the constitutional guarantee of right of appeal which emanates from the High Court through the Court of Appeal, to the Supreme Court in capital cases.

12. Amnesty International, *supra* note 5.

squad the next day, because the then Robbery Act did not provide for a right of appeal to a higher court.[13]

A corollary to the right of a condemned prisoner to exercise his appellate right is the requirement that he should be afforded adequate time to process his appeal, so as not to be executed hastily. In 1996, the Economic and Social Council urged member states "to allow adequate time for the completion of appeal to a court of higher jurisdiction and for the completion of appeal proceedings as well as petitions for clemency in order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty."[14]

Consequently, the UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions has recommended that states establish on their internal legislation a period of at least six months before a death sentence imposed by a court of first instance can be carried out. This is so to allow adequate time for the preparation of appeals to a court of higher jurisdiction and petitions for clemency.[15]

Despite the above provisions on requisite safeguards for condemned prisoners, a number of condemned prisoners have been executed in Nigeria without being afforded the opportunity of preparing an appeal.[16] It is submitted that execution of condemned prisoners without having been given adequate time to appeal, or while they were still trying to appeal, constitutes a violation of the post-trial process right.

Furthermore, there is a stipulation that the death sentence cannot be carried out while a condemned prisoner's appeal is pending.[17] Yet, in Nigeria, in the case of *Aliu Bello & 13 Ors v. A.G. Oyo State,*[18] the major contention was the legality of the execution of the death sentence by the Oyo State Government against Nosiru Bello, Aliu Bello's brother, for armed robbery while his appeal against conviction was pending. The appellants, being the junior brother and the other relations of the deceased, instituted the action for a claim for damages for unlawful execution. The Supreme Court held that the execution of the deceased was wrongful and illegal, and restored the damages awarded by the trial court. In the same vein, the UNHRC had

13. In response to public outcry, the Federal Government promulgated the Civil Disturbances (Amendment) Decree of 1996, which introduced appeals for such trials.

14. Economic and Social Council Resolution 1996/15, 3.

15. Report of the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions. E/CN.4/1996/4. 25 January, 1996 para. 556.

16. *See*, Constitutional Rights Project (in respect of *Akanmu and Others v. Nigeria*) Communication 60/91, 8th Annual Activity Report: 1994 – 1995 (2000) AHRLR 180 (ACHPR 1995) para. 13. See also, Constitutional Rights Project (in respect of *Lekwot and Others v. Nigeria*) Communication 137/94, 154/96 and 161/97, 12th Annual Activity Report: 1998 – 1999 (2000) AHRPR 1998 para. 93.

17. Safeguard 8 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the U.N Economic and Social Council in 1984.

18. [1986] 5 NWLR (Pt. 45) 826 at 860.

made it clear in various cases that the execution of a prisoner when the sentence was still under challenge in the courts of a state party to the ICCPR constitutes a violation of articles 6(1) and 6(2) of the covenant.[19]

III. THE RIGHT TO SEEK PARDON OR COMMUTATION

Pardon[20] or commutation is the last hope of a prisoner under a sentence of death. It usually comes after a prisoner has exhausted all his appellate rights. In most states, it is exercised by the chief executive of the country, in which the death sentence is imposed, whilst in others, some bodies could be empowered to exercise pardon or commutation. The president, or other body, acts either on his own initiative or on the presentation of a petition by the convicted person to be considered for pardon or clemency. A death sentence can be set aside through the grant of clemency and it usually takes the form of a decision to commute the sentence to a lesser punishment.[21]

Pardon or commutation is important in that it can be used to mitigate the harshness of punishment, correct possible errors in the trial or to compensate for the rigidity of the criminal law by giving consideration to factors which are relevant to an individual's case for which the law makes no allowance.

The right to seek pardon or commutation is guaranteed under article 6 (4) of the ICCPR and UN Safeguard No. 7. The two provisions both stipulate in almost identical wordings that:

> Anyone sentenced to death shall have the right to seek pardon or commutation of sentence. Hence, amnesty, pardon or commutation of the sentence of death may be granted in all cases of Capital Punishment.[22]

Consequently, the UNHRC has stated that the imposition of the death sentence without the possibility to seek pardon or commutation of the sentence is incompatible with the ICCPR.[23] It can thus be inferred from the foregoing that a full and proper use of the clemency process is essential to guaranteeing fairness in the administration of the death penalty.

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19. See for example, *Ashby v. Trinidad and Tobago*, views of the HRC, communication No. 580/1994, UN Doc. CCPR/C/74/D/580/1994. Para 10.8.

20. Otherwise called Clemency.

21. *See*, L. CHENWI, TOWARDS THE ABOLITION OF DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE (2007), at 185.

22. It must be noted that Amnesty is not mentioned in Safeguard No. 7.

23. *See*, Concluding Observations of the HRC: Uganda, UN. Doc. CCPR/CO/80/UGA.

The right is also recognised in national constitutions and the laws of African states. For example, in Tanzania, a person sentenced to death can appeal to the president to commute the sentence.[24] The president relies on the judgment and notes of evidence taken during the trial to arrive at a decision. Also, the President of Uganda has the power, on the advice of the Advisory Committee on the Prerogative of Mercy, to grant any person convicted of an offence a pardon either absolutely or subject to lawful condition.[25]

The extent to which this right is observed in Nigeria is not substantial. As soon as a court pronounces a sentence of death on a convict, the registrar of the court shall transmit to the commissioner of police two copies of the certificate issued by the judge under the provisions of section 407 of the Administration of Criminal Justice Act 2015 (ACJA), one copy of which shall be retained by the commissioner of police and the other handed to the superintendent or other officer in charge of the prison in which the convict is to be confined. The registrar shall also transmit a copy of the certificate to the sheriff and file a copy with the record of the proceedings in the case.[26] In the same vein, where a person has been sentenced to death and he:

> a) (i). … has exercised his legal rights of appeal against the conviction and sentence and the conviction has not been quashed or the sentence reduced or has failed to exercise his legal rights of appeal or having filed an application for leave to appeal, an applicant has failed to perfect or prosecute the application or appeal within the time prescribed by law; or
>
> (ii). … desires to leave his case considered by the Committee on Prerogative of Mercy, he shall forward his request through his legal practitioner or officer in charge of the prison in which he is confined to the Committee on Prerogative of Mercy.
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> b) The Committee on Prerogative of Mercy shall consider the request and make their report to the council of state which shall advise the President.[27]

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24. *See*, section 325 (3) of the Tanzania Criminal Procedure Act of 1985.

25. UGANDA CONST., 1995, Article 121(1). Article 121 (5) requires that after a person has been sentenced to death, the trial judge or person presiding over the court or tribunal submits a written report of the case and other relevant information, to the Advisory Committee on Prerogative of Mercy.

26. Administration of Criminal Justice Act 2015 (hereafter: "ACJA 2015"), section 408.

27. *Id.,* section 409.

From the foregoing, the President shall, after considering the report made by the committee, and after obtaining the advice of the Council of State, decide whether to recommend that the sentence be commuted to imprisonment for life or that the sentence should be commuted to any specific period or that the convict should be otherwise pardoned or reprieved.[28] The President is required to issue an order to that effect which shall be sent to the superintendent or other officer in charge of the prison where the condemned prisoner is confined, directing that the execution shall not be carried out.[29]

The Federal Advisory Council on the Prerogative of Mercy is the Council of State[30] and the States of the Federation are empowered by the constitution to establish an Advisory Council on the Prerogative of Mercy.[31] Thus, in *Okeke v. State*,[32] the Supreme Court, in refusing an application for mercy, held:

> i) That the recommendation for mercy for convicted persons are matters within the province of the Committee on the Prerogative of Mercy; and
> ii) That it is to that body that a convicted person, if he so desires, may direct his application for consideration.

It is instructive, however, that a sentence of death shall not be executed, unless and until the President or Governor, as the case may be, has confirmed it.[33]

The power to grant pardon or commutation is discretionary, as the President or Governor is not bound to follow the recommendation of the Advisory Committee or the trial judge. Hence, the extent to which this discretion is exercised is questionable as the clemency process varies from country to country. While some apply a generous standard, others apply a less liberal standard.

Moreover, in Africa, there is a dearth of information on the extent to which the power of prerogative of mercy is exercised, since the process is shrouded in secrecy. This is a matter of discomfiture, and it allows for arbitrariness in the exercise of clemency and disparity in the grant of pardon.[34]

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28. *Id.,* section 410.
29. *Id.,* section 411.
30. *See*, NIGERIA CONST., 1999, section 175 (2).
31. *Id.,* section 212 (2).
32. [2003] 15 NWLR (pt. 842) 25.
33. B. OSAMOR, FUNDAMENTALS OF CRIMINAL PROCEDURE LAW IN NIGERIA (2004), at 377 – 388.
34. The Inter- American Commission on Human Rights has found a violation of the right to life in a case where the applicant was not given an effective and adequate opportunity to participate in the mercy process. See, *Aitken v. Jamaica*. Case 12. 275, Report No. 58/02, 21 October, 2002.

Against the backdrop of the secrecy and lack of uniformity in the considerations for pardon by states, Amnesty International has noted that it is an illusion to suppose that the inherent arbitrariness and fallibility of human justice can somehow be made right by a process which itself is arbitrary.[35]

It has also been suggested by Chenwi[36] that, since pardons are not only an executive issue, they can be granted by way of renouncing retribution or obtaining pardon from the victim or the victim's families in countries that apply Islamic Law, as renunciation of the right to retribution in return for payment of blood money, which can be said to be equivalent to commutation of the death penalty.[37]

IV. THE RIGHT TO BE SUBJECTED TO MINIMUM SUFFERING IN THE EXECUTION OF THE DEATH SENTENCE

In 1984, there was sufficient international consensus for the UN Economic and Social Council to adopt a Safeguard for the Protection of the Rights of Persons Facing the Death Penalty in countries that are yet to abolish capital punishment.[38] The safeguard declared that where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.[39] Consequently, member states in which the death penalty may still be carried out were urged to effectively apply the Standard Minimum Rules for the Treatment of Prisoners in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.[40]

However, contrary to the aforementioned stipulations, the due process rights of the condemned prisoner facing execution of death have been flouted with impunity. Species of due process abuse include the death row phenomenon, agonising methods of execution and the instances of publicity of executions in certain jurisdictions.

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35. AMNESTY INTERNATIONAL, WHEN THE STATE KILLS: THE DEATH PENALTY, A HUMAN RIGHTS ISSUE (1989), at 34.

36. Chenwi, *supra* note 21, at 187.

37. *See*, 3rd Periodic Report of Libya, para. 129, and section 38 (1) of the Penal Code of Sudan respectively.

38. Safeguard No. 9.

39. In 1996, the Economic and Social Council made it explicit that this also applied to those under sentence of death awaiting their fate.

40. The Commission on Human Rights later strengthened this prescription when, in Resolution 2004/67, it urged member states to ensure that, where capital punishment occurs, it shall not be carried out in public or in any other degrading manner.

A. Death Row Phenomenon

It has been variously argued that the long interval between the death sentence and the actual execution violates the convict's right to freedom from torture, inhuman or degrading treatment. This contention is premised on the fact that convicts are liable to psychological suffering due to having fore knowledge of death since inherent expectation of death defies qualitative description.[41] It has also been contended that inherent cruelty of the death penalty is not limited to the moment of actual infliction of death. The mental effect of a pronouncement of death sentence on a prisoner is often degrading and brutalising as to constitute psychological torture.[42]

In a study conducted in the United States, it was discovered that prisoners under sentences of death often experienced severe depression, apathy, loss of sense of reality and physical and mental deterioration.[43] No doubt, waiting to be executed or wondering over a long period of time whether or not one would be successful in avoiding execution must be stressful. The unique horror of the death penalty is that from the moment the sentence is pronounced, the prisoner is forced to contemplate the prospect of being taken away to be put to death at an appointed time.[44]

Generally, in most jurisdictions, the place where the condemned prisoners are confined is called "death row." This death row, therefore, refers to the area in prison which houses inmates awaiting execution, and it is often considered an institutionalised hell.[45] Hudson further defined the death row phenomenon as a prolonged delay under harsh conditions.[46]

However, Cherum contended that prolonged delay, taken together with other factors (not necessarily harsh conditions), would constitute the death row phenomenon. He reasoned that if a prisoner is uncertain about when he will be executed, even if the conditions on death row are not harsh, he still agonises and deteriorates mentally, which leads to mental pain or torture.[47] Schmidt has also referred to the death row phenomenon as "the situation and treatment of individuals sentenced to death and

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41. E. O. Akingbehin, Capital Punishment in Nigeria: A Critical Appraisal (Ph.D Degree Thesis, University of Lagos, Nigeria October 2011), at 156.

42. See, *People v. Anderson* 6 CAP 3d 628 at 649.

43. R. JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981) at 15.

44. Amnesty International, *supra* note 35, at 61.

45. P. Hudson, *Does Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2000), at 817.

46. *Id*., at 834.

47. Chenwi, *supra* note 21, at 112.

waiting execution for many years under particularly harsh conditions of detention."[48] In the United States, the new post-Furman Death Sentence Laws attracted litigations. The average length of time spent on death row rose from 12 years and 3 months in 2005 to 15 years and four months in 2013 and some have been on death row for more than 30 years.[49]

In some African states, convicts have spent over 10 years on the death row. In Uganda, some convicts have spent over 20 years on the death row. For example, Ogwang, the longest serving prisoner on the death row in Luzira Upper Prison, has been on the death row for over 25 years.[50] Also in Kenya, death row inmates have spent over 20 years in prison awaiting execution.[51] In Swaziland, it was also reported by Hood that some prisoners served at least 18 years on the death row before being pardoned.[52]

The condition of capital prisoners on the death row is evidently horrible and pathetic. Johnson *et al.* have likened the conditions of condemned prisoners on the death row to that of terminally ill hospital patients, whose ordeals were exacerbated by the physical conditions of cellular confinement for up to 22 hours a day, restricted visits and, in many states, no access to prison jobs, educational classes, clubs, religious services or recreational facilities. They further decried their condition as that of despair and loneliness in an austere world where prisoners are treated as bodies kept alive to be killed.[53]

Many prisoners in African countries endure hard lives on death row and suffer under difficult conditions, frequently for decades. In Zambia, for example, some of the cells in Lusaka prison hold up to six prisoners and the uniforms of the prisoners consist of rags of materials crudely stitched together. Some prisoners consequently suffer from tuberculosis and lack of access to medical treatment. The death row section in Mukobeko Maximum Security Prison was also reported to be built for 50 prisoners, yet

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48. M. Schmidt, *The Death Row Phenomenon: A Comparative Analysis*, in THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETATIVE APPROACH (T. Orlin *et al .,* eds., 2000), at 47 – 48.

49. Calculated from DPIC Execution List 2013. See also, R. HOOD AND C. HOYLE. THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (5th edn.) (2015), at 203.

50. *See*, W. Wairagala, The Death Penalty in Uganda, retrieved from http://www.thedeathhouse.com (Accessed 15 May, 2016).

51. G. Munene, Plan to Release Death Row Prisoners, retrieved from http://allafrica.com/stories.200307150153.html (Accessed 15th May, 2016).

52. R. HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (2002), at 10.

53. R. Johnson and J.L. Carrol, *Litigating Death Row Condition: The Case for Reform*, in PRISONERS AND THE LAW. PRISONER RIGHTS SOURCE BOOK (I. P. Robbins ed., 1985), at 3 – 33. For more pathetic accounts, see R.M. ROSS, WAITING TO DIE, LIFE ON DEATH ROW, (2004); and K.M. COOK, CHASING JUSTICE (2007), at 62 -75.

in 2004 it housed more than 200 condemned prisoners.[54] The prisoner is, therefore, ensnared in a dehumanising environment from the moment he enters the cell.

The condition of a condemned prisoner on death row in Nigeria is worse off and has more traumatic effects on the prisoner. A report by Amnesty International describes Arthur Judah Angel's experience of nine years on the death row in Nigeria's Enugu Prison (after which his sentence was commuted to life imprisonment).[55] While on the death row, Arthur stated that he witnessed numerous mass executions by firing squad or hanging and that groups of 25 to 30 people were executed on a monthly basis. He was reported to have also witnessed torture and other cruel, inhuman and degrading treatment on a regular basis.[56]

A government appointed committee on the reform of the country's justice and prison system produced its first report in 2005. It recommended the release of all those who had been on the death row for more than 10 years. But Nowak found out that at least one death row inmate had been waiting there for more than 20 years and that 600 people were crammed into Nigerian disease-infested death rows without medical attention.[57] The trauma and agony of the death row became so unbearable that some prisoners decided to forgo their appellate rights so as to be swiftly put to death. In a study conducted in the United States, it was discovered that out of the approximately 115 people executed in 2005, more than 10% decided to forgo any further appeals and accept execution.[58]

Attempts have been made in some jurisdictions to limit the time to be spent by prisoners on the death row, although the decisions from the United States[59] are unhelpful in this regard, because the courts in the majority of the states hardly acknowledged that death row violates any right to human dignity. However, the decisions from the Judicial Committee of the Privy Council had been commendable.

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54. Report of the National Coordinator of Zambia, Frederick Ng'andu (Paper presented at the First International Conference on the Application of the Death Penalty in the Commonwealth Africa, Entebbe, Uganda, 10 – 11 May, 2004).

55. Amnesty International, *Former Death Row Prisoner in Nigeria Describes Torment*, 35 THE WIRE (October 2005).

56. His experiences are backed up by a report on a visit to Nigeria in March, 2007 by the UN Special Rapporteur on Torture, Mansfred Nowak, who concluded that there was only a few tangible results from the efforts to reform the justice system.

57. T. Olori, Rights - Nigeria: Grim, overflowing Death Rows, IPS, 19 March, 2007.

58. Amnesty International, Death Penalty News, June, 2005, at 5. See also, J.H. Blume, *Killing the Willing: Volunteers, Suicide and Competency*, 103 MICHINGAN LAW REVIEW (2005), at 939 – 1009.

59. See, *Moore v. Nebraska* 528, US 990, [1999], where a Federal Court of Appeal of the United States declined to rule that 18 years on the death row violates a prisoner's right to freedom from cruel, inhuman or degrading treatment.

Thus, in *Pratt and Morgan v. A.G Jamaica*,[60] the Privy Council set a time limit of five years beyond which, if a prisoner is kept on the death row, it would amount to inhumane treatment. Also in *Reckley v. The Minister of Public Safety and Immigration & Ors*,[61] the Privy Council treated five years as the length of time that was needed to be attained before a violation could occur.

Decrying the spate of death row phenomenon as a violation of the right of a condemned prisoner to be subjected to minimum suffering, Lord Griffith aptly pointed out in *Pratt's* case that:

> …a state that wishes to retain capital punishment must accept the responsibility of ensuring that the execution follows swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve … the death row phenomenon must not become established as part of our jurisprudence.[62]

B. Methods of Execution

Methods of execution of death sentences during the early centuries included boiling, burning at the stake, beheading,[63] quartering, hanging, crucifixion, beating to death, impalement and stoning. However, with the emergence of the abolitionist groups that opposed the execution of condemned prisoners and public outcry, the issue of the death penalty was revisited and execution methods have been modified in many retentionist countries. Notable amongst the modern methods of execution in the world today are electrocution, gas chamber and lethal injection.[64]

Execution of death penalty through any method constitutes a violation of a condemned prisoner's right to freedom from torture, inhuman or degrading treatment. This is a blatant violation of Safeguard No. 9 of the UN Economic and Social Council

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60. Privy Council Appeal No 10 of 1993. 4 All E. R. 769. According to the Privy Council, "there is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity. We regard it as an inhuman act to keep a man facing agony of execution over a long extended period of time."

61. [1996] 2 WLR 281. See also, *Henfield v. A. G. of the Commonwealth of the Bahamas* [1996] 3 WLR 1079.

62. *Id.,* at 786.

63. This is still the case in Saudi Arabia especially for drug traffickers.

64. Another method of execution is shooting. The methods that are currently in use in Nigeria are hanging and lethal injection. *See,* section 402 (2) of ACJA 2015. Shooting as a method of execution was applied during the military regimes. The Shari'ah Penal Code also prescribes stoning and crucifixion in certain cases.

which prescribes that condemned prisoners be subjected to minimum suffering in the execution of the death penalty.[65] One may quickly posit at this juncture that the impression that the death penalty is not a form of torture, inhuman or degrading treatment, may have been informed by the illusion that the modern methods of execution are humane and painless, thereby constituting an elixir to painful killings. However, Okagbue has fiercely contended that such an impression is illusory and that none of the methods of execution guarantees a painless death.[66]

The execution method of electrocution, sometimes called "electric chair" and also referred to as "Old Sparky," is normally effected by strapping the condemned person in a wooden chair[67] and connecting electrodes to his/her body. The head and the right leg would have previously been shaved in order to facilitate attaching the electrodes. The executioner then applies between 2,000 and 2,200 volts at the amperage of 7 to 12 whilst the current is subsequently reduced and re-applied a series of times[68] until the prisoner is declared dead.[69]

However, in the last three decades of the twentieth century, there have been dramatic instances of botched executions where the equipment appears to have malfunctioned to such an extent that flame shots from the prisoner's body with intense muscle spasms generated excruciating pains.[70] It has therefore been contended by Lord Brennam in *Glass v. Louisiana*[71] that even if electrocution does not invariably produce

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65. Promulgated by the UN Economic and Social Council in 1984 for the Rights of those facing the death penalty in Countries that are yet to abolish capital punishment. To date, the total number of retentionist countries in the world are 58, 98 abolitionist countries, 35 de facto abolitionists, i.e., retaining capital punishment in their statutes but yet to execute any prisoner for the past 10 years. We also have 9 countries that are abolitionists for ordinary crimes only. See http://www.deathpenaltyinformationcentre.org//execution (Accessed 2 January, 2016).

66. I. Okagbue, *The Death Penalty from a Human Rights' Perspective*, NIGERIAN CURRENT LAW REVIEW (NIALS) (1995), at 143 – 160.

67. The chair is constructed of oak and is set on rubber matting and bolted to a concrete floor. The head gear consists of a metal head piece, covered with leather hood which conceals the prisoner's face. See E.O. Akingbehin, *Modern Methods of Executing Condemned Prisoners: Elixir to Painful Killings?*, 3(8) INTERNATIONAL JOURNAL OF BUSINESS AND SOCIAL SCIENCES (2012), at 141 – 148.

68. *See*, R. Weisberg, *Deregulating Death*, SUPREME COURT REVIEW (1983), at 305 – 395. Electrocution never results in instantaneous death, hence the need for recurrent shocks is common place. See L.J. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. (1992), at 1041.

69. L.E. LAWES, LIFE AND DEATH IN SING SING (NEW YORK: DOUBLE DAY, 1928) at 170.

70. Most noticeable were the executions of Jesse Joseph Tafero in 1990, Pedro Medina in 1997 and Allen Lee Davis in 1999. *See*, E.O. Akingbehin, Right to Freedom from Torture, Inhuman or Degrading Treatment within the Context of the Nigerian Criminal Justice System: A Critical Appraisal (Unpublished Ph.D Seminar, delivered to the Department of Public Law, University of Lagos, Nigeria, December, 2006), at 40.

71. *471, US 1003 – 93, S. ct 2159, 2163. Dissenting.*

pain and indignities, the apparent century-long pattern of abortive attempts and lingering deaths suggests that this method of execution carries an unconditionally high risk of causing atrocities.

On the use of gas chamber, the condemned prisoner is to be placed in a special cell for one week, and at an unspecified moment. During this period, the valves would be opened while the prisoner would die without awakening. The offender is strapped into a chair in the chamber with all clothes removed except shorts in order to eliminate the possibility of pockets of gas remaining in items of clothing. Execution by asphyxiation normally makes use of hydrogen cyanide or hydrocyanic gas.[72] Cyanide gas that is inhaled binds to an enzyme system (the cytochrome oxidase system) thereby blocking the energy. The cells cease functioning and then die, leading to unconsciousness and eventual death for the person in question which is similar to what happens when a person drowns or is strangled.[73] There is no doubt, therefore, that cyanide inhalation has a number of other consequences which can be very painful.

In the 1994 case of *Fierro v. Gomez*,[74] a federal judge ruled that California's use of the gas chamber was unconstitutional on the grounds of the time that it took to render the prisoner unconscious. The court held further that the execution method had no place in a civilised society.

Lethal injection, being the latest of the modern methods of execution, has very quickly replaced electrocution and the gas chamber in most jurisdictions.[75] The condemned prisoner is strapped to a gurney and a small tube or a cannula is inserted into the vein on one arm at the angle of the elbow. Once the cannula is passed into the vein, a series of substances are injected.[76] The execution authorises the use of a three-drug combination. The first is sodium pentothal (thiopental), followed by pancuronium bromide and later by potassium chloride.[77]

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72. *Fierro v. Gomez* 865, F. Supp. 1387, 1406 (ND. Cal. 1994).

73. W. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE (1996), at 179.

74. See supra note 72.

75. Section 402(2) of the ACJA 2015 now prescribes lethal injection as an alternative mode of executing death sentence in Nigeria.

76. Besides the US that uses lethal injection, other countries that apply the same method of execution for capital offenders include India, Taiwan, Thailand, Vietnam and Guatemala. It was also the method adopted by Philippines prior to abolition. China also adopted the use of lethal injection where mobile vans equipped for the purpose have been employed to move from one area to another. *See*, AMNESTY INTERNATIONAL REPORT (2006), at 281. See also, *Agence France Presse*, 10 February, 2006, at 8.

77. D.W. Denno, *For Execution Methods Challenges, The Road to Abolition is Paved with Paradox*, in THE ROAD TO ABOLITION (C. J Ogletree & A. Sarat eds., 2009), at 202. It must be noted that states like Ohio and Washington have resorted to the use of a single drop protocol since 2009 and 2010 respectively.

However, the technique is not without flaws. Different problems do arise in cannulating the vein. Inserting the tube involves a degree of expertise and the medical professionals have refrained from participating due to the Hippocratic Oaths taken to save lives.[78] Some prisoners as a result of overdose or under-dose have scarred arms. Veins may also be invisible, covered with layers of fat or may be so fat that a needle which pierces one wall goes through the opposite one as well.[79] Leonidas koniaris *et al*, in buttressing the above position as it applies to some states in the United States, concluded thus:

> …toxicology report from Arizona, Georgia, North Carolina and South Carolina showed that post mortem concentration of thiopental in the blood were lower than required for surgery in 43 of 49 executed inmates (88%); 21 (43%) inmates had concentration consistent with awareness.[80]

Little wonder, therefore, that Justice William J. Brennam of the United States Supreme Court noted that injection using barbiturates has its own risk of pain, indignity and prolonged suffering.[81] Juan E. Mendez, the UN Special Rapporteur on Torture who devoted his interim report for 2012 to the issue of whether capital punishment inevitably violates the prohibition against torture, cruel, inhuman or degrading treatment, concluded thus:

> …there is no categorical evidence that any method of execution in use today complies with [this] prohibition … methods of execution currently used can inflict inordinate pain and suffering. States cannot guarantee that there is a pain-free method of execution.[82]

C. Publicity of Executions

Publicity is a feature of capital punishment that has evolved over time, no doubt because of changing perceptions about what is decent. However, research does not bear

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78. W. Casscelles & W.J. Curran, *The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection*, 302 NEW ENG. J. MED (1980), at 383.

79. UNITED KINGDOM ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949 -1953 REPORT (Cmd 8932, 1953), at 258.

80. L.G. Koniaris, T.A. Zimmers, D.A. Lubarsky & J.P Sheldon, *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 THE LANCET (2005), at 1412 -14.

81. *Glass v. Louisiana, supra* note 71.

82. UN. Doc A/67279 (9 August 2012) para. 41.

out the conclusion that there is a relationship between deterrence and the publicity given to executions.[83] Public executions have been condemned by the United Nations Human Rights Commission as incompatible with human dignity.[84] Also, in Resolution 2004/67, the Commission on Human Rights urged states to ensure that where capital punishment occurs, it shall not be carried out in the public or in any other degrading manner. Yet, executions have been taking place in the public or have been broadcast on television.

In England, executions still took place in the public as late as the Nineteenth century. However, the practice was increasingly viewed as a degrading form of popular entertainment which could serve only to deprave the minds of the spectators.[85] Consequently, the 1868 Act of Parliament decreed that henceforth executions would take place within the prison, away from the public eye.[86] The United Kingdom's Royal Commission noted the progressive trend that put an end to public executions and rejected any attempt at their re-introduction.

In the United States, executions are normally witnessed by a handful of journalists, state officials, clergy and friends or relatives of the condemned prisoner and the victim.[87] Courts have, therefore, gone as far as ruling that death row prisoners may videotape executions of others in order to develop evidence of the effects of the technique to be used eventually in their own applications challenging the method of execution.[88]

In India, the Supreme Court had held in the case of *Attorney General of India v. Lachma*[89] that public hanging would be a barbaric practice and that it is violates of article 21 of the constitution. The court went further to hold that barbaric crime does not have to be visited with barbaric penalty such as public hanging.

During the presentation of its initial report to the Committee against Torture, Libya was questioned about stories of televised executions. The implication was that such executions were a breach of the prohibition on cruel, inhuman or degrading

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83. C. Stack, *Publicized Execution and Homicide 1950 -1980* 52 AM. SOC. REV. (1987), at 532. See also, W. C. Bailey, *Murder, Capital Punishment and Television: Execution Publicity and Homicide Rates* 22 CRIM. JUST. & BEHAV. (1990), at 172.

84. UN. Doc. No CCPR/C/79/Add. 65, 24th July, 1996, para 16, referring to public executions in Nigeria.

85. D.C COOPER, THE LESSON OF THE SCAFFOLD: THE PUBLIC EXECUTION CONTROVERSY IN VICTORIAN ENGLAND (1974), at 69.

86. Capital Punishment Amendment Act 1868

87. See *Garrett v. Estelle* 424F. Supp 468, 470 ND: Texas (1977).

88. See *Fierro v. Gomez* (supra). See also, Coyle M, *Inmates Want Execution Taped*, NATIONAL LAW JOURNAL, February 21, 1984.

89. *Devi. A. I. R. (1986) S. C. 467.*

treatment or punishment.[90]

Despite the barrage of controversies generated by the public executions,[91] it is highly perturbing that members of the public have been involved in carrying out the executions, mostly by stoning, in several countries.[92]

In Nigeria, the issue of public executions has been highlighted in cases of armed robbery. Convicts were publicly executed between 1971 and 1979 during the military era. Also, convicted drug traffickers were publicly executed under the Buhari regime whilst failed coup plotters were publicly executed under the Babangida era.

A study conducted by Adeyemi in 1987found no support for the validity of any assumption of the efficacy of death penalty where it has been inflicted publicly and given the widest publicity.[93] Garland has also pointed out that one cannot think of anywhere in the world where such shocking tactics have worked. He contended that the process of abolition has, in most countries, been marked by its removal from the public gaze into a secretive and eventually marginalised activity of the criminal justice system. He further argued that by making theatre out of executions, the public would be brutalised too.[94]

Publicity of execution is undesirable because it inflicts unquantifiable pain and trauma on the victim, the public and particularly the youth and children. Whenever an execution is carried out in public, there is usually coverage by modern mobile communication. The images are often circulate on the internet as was evidenced by the uploading of the film showing Saddam Hussein's execution in December 2006.[95]

V. CONCLUSION AND RECOMMENDATIONS

This article has analysed the array of a condemned prisoner's rights as prescribed by the various international instruments. These rights have been identified as the right to appeal to higher judicial bodies, right to pardon or commutation and right to be subjected to minimum suffering in the process of the execution of a death sentence.

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90. UN. Doc. CAT/C/SR. 135, S. 26.

91. A. SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (PRINCETON NJ: PRINCETON UNIVERSITY PRESS, 2001) at 139 – 208.

92. For example, in Saudi Arabia and Iran, the guardian of the murdered victim has the right to perform the execution himself or hire another person to do it. Also, incidence of public execution has been prevalent among the Taliban in Afghanistan. *See*, Hands off Cain, retrieved from <//http://www.handsoffcain.info> (accessed 19 April, 2016).

93. A.A. Adeyemi, *Death Penalty: Criminological Perspectives: The Nigerian Situation*, 58(3 & 4) REVUE INTERNATIONAL DE DROIT PENAL (1987), at 11.

94. D. Garland, *The Cultural Conditions of Capital Punishment,* 4 PUNISHMENT AND SOCIETY (2002), at 459 – 487.

95. *See*, Hood & Hoyle, *supra* note 49, at 196.

However, the writer has revealed that member states across the globe have observed the said rights in their breach rather than compliance. A lot of violations of a condemned prisoner's rights to appeal to higher bodies have been exposed. For example, prisoners have been executed while prosecuting their appeals. Some were even denied the appellate opportunities in some jurisdictions while other countries, like Nigeria, do not provide for mandatory legal representation for condemned prisoners. The provisions guaranteeing rights to pardon or commutation across jurisdictions are also shrouded in complexity as the procedure for invoking the rights are cumbersome. This has deprived many condemned prisoners opportunities to benefit from the scheme.

This article has also analysed the violations of a condemned prisoner's right to be subjected to minimum suffering in the execution of the death penalty. Violations within the context of death row phenomenon, methods of execution and publicity of execution have been identified. It has been established that all these phenomena result in agony, torture and inhuman treatment of the condemned prisoners. From the foregoing, the following recommendations are proffered:

First of all, towards the actualisation of a condemned prisoner's right to appeal to higher judicial bodies, member states should make provision for mandatory legal representation for condemned prisoners. Several of the condemned prisoners are impecunious and cannot hire the services of counsel and that will eventually preclude them from seeking judicial review of their sentences.

Secondly, member states should improve the living conditions of prisoners on the death row. Efforts should be made to afford them decent accommodation in decongested apartments with good feeding, medical and recreational arrangements.

Thirdly, in line with the Privy Council decisions in some of the reviewed cases in this work, Member States should adopt a particular time frame as maximum for those on the death row, after which their sentences will be commuted to life imprisonment. Some jurisdictions have adopted a maximum of five years. In the Ugandan case of Suzan Kigula, the Supreme Court set three years after which the sentence of death is automatically commuted to life imprisonment without remission.

Fourthly, member states that still engage in public executions should desist forthwith in line with the international prescription because publicity of execution has been found to produce agonising and torturous consequences to the condemned prisoners. Retentionist countries should take a cue from Pennsylvania which was the first American State to ban public execution.

Fifthly, there should be concerted efforts towards outright abolition across jurisdictions. Some of the violative acts cannot be redressed. The so-called modern methods of execution have been found not to guarantee painless killings as a result of likelihood of botched executions.

ADMISSION OF CONFESSIONS IN UGANDA: UNPACKING THE THEORETICAL, SUBSTANTIVE AND PROCEDURAL CONSIDERATIONS OF THE SUPREME COURT

Robert Doya Nanima*

ABSTRACT

The Uganda legal regime relies on the discretion of the courts in dealing with improperly obtained evidence. While various theories explain the need to exclude evidence, understanding their rationales sheds light on evaluating why the courts deal with this kind of evidence in the way they do. This article offers an assessment of selected decisions handed down by Uganda's Supreme Court between 1995 and 2015 with regard to evidence improperly obtained through confessions. It seeks to establish the underlying theoretical considerations of the decisions, how the courts address aspects of procedural and substantive justice, and whether there is a consistent developed jurisprudence. This analysis, therefore, supports the need for reform.

I. INTRODUCTION

The investigative function of law enforcement officers is as important to the criminal process as the criminal trial because their improprieties in obtaining evidence may taint the functioning of the courts.[1] The investigative function may be abused and, as a consequence, lead to improperly obtained evidence. This evidence may be as a result of human rights violations or procedural impropriety. For purposes of this article, improperly obtained evidence refers to the latter, with no taint of human rights violations.[2] This improperly obtained evidence may exist as a result of deceit, improper or unfair means without any additional illegality.[3] Instances include a non-designated officer obtaining a confession[4] or obtaining evidence in the course of an inadmissible

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1. C. Fai, *Illegally obtained evidence,* 15 SINGAPORE LAW REVIEW (1994), at 98.

2. D.T. ZEFFERT AND A.P. PAIZES, THE SOUTH AFRICA LAW OF EVIDENCE 2 (2009) 711; see also, Fai *id.,* at 99.

3. A. Skeen, *Admissibility of Improperly Obtained Evidence in Criminal Trials*, 1 SAJCJ (1988), at 389.

4. *Nashaba v Uganda* (Criminal Appeal No.39 of 2000) [2002] UGSC 17 (15 April 2002).

confession.[5] Other scenarios which are beyond the scope of this article include evidence obtained through illegal searches and seizures,[6] entrapments,[7] and the use of undercover police investigations to obtain confessions.[8] This article limits its scope to confessions obtained through improper means. It seeks to establish, first, what theoretical considerations may be used to understand the rationales of the decisions; secondly, how the Supreme Court has used the concepts of procedural and substantive justice; and thirdly, whether there is a consistent jurisprudence dealing with improperly obtained evidence.

II. CONCEPT OF IMPROPERLY OBTAINED EVIDENCE

Different jurisdictions attach different meanings to the term 'improperly obtained evidence.' The meaning that is attached may be due to the existence of statutory law or judicial interpretation.[9] Some jurisdictions use the terms 'illegally' and 'improperly obtained evidence' interchangeably subject to proof of violation of the rights of an accused.[10] Other jurisdictions require that where procedural rules are not followed, a court may decline to admit the evidence.[11] In South Africa, for example, the constitutional directive refers to improperly or illegally obtained evidence and requires that it should be subjected to the constitutional test before it is excluded.[12] The relevant section provides thus:

> Evidence obtained in a manner that violates any right in the bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of

5. A. Choo, *Evidence Obtained in Consequence of an Inadmissible Confession*, 57 JOURNAL OF CRIMINAL LAW (1993), at 195-198.

6. Fai, *supra* note 1, at 98.

7. S. Darren and W. Nicci, *The Exclusion of Evidence obtained by Entrapment: Un Update*, THE ORBITER (2011), at 634.

8. B. Murphy and J.L. Anderson, *Confessions to Mr. Big A new rule of evidence?*, 20 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF (2016), at 29-48.

9. *See,* section 35(5) of the Constitution of the Republic of South Africa 1996 (South African Constitution) and section 359a of the Dutch Code of criminal procedure (*Nederlandse Wetboek van Strafvordering (Sv)* to be discussed below.

10. See the subsequent discussion on South Africa.

11. See the subsequent discussion on the Netherlands.

12. For instance, section 35(5) of the South African Constitution; and *S v. Mthembu* [2008] ZASCA 51 where Cachalia J referred to the requirement to exclude improperly obtained evidence in terms of section 35(5). See also, Cameron J in *S v. Tandwa* [2007] SCA 34 (RSA) para. 116. See further section 24(2) of the Canadian Charter on Human Rights and Fundamental Freedoms.

justice.[13]

This section requires that before the evidence is excluded there should be a violation of a constitutional right.[14] In interpreting the above section, the South African courts have referred to this evidence as 'improperly obtained evidence.'[15] Notwithstanding the above, the South African courts still have the discretion under the common law to exclude improperly obtained evidence. The exclusion can be done in instances where there has been no violation of human rights in the course of obtaining the evidence.[16]

In The Netherlands, The Dutch Code of Criminal Procedure, which regulates the assessment of illegally gathered evidence, provides:

> 1. If procedural rules prove to have been breached during the preliminary investigation, which breach can no longer be remedied, and the legal consequences of the breach are not apparent from statutory law, the court may rule that:
>
> a). the severity of the punishment will be decreased in proportion to the gravity of the breach if the harm caused by the breach can be compensated in this way;
> b). the results of the investigation obtained through the breach may not contribute to the evidence of the offence charged;
> c). the Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.[17]

This section allows a judicial officer discretion in how to deal with improperly obtained evidence. This evidence must have been obtained as a result of not following the procedural rules. The discretion is wide and is not limited to non-admission of improperly obtained evidence. The judicial officer may reduce the punishment due to the accused, or decline to admit the evidence, or bar the prosecution from prosecuting

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13. Section 35(5) of the South African Constitution 1996.

14. For a discussion of section 35(5) of the South African Constitution, see Zeffert & Paizes, *supra* note 2, at 721-775.

15. Zeffert & Paizes *id.,* at 721- 775.

16. For a discussion on the exclusionary rule in South Africa, see Van der Merwe *Unconstitutionally Obtained Evidence: Towards Compromise between the Common Law and the Exclusionary Rule*, 3 STELLEN L.R (1992), at 173-206.

17. Section 359a of the Dutch Code of Criminal Procedure (*Nederlandse Wetboek van Strafvordering (Sv)*. *See*, M.J. Borgers and L. Stevens, *The Netherlands: Statutory Balancing and a Choice of Remedies*, in EXCLUSIONARY RULES IN COMPARATIVE LAW (S.C. Thaman, ed., 2015), at 185.

the accused. The section does not limit itself to only improperly obtained evidence. It may include violations of a procedure, which include human rights violations.[18]

III. THEORETICAL CONSIDERATIONS IN REGARD TO ADMISSION OF EVIDENCE

Various theories explain the rationale underlying the admission of evidence. The theories may lead to the inclusion or exclusion of evidence. A comparison of the tenets of these theories informs the decisions of the Supreme Court that are under review. These theories have been used by the Supreme Court and are classified into two groups: the forward-looking theories and the backward-looking theories.[19] The forward-looking theories aim at ensuring that the persons who engage in obtaining evidence improperly are discouraged from doing so. At the forefront of these theories is the deterrent theory for exclusion of evidence. This theory requires that illegally or improperly obtained evidence must be excluded from admission to deter the perpetrators from committing future acts of obtaining evidence improperly.[20]

The condonation theory, on the other hand, is based on the assumption that courts will exclude improperly obtained evidence so that they do not condone improper or illegal police or investigative behaviour.[21] The backward-looking theories attempt to correct the harm occasioned to the victims of the illegal or improper conduct.[22]

The first theory is the compensatory theory which uses exclusion in order to recognise that rights have value, and that if the right is infringed the wrongdoer should provide alternative value to the rights holder.[23] This theory is, however, criticised because an accused who would have been convicted may avoid a penalty if his rights were infringed before he was brought to trial. This is because his rights, just like a victim's rights, have value attached to them. The other backward-looking theory is the vindication theory which affirms constitutional values through granting meaningful remedies.[24] It would appear that the vindication theory promotes the observance of a given right rather than ensuring that the perpetrators are brought to justice.

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18. Borgers & Stevens *id.,* at 185.

19. M. Madden, *A Model Rule for Excluding Evidence*, 33 BERKELEY JOURNAL OF INTERNATIONAL LAW (2015), at 447.

20. *Id.,* at 448.

21. R.M. Eugene, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MILITARY LAW REVIEW (2012), at 239.

22. Madden, *supra* note 19, at 453.

23. D.M. Pacciocco, *Section 24(2): Lottery or Law—The Appreciable Limits of Purposive Reasoning,* 58 CRIMINAL LAW QUARTERLY (2011), at 21.

24. Madden, *supra* note 19, at 454.

Another theory that may be used is the reliability theory. This theory provides that improperly obtained evidence may be as reliable as lawfully obtained evidence and may have a bearing on the innocence or guilt of an accused.[25] The South African courts also use the protective theory which provides that an accused should not suffer a disadvantage because of evidence obtained through human rights violations by investigators.[26] These theories create a balance in the admission of improperly obtained evidence and the courts' reasoning always leans to at least one of the theories.[27]

A. Exclusionary Rule in Uganda

There is no direct rule of exclusion of improperly obtained evidence in Uganda. Like other former colonies of England, Uganda derives applicable common law and criminal law principles from England.[28] This rule informs the way court decides on confessions, and it is on this basis that the principles that govern it are discussed. The general principle in common law jurisdictions is that relevant evidence is admissible unless it falls within a category which is excluded by law, or it is excluded in the exercise of a judicial discretion.[29] The Evidence Act[30] provides guidance in dealing with relevance and admissibility of evidence. The Act provides:

> Subject to any other law, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereafter declared to be relevant, and of no others.[31]

This section requires that for evidence to be admitted it has to be relevant to a fact in issue or it should relate to a fact in issue. The relevance of evidence depends on its ability to address a substantive issue of the case or a question in dispute.[32] The failure of any piece of evidence to do the former is a yardstick for its non-admission. With

25. Zeffert & Paizes, *supra* note 2, at 712.

26. *Id*.

27. These theories will be used in the analysis of case law by the Supreme Court shortly.

28. Section 1 of the Penal Code Act Cap 120 Laws of Uganda.

29. W. Van-Caenegem, New trends in illegal evidence in criminal procedure: general report (Report of the World Congress of the International Association of Procedural Law, held in Salvador, Brazil, 2007), at 1.

30. Cap 6 Laws of Uganda.

31. Section 4 of the Evidence Act; see part II generally of the Evidence Act.

32. J. Wanga, *Evidence Obtained from Remote- Electronic Traffic Devices: An Argument for Admissibility in Civil and Criminal Contexts*, 46 THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION (2010), at 102- 109.

regard to the admissibility of relevant evidence, a court has to deal with two questions. First, it deals with the question of relevance to a substantive fact in issue. The second question relates to relevance to the credibility of the evidence.[33] In *Uganda v. David Kamugisha*,[34] the accused sought to admit a letter into evidence that was purportedly signed by a prosecution witness and written to the accused. The admission of this evidence was supposed to rebut the evidence of the witness who had testified that: first, she could not write anything other than her name; secondly, she was not a girlfriend of the accused; and thirdly, she held a grudge against the accused.

The Court held that the admissibility of a piece of evidence depended on whether it was relevant to an issue before a court, otherwise the court record would be filled with evidence which was not sufficiently relevant and which had the effect of prolonging the trial because of immaterial matters. The letter turned out to be irrelevant to the substantive issues before the Court. The evidence sought to be admitted failed to pass the initial relevance test. If it had passed the test, then the relevance to the credibility of the evidence would have been put into consideration.

Furthermore, with regard to the requirement that the evidence must relate to a fact in issue, failure to prove this relationship is detrimental to any attempts to admit that piece of evidence. In *Struggle (U) Ltd v. Pan African Insurance Company Ltd*,[35] at the commencement of trial, counsel for the plaintiff laid evidence to show that the defendant's company did not exist. The defendant objected to this evidence on the ground that the pertinent issue before the Court was whether the defendant's company owned the premises and that therefore evidence to prove the non-existence of the defendant's company was irrelevant. The Court held that the issue of whether the defendant's company had ceased to exist was not a fact in issue as it was not pleaded and that therefore evidence to prove its non-existence was not admissible. The lack of a connection or failure by the plaintiff to show a connection between the evidence that the plaintiff sought to be admitted and the facts in issue was the reason why the evidence was not admitted.

If evidence is admissible, the manner of its procurement does not matter. It is on the basis of this rule that the exclusionary rule may be used. In *Kuruma s/o Kairu v. R*,[36] the appellant was convicted on a charge of being in unlawful possession of ammunition contrary to the Emergency Regulations.[37] The ammunition was found as

33. A. TERENCE, D. SCHUM AND W. TWINING, ANALYSIS OF EVIDENCE 2 (2006) 96.

34. (1988 – 90) HCB 77.

35. (1990-91) KARL 46.

36. *Kuruma s/o Kairu v. R* (1955) AC 197, 203; A. Choo & S. Nash, *Improperly Obtained Evidence in the Commonwealth; lessons for England and Wales?,* 11 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF (2007), at 78.

37. *Kuruma v R*, *id.*, at 198.

a result of a search carried out by two police officers who were below the designated rank of assistant inspector of police. Although the officers had no power to search the appellant,[38] the evidence recovered was nevertheless admitted.[39] The ground of leave to appeal was that the evidence proving that the appellant was in possession of the ammunition had been illegally obtained and should not have been admitted.[40]

The Court held that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and a court is not concerned with how the evidence was obtained.[41] The only exception to the rule was that a court has the discretion not to admit improperly obtained evidence if the strict rules of admissibility will operate unfairly against the accused.[42] The rationale for this holding was that all relevant evidence was admissible, regardless of the manner in which it was obtained.[43] The Court stated that when it was a question of the admission of evidence, it was not about whether the mode of obtaining the evidence was tortuous but excusable; it was about whether the evidence obtained was relevant to the issue being tried.[44] Therefore, all evidence is admissible until an accused seeks to rebut this presumption.

B. Substantive and Procedural Justice

Substantive justice is referred to as the justice of the outcome of a given process[45] which involves a value judgment about the content of law and its consequences.[46] For instance, where a criminal statute provides for imprisonment for life for the offence of defilement, substantive justice is used to find value through other circumstances, externalities such as morality, religion or culture,[47] and it evaluates the need to impose punishment which is proportionate to the crime to ensure that there is retribution or rehabilitation.

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38. Regulation 29 of the Emergency Regulations.

39. Kuruma v R, *supra* note 36, at 198.

40. *Id*.

41. *Id.,* at 203.

42. *Id.,* at 204. The Court referred to *Noor Mohamed v. The King* [1919] AC 182 191-192 and *Harris v. The Director of Public Prosecutions* [1952] AC 694 707.

43. Kuruma v. R, *supra* note 36, at 204.

44. *Id*. The court referred to *Regina v. Leatham* (1861) 8 Cox CC 498 501 where Crompton J said: 'It matters not how you get it; if you steal it even, it would be "admissible".

45. W. SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY (1985), at 49.

46. N. Faso, *Civil disobedience in the Supreme Court: Retroactivity between compromise and formal Justice*, 75 ALBANY LAW REVIEW (2012), at 1614.

47. *Id*.

On the other hand, procedural justice finds value internally in the regular and consistent application of law. The judicial officer weighs the evidence, the circumstances relating to the commission of the offence, before deciding on liability for the commission of the offence and the sentence. In the same way, where factual issues arise about voluntariness in the recording of a confession, he has to weigh up the probative value of the evidence in the light of other corroborative evidence before making a decision on the admission of the confession.[48] Furthermore, a system of criminal law may dictate that punishment is proportionate to the crime, or that punishment serves ends, such as retribution or rehabilitation. These are substantive goals and substantive justice would be achieved if these ends were met. Accordingly, substantive justice is achieved after an objective assessment and not a subjective assessment.

While substantive justice is referred to as the justice of the outcome, procedural justice is referred to as the justice of the process that brings about the outcome.[49] Procedural justice requires that all cases should be treated in the same way in accordance with the law, regardless of the circumstances of a particular case, without regard to the defects or virtues of the case.[50] In procedural law, therefore, justice is seen to be found in the form of the law and not in its content, and is delivered through adherence to its form.[51] This is an indication that procedural justice may form part of substantive justice. Therefore, where a given law provides for the procedure to follow in recording confessions,[52] the procedure is supposed to be followed if the evidence is to be admitted. It follows that if a police procedure is required to obtain particular evidence, it has to be shown to the satisfaction of the court that it has been followed before it is admitted.[53]

By its nature, procedural justice imposes restraints on processes through which an outcome of substantive justice is obtained.[54] It is, therefore, expected that as courts adjudicate cases, they should ensure that the processes leading to the obtaining of evidence and filing of cases are followed to the letter. Substantive and procedural justice are interrelated in a way that the latter is required for the existence of the

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48. See the analysis of the decisions of the Supreme Court below.

49. Sadurski, *supra* note 45.

50. D. Lyons, *On Formal Justice*, 58 CORNELL LAW REVIEW (1973), at 833.

51. *Id*.

52. *Festo Androa Asenua v. Uganda,* Unreported Supreme Court case 1 of 1998 2 October 1998, at 26-30.

53. See, *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda* Unreported case 33 of 2001 20 February 2003 and *Walugembe Henry, Ssali Paul and Kamanzi Joseph v Uganda* unreported case 39 of 2003 1 November 2005.

54. Sadurski, *supra* note 45.

former.[55] The major question that arises out of this relationship is whether it can be said that where substantive and procedural rules are followed, one can attain the former.

Consider a hypothetical case where all the rules are followed in obtaining a confession but the interpreter misinterprets the story of the accused in the process of recording it, which becomes evident when it is read back to the accused before he appends his signature. A similar hypothetical case may arise where in the course of recording a confession, the procedure is not followed but the accused is identified as the person responsible for the acts that constitute part of the offence.

In the first hypothetical example, justice may not be seen to be served if the accused is convicted: but, justice may still not be seen to be done in the second scenario, if the accused is convicted on the basis of a flawed process. The two hypothetical situations raise the question of whether a system of procedural justice on its own produces substantive justice outcomes.[56] There is a possibility, therefore, that the presence of procedural justice does not lead to substantive justice.[57] It follows that an inquiry into the basis of the decisions by the Supreme Court will help to show whether it has enforced substantive justice, procedural justice, or a fusion of substantive and procedural justice.

C. Confessions

1. Legislative provisions—The recording of confessions in Uganda is regulated by the Evidence Act[58] and the Guidelines to Magistrates on Recording Confessions.[59] The Evidence Act provides:

> (1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—
> (a) a police officer of or above the rank of assistant inspector; or
> (b) a magistrate…[60]

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55. *Id*.

56. P. SELZNICK, THE MORAL COMMONWEALTH : SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1994), at 437. See also, Faso, *supra* note 46.

57. Faso *id*.

58. Cap 6 Laws of Uganda.

59. Instruction Reference C.J./c.b by the Chief Justice on Magistrates on Recording of extra-judicial statements dated 2nd March 1973. The instruction offers direction to police officers as well. This circular was released after section 23 had been repealed by Decree 25 of 1974. The Evidence (Amendment) Act of 1985 did not save the operation of section 23 of the Evidence Act Cap 101(as it was then).

60. See s. 23 (1) b of Cap 6 Laws of Uganda.

The wording of the section does not require that it is only a police officer above the rank of assistant inspector of police who can record a confession. The requirement is that the confession should be made in the presence of a police officer who is at least assistant inspector of police. This is an indication that a police officer below the indicated rank may record a confession by an accused person if he is in the immediate presence of an officer at the level of inspector of police or of a higher rank.

A circular from the Chief Justice replicates the wording.[61] It offers an explanation to the effect that the section is designed to ensure that any statement made by a person in police custody is voluntary. The rationale that can be deduced from the section and the circular is that they both require a space where an accused voluntarily offers his statement. In addition, the circular requires that the magistrate or officer may use an interpreter if the accused chooses to use a language with which he is not conversant.[62] It is therefore prudent that the magistrate or a designated police officer record the statement, instead of having the statement recorded by another person, in his immediate presence. 'Immediate presence' should be interpreted literally to mean the physical presence of the magistrate or designated police officer in the room at the time of the recording of the confession.[63]

The Evidence Act requires corroboration before an accused is convicted on the basis of a confession. Section 28 provides:

> if court forms the opinion that the confession was involuntarily obtained. The protected from impropriety if at the time of making the confession, it appears to the court that having regard to the state of mind of the accused person and to all the circumstances, it was caused by violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made.

From the above section, the opinion of the Court that the confession was involuntarily obtained raises a presumption that the confession is inadmissible. The Court has to be satisfied that the confession was obtained voluntarily.[64] This may be done by establishing the absence [or presence] of violence, force, threats, inducement or promise in the course of recording the confession.[65] It must be noted, however, that if the Court

61. Note 59 par 1.

62. Note 59 Guideline 9.

63. *See*, *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda* Unreported case 33 of 2001 20 February 2003

64. *Id*.

65. *See,* Zeffert & Paizes, *supra* note 2, at 519, on the meaning of a threat or promise of advantage made to a recording officer.

is satisfied that the impression that the confession was caused by any such violence, force, threat, inducement or promise is removed, it may proceed to have the confession admitted.[66]

2. Analysis of case law—In *Namulobi Hasadi v. Uganda*,[67] the appellant sought to have the confession rejected because it was improperly obtained. The improprieties included the fact that he did not sign the confession,[68] that there was the insertion of a name of a detective on the confession,[69] and that the confession was recorded in a room full of other police officers and people doing other work.[70] The Court upheld the admission of the confession in evidence on the ground that it did not occasion any injustice to the appellant.[71] With regard to the irregular recording of the confession, the Court stated first, although the recording of the confession took place in a room occupied by other people, they were busy with their own duties.[72] The Court recognised the fact that the police do not usually have enough room for a recording officer to be alone with an accused,[73] and that the appellant never complained about the irregularity in the mode of recording the confession.[74] In addition, although the confession was recorded in a language the appellant did not understand, the fact that it was read back to him was proof that he voluntarily made it.[75]

The appellant also informed the Court that the recording of the confession was not done in accordance with the *Evidence (Statements to police officers) Rules*[76] (hereinafter referred to as the Rules) regarding the procedure of recording confessions.[77] The Court also noted that rule 7(a) of the Rules was repealed by the Evidence (Amendment) Decree 25 of 1971. Instead of relying on the improprieties, the Court laboured to justify the admission of the confession on the basis of the fact that the rights of the accused had not been violated. Therefore, to a great extent, the confession was admitted because the appellant's rights were not violated and not notwithstanding the irregularities.[78]

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66. *See*, s. 25 of Cap 6 Laws of Uganda.
67. *Namulobi Hasadi v. Uganda* Unreported case 16 of 1997 13 July 1998.
68. *Id.,* at 3.
69. *Id*.
70. *Id*.
71. *Id.,* at 4 – 11.
72. *Id.,* at 4.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Evidence (Statements to police officers) Rules SI 6-1, Laws of Uganda.*
77. *Id.,* Rule 4.
78. *Id*.

The Court set a precedent which upheld the notion of substantive justice over that of procedural justice. This is so because it used a proportionality test to determine the use of a confession that was recorded with a lot of glaring irregularities which could be explained as not being fatal to the final outcome. With the confession on the one side of the scale, the other side contained the facts that the appellant had been asked about the content of the confession and did not object thereto and also did not complain about the recording procedure. In addition, the appellant at the time of his arrest had cooperated with the police in recovering evidence that pointed to his role in the commission of the murder. He had in his possession items belonging to the victim. Furthermore, the procedural law upon which the appellant relied to justify his claims had been repealed. These facts outweighed any rationale that the Court would have had to prefer procedural justice over substantive justice, or to use procedural law in obtaining the confession, to arrive at substantive justice.

The court viewed the facts surrounding the recording of the confession in the light of other circumstances, such as the existence of other evidence, and the appellant's role in the investigation process, and held that the admission of the confession would not cause an injustice to the accused. While the Court handled a delicate matter properly, it ought to have denied the admission on grounds of failure to follow procedural laws by the police.

The Court condoned the excesses of the police because there was no law to stop them, and the appellant had co-operated with the police in the investigation. Although the accused was represented, his ignorance of the guidelines should not have been used as a ground to hold that there was no injustice occasioned to him. The Court was more interested in ensuring that any failure to meet procedural safeguards in recording confessions could be justified if no injustice was occasioned to the accused. This precedent that encouraged the admission of improperly obtained evidence when it did not occasion an injustice to the accused was wrong. It caused procedural injustice to the appellant. Four months later, the Supreme Court, in *Festo Androa Asenua v. Uganda*,[79] reproduced the rules passed for the recording of confessions. They require, firstly, that an accused be cautioned before a statement is made. Secondly, if the recording of the statement is made by a police officer, then he should be at the level of an Assistant Inspector of Police or higher. Thirdly, the confession should be recorded by the officer in a language that the accused understands, in a room which should have only two people unless an interpreter is required. [80] These rules set a standard which the Court hoped would reduce the improper recording of confessions by the police.

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79. *Festo Androa Asenua and Kakooza Dennis v. Uganda* Unreported Supreme Court case 1 of 1998 2 October 1998, at 26-30.

80. *Id.,* at 27.

In *Nashaba Paddy v. Uganda*,[81] the appellant and three others were involved in the commission of a robbery. When the appellant was arrested, he gave incriminating information to an inspector of police about himself and two other persons in the commission of the crime.[82] After police had recovered the evidence on the basis of the information given, the appellant was taken to a Magistrate where he recorded an extra-judicial statement.[83] On appeal, the appellant claimed that the confession should not have been admitted because of irregularities and human rights violations in the recording of the statement. In reference to irregularities, it was contended that the appellant was not informed of the charges against him before the Magistrate, that the statement was not recorded in a language that the appellant spoke, and that the holding that the confession of the appellant was obtained voluntarily was not supported by evidence.[84] The recording of the confession was done by the Magistrate's clerk, and it was not recorded in the language the appellant spoke.[85]

The Court showed a willingness to admit a statement, if the impropriety was not a material departure from the rules for recording a statement. In *Nashaba*, the confession involved various improprieties. First, the appellant was not informed of the charge against him. Secondly, the confession was recorded in a language he did not understand. Thirdly, the statement purportedly recorded by the Magistrate was in fact recorded by his clerk.[86] The Court held that the irregularities committed by the Magistrate were not prohibited by the law, and that the procedure adopted was not a material departure from the Guidelines for Recording Confessions.[87] The Court stated further that although the only omission was that of the Magistrate in not certifying the charge and caution statement, it was cured by the confirmation by the appellant that the recording was accurate.[88]

The Court further held that the Chief Justice' Rules on Recording Confessions were rules of practice and not law, and as such a contravention thereof would not render the recording to be bad if the confession was found to be voluntary.[89] The rationale for the holding was the presence of voluntariness. If the Court could establish that the

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81. *Nashaba v. Uganda, supra* note 4.
82. *Id.,* at 2.
83. *Id.,* at 3.
84. *Id.,* at 4.
85. *Id.,* at 6. The dialect the appellant understood was *Runyakitara*, which was not used in the recording of the confession.
86. *Id.,* at 4-5.
87. *Id.,* at 6.
88. *Id.,* at 7.
89. *Id.*.

irregular recording of the confession was done voluntarily, it would admit it.[90]

This case reiterates the position adopted in *Namulobi*, that the Court was inclined to admit an improperly obtained statement if the irregularity was shrouded in a cloak of voluntariness. The Court used substantive justice to maintain the admission of a confession despite the procedural irregularities in recording it. The Court used a subjective test of whether the accused was made to sign the confession involuntarily, and it was established that he signed it voluntarily. In addition, the extent of the Magistrates' non-adherence to the Rules of practice was not great enough to oust the voluntariness in the making of the confession. The Court gave the procedural rules a low grading because they were rules of practice and not rules of law. The admission of the confession was based on its subjective content with regard to the commission of the crime, and not on the procedural objective of following the rules. Despite the fact that the appellant sought to have the appeal allowed on the basis of the failure to follow the correct rules regarding the recording of confessions, unlike in *Namulobi*, the Court watered down the rules to mere rules of practice and not rules of law. This was an indication that substantive justice was more important that procedural justice.

While substantive justice was upheld as long as it did not occasion injustice to the appellant, the yardstick for measuring the injustice was the ability to regard the demands of substantive justice as being greater than those of procedural justice. Just as in *Namulobi, Nashaba* develops the principle that improperly obtained evidence may be admitted if it does not cause injustice to the accused. The question of injustice is for the courts to decide according to the circumstances of each case. In addition, the Supreme Court seemed to concretise its stance of being objective in following the subjective content of the confession instead of being objective in following the objective rules of recording confessions.

In *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda,*[91] the appellants appealed to the Supreme Court, claiming that the Court of Appeal erred in law when it admitted their retracted confessions.[92] The first and second appellants contended that their confessions were recorded by the same investigating officer, which was an irregularity.[93] In addition, in the course of admitting the confession, the trial judge did not inquire from the defence as to whether it had any objection to the admission of the confessions, and his failure to do so was a failure of justice.[94] The

90. *Id.,* at 8.

91. *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda* Unreported case 33 of 2001 20 February 2003.

92. *Id.,* at 4.

93. *Id*.

94. *Id*.

Court agreed with the appellants and held that it was improper to admit the confessions, because the trial judge did not give the defence an opportunity to say anything about the nature of the confessions before they were admitted.[95] The High Court did not subject the admissibility of the confession to a trial within a trial, to test the voluntariness of the recording of the confessions.[96]

With respect to the confessions, they were not admitted in evidence because of the procedural improprieties that surrounded their making. It was a rule that had to be upheld by each judicial officer that all confessions had to be subjected to a trial within a trial.[97] The decision in *Ssewankambo* indicated a shift by the Court regarding the admission of improperly obtained confessions. It indicated that the Court would not admit evidence of confessions where the procedural rules were not followed. This case affected the consistency that the Court had created in its earlier decisions in *Namulobi* and *Nashaba*. The jurisprudence that had been created was put on a halt.

With regard to how the Court dealt with the principles of substantive justice vis-a-vis the principles of procedural justice or the balancing of the two principles, the Court used the procedural rules that govern the recording of confessions to arrive at substantive justice. The Court used a two-step approach by employing a fusion of procedural justice and substantive justice.

First, in the employment of procedural justice, the Court adopted a subjective stance by following the procedural rules relating to the letter, and that failure to do so would lead to the non-admission of the evidence. Secondly, the Court then used the procedural law findings to arrive at a value judgment based on the proportionality and objectivity of legal principles.

The Court, therefore, adopted a fusion of both procedural and substantive justice before it arrived at its decision. In addition, the Court also upheld the notion that it will not sustain an illegality once it is brought to its attention.[98] The Court deviated from the condonation theory applied in *Namulobi* and *Nashaba* to the deterrence theory in deciding whether to admit the confession. This forward-looking theory of deterrence was aimed at ensuring that the persons who engage in obtaining evidence improperly are discouraged from doing so.[99] It must be noted that in this case, apart from the procedural irregularities, the Court also looked at other factors, such as human rights violations in the course of obtaining the evidence. It may, therefore, be said that the

95. *Id.,* at 8.

96. *Id*., at 9-10.

97. *Id*.

98. *Makula International v. Emmanuel Nsubuga* [1982] HCB 11. See also, *Francis Mpamizo v. Uganda* Kabale High Court Criminal Revision Case [2011] UGHC 30 3 4.

99. Madden, *supra* note 19, at 448.

existence of factors other than the improprieties in the recording of the evidence played a role in the decision of the Court.

In *Mweru Ali, Abas Kalema, Sulaiman Senkumbi v. Uganda*,[100] the appellants were charged with robbery and were convicted on the basis of confessions made by the first and second appellants.[101] They appealed on the grounds that the confessions had been repudiated, and that it was wrong for the trial court judge to rely on confessions that had been irregularly obtained.[102]

According to the first appellant, his confession was irregularly obtained in so far as it was not recorded voluntarily.[103] The Supreme Court rejected this ground of appeal and held that the confession was properly admitted. The rationale was that the first appellant willingly signed the charge and caution statement and that after recording the statement, it was read back to him before he countersigned it.[104] It was established further that the appellant offered a detailed explanation of his role in the commission of the robbery: his attendance at preparatory meetings, taking part in the robbery, and getting a share of the proceeds.[105] The retracted confession was corroborated by evidence of the discovery of the gun alluded to by the first appellant in the confession, the conduct of the appellant which led to the arrest of the other suspects, and the confession of the second appellant.[106] In addition, the first appellant was a former police officer, who ought to have insisted that the statement be subjected to a trial within a trial but decided not to do so; and his choices could not be used as reasons not to admit the confession.[107]

In relation to the confession of the second appellant, he stated that his confession was not recorded in a language that he understood.[108] While the Court emphasised the need to record statements in accordance with the procedure set out by the Chief Justice's instructions dated 3 February 1973, it was persuaded that the recording of the confession in English did not occasion an injustice to the second appellant.[109] It was established that the officer who recorded the statement followed the correct procedure before and after recording the confession.[110] It was established that

100. *Mweru Ali, Abas Kalema, Sulaiman Senkumbi v. Uganda* Unreported Supreme Court case 33 of 2002 21 August 2003.
101. *Id.,* at 1.
102. *Id.,* at 2.
103. *Id.,* at 6.
104. *Id.,* at 5.
105. *Id.,* at 6.
106. *Id.,* at 7.
107. *Id*.
108. *Id*.
109. *Id.,* at 8.
110. *Id*.

the appellant actually feigned illiteracy so as to attempt to ensure that the confession was not admitted.[111] The appeals were therefore dismissed.

With regard to balancing substantive and procedural justice, the Court downplayed the failure to follow the rules of recording confessions since it found that the failure to test the one confession in a trial within a trial, or to record the other confession in a language the appellant understood, were not fatal to the appellants. In this case, the appellants were trying to benefit from the improprieties in recording the confessions that they had made voluntarily.

The Court adopted an approach that made any development in the jurisprudence inconsistent. While in the earlier case of *Ssewankambo* the Court decried the need to follow the procedure for recording confessions, it drifted back to the earlier principles in *Namulobi* and *Nashaba*. In a bid to prevent the appellants from benefitting from an illegality, the Court used the existence of other evidence, such as evidence of the recovery of a gun and the appellant's co-operation with the police, to arrive at a value judgment. The Court sacrificed procedural rules to arrive at substantive justice. This is an indication that procedural justice need not be attained before substantive justice is achieved.

The author differs from the view of the Court in this case and is of the view that the Court should have remained consistent in following the procedural aspects, and should have disregarded the confessions since they were not subjected to a trial within a trial or were not recorded in a language that an appellant understood. There was evidence that could be used to sustain the convictions. The identification of the first and second appellants in broad daylight at the scene of the crime by prosecution witnesses,[112] the recovery of the gun,[113] and the evidence of the first appellant about his role in the robbery.

The Court could have followed the procedure to disregard the evidence of the confessions and still maintained the convictions of the accused persons. These pieces of evidence point to a subjective notion of justice which, if applied using the proportionality test, would still ensure that substantive justice was achieved. With regard to the theoretical considerations relating to the admission of evidence, the Court admitted the evidence on the basis of its reliability, despite the fact that it at the same time condoned the excesses of the police in recording the confessions. While the Court struck a balance between adducing reliable evidence at the cost of condoning improper police conduct,[114] it created inconsistency in its jurisprudence dealing with evidence

111. *Id.,* at 9.
112. *Id.,* at 4.
113. *Id*.
114. Eugene, *supra* note 21. See also, *R v. Collins* [1987] 1 SCR 265 para. 45.

obtained through human rights violations.

In *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v. Uganda* (Walugembe),[115] the appellants sought to have their confessions struck off the record because of the irregularities in their recording. The first and second appellants informed the Court that their confessions were recorded in English rather than in the language that they understood.[116] In addition, the confessions were recorded by the same police officer[117] and the confession of the second appellant was recorded in the presence of the officer in charge of the police station. Other facts that were vital to the Court in making its decision were that the third appellant cooperated with the police in recovering the stolen items from a certain swamp,[118] and that the first and second appellants stated that their confessions were obtained through torture.[119]

The Court in allowing the appeal stated that it was a misdirection to admit confessions with these irregularities, and without testing the voluntariness of the confessions.[120] The rationale for this holding was that where a police officer recorded a statement from an accused person and went on to record another from a second accused, he would be tempted to use the information from the confession of the first accused in the confession of the second confession.[121]

Just like in *Ssewankambo*, the Court made use of procedural rules to arrive at substantive justice. Secondly, the Court leaned to the deterrence theory in deciding whether to admit the confession in order to ensure that persons who engage in obtaining evidence improperly are discouraged from doing so.[122] This case also involved human rights violations in the course of obtaining the confessions.

IV. CONCLUSION

At the outset, it should be noted that the cases of Namulobi, Nashaba, Ssewankambo, Mweru and Walugembe involved irregularities in recording confessions. With particular regard to the recording of confessions in a language that the accused could not understand, the Court dealt with this question in the cases of Nashaba, Ssewankambo, Mweru, and Walugembe. It attached little significance on this

115. *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v. Uganda* Unreported case 39 of 2003 1 November 2005.
116. *Id.,* at 5.
117. *Id.,* at 6.
118. *Id.,* at 2.
119. *Id.,* at 5.
120. *Id.,* at 6.
121. *Id.,* at 9-10.
122. Madden, *supra* note 19, at 448.

procedural issue in Nashaba and Mweru and upheld the admission of the confessions. Conversely, it placed emphasis on the need to follow this rule of practice in Ssewankambo and Walugembe and this emphasis led to the non-admission of the confessions. In Ssewankambo and Mweru, the Court had evidence that, in addition to the improperly obtained evidence, there were violations of human rights in the process of obtaining the confessions.

This analysis identifies three points. First, that there is an inconsistent jurisprudence in dealing with evidence obtained through improper means. Secondly, the Court has not been consistent in following the procedural rules governing the recording of confessions and thereby has created the inconsistency. Thirdly, where the Court has insisted that procedural rules are followed in the recording of confessions, the confessions have not been admitted. Fourthly, where the Court has disregarded procedural rules, it has used substantive justice as a tool of proportionality and subjectivity in admitting the confessions.

Where failure to follow the procedural rules would not change the outcome of the process of recording the confessions, the Court disregarded the procedure and maintained that the confessions were properly admitted. This was dependent on the presence of other evidence that corroborated the guilt of the accused, such as: cooperation with the police in the investigations; reading of the confession to the accused before he signed it; the decision not to contest the admission of the confession in the court of the first instance; and the existence of deceit and a desire to abuse the process relating the recording of confessions.[123]

Conversely, where the failure to follow the procedural rules would greatly change the outcome of the process and the subsequent judgment, the Court would not allow the admission of the confession. In addition, the Court would not maintain the admission of the confession if the irregularities were marred by human rights violations. In all the circumstances stated above, the Court would then make a value judgment based on its decision on the confession and other relevant evidence. Thus, while the admission of the confessions was seen as a condonation of the excesses of the police, it was also taken to be a mode of ensuring that confessions with a high probative value are admitted, to enable the Court to arrive at a value judgment. The Courts seem to admit improperly obtained confessions if the probative value of the evidence is not impaired by the unlawful method used in acquiring such evidence, and if the relevance

123. There is no recent decision of the Supreme Court after *Walugembe*. The most recent decisions where a Court reiterated that the presence of substantive evidence other than the confession is instructive to sustain a conviction, was by the Court of Appeal in *Baigana John Paul v. Uganda* Unreported case 08 of 2010 25 May 2016. All the decisions of the Supreme Court were obtained from http://www.ulii.org/.

of such evidence cannot be affected by the mere fact that it was unlawfully procured.[124]

In the cases discussed involving impropriety in obtaining confessions, the Court states that it admits confessions if they do not occasion an injustice to the accused. A question arises whether it is substantive injustice or procedural injustice. While substantive justice may mean an accused person suffering the consequences of his actions, procedural justice may mean that the outcome of the process would not change, even where a few rules were not followed. The injustice referred to seems to be a procedural injustice, for instance, where the accused is read the contents of the confession before he or she signs it, does not complain about it to the court, and later seeks to manipulate a rule that was not followed because the evidence may be used to incriminate him.

While the Court is trying to arrive at substantive justice, the law enforcement agencies ought to take responsibility to ensure that they follow the procedures to the letter so as to avoid placing the courts in an awkward position. In addition, the courts should be seen to be administering justice in a manner that is fair and consistent. The discretion should be exercised in a way that does not lead to an unfair trial or place the administration of justice into disrepute. It is for this reason that consistency is required to enable parties to have a fair idea of what the outcome of a case may be.

In the author's view, the varying reasons only buttress the effect of using discretion on a case-by-case basis to ensure justice. While discretion is paramount in ensuring that evidence admitted does not operate unfairly against the accused, consistency is also needed in the development of jurisprudence if procedural laws are to be used as handmaidens of justice. It follows, therefore, that a framework needs to be put in place to cater for evidence obtained through improper means to ensure that the accused is protected in deserving cases, and that a court is not seen to be condoning the excesses of the police. The courts should insist that the rules of practice for recording confessions are followed to the letter, such that consistency is developed.

The author proposes a framework which requires the courts to embrace the use of both procedural and substantive rules to arrive at substantive justice. While this is a diversion from Namulobi, Nashaba, and Mweru, where the Court disregarded procedural aspects in favour of substantive justice, it still leads one to the desired judgment. The substantive approach requires that a confession is corroborated before it is admitted. Since the evidence that corroborates a confession may be conclusive to sustain a conviction, the perception that procedural rules will lead to substantive injustice is of no consequence.

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124. J.D. HEYDON, EVIDENCE: CASES AND MATERIALS 2ND EDN (1984), at 254; Kuruma, Son of Kaniu v R 1955 AC 197 203.

A dual approach should be used. First, where procedural rules with regard to the recording of a confession are not followed, it should not be admitted. Secondly, the evidence which would have been used to corroborate the confession is used to ensure a conviction. This approach enhances fairness at the trial, and the repute of the judiciary in the administration of justice.

EXAMINING THE CHANGING CORRUPTION CULTURE IN KENYA

Douglas Kimemia*

ABSTRACT

Corruption today in Kenya can be described as a cancer that has reached an advanced stage, spreading through all sectors. Due to its pervasiveness, it has become normalised to the extent that citizens can easily predict both the pattern of graft occurrence and its outcome. Evidence clearly shows that despite numerous attempts at a solution, corruption continues to thrive. This article examines the factors that have fueled corruption in Kenya. Its primary concern involves diagnosing the scope and nature of a problem—corruption in Kenya—and offering solutions to it. The article argues that failure to address corruption, which has been integrated into the national culture, will continue to undermine any hopes of gaining ground against this cancer.

I. INTRODUCTION

There is no doubt that Kenya has made huge progress since it gained independence more than five decades ago. According to the World Bank report of 2016, the country has witnessed economic progress in the last several years, recording a very impressive average growth rate of above five percent coupled with projections of more than six percent growth in the upcoming years.[1] Kenya's economic performance has remained robust and is one of the top five economies in Sub-Saharan Africa.[2] Despite several terrorist attacks by *the Al Shabab* and instances of election violence in 2007, the country has remained stable, showing increased political participation and civic engagement. Even though the young democracy remains fragile, Kenyans have seen smooth regime transition and the promulgation of a new constitution in 2010. While Kenya has made commendable progress as a developing country, it faces myriad constraints slowing economic progress, national security, and political stability. Corruption has permeated almost every facet of the society, holding the country back

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1. World Bank, Kenya Economic Update: Economic Growth Continues Despite Challenging Global Environment, October, 2016. Retrieved from <http://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-economic-growth-continues-despite-challenging-global-environment.

2. *Id.*

from achieving its full economic potential, in contrast with nations such as South Korea and Botswana.

Corruption today in Kenya can be described as a cancer that has reached an advanced stage, spreading through all sectors. Most Kenyans have experience with corruption either through personal encounters, stories from relatives and friends, or through information gained from media reports.[3]

Based on the prevalence of corruption in Kenya, many people have benefitted from the vice for their employment, wealth, and faster services. Numerous media reports show that some Kenyans have been denied opportunities that they fully deserve; they have seen their loved ones die due to corruption in the medical sector; some have lost money and properties due to corruption, while others have been denied justice due to corruption in the justice system.

Corruption has also shaken security of the nation at its core, as evidenced by the well-orchestrated attacks of *Al Shabab* who have gained access to the country by bribing their way across the Kenya-Somali border. In 2015, President Uhuru Kenyatta declared corruption a national security threat and ordered companies to sign an approved code of conduct to transact business with the government.[4] This declaration came on the heels of several grand, and very public, corruption scandals such as the National Youth Services loss of KSH. 791 million (US $7.9 million) by senior government officials.[5] This instance in particular made quite a splash with the media and attracted both local and international attention.

Despite the many promises by the government to deal with corruption, evidence shows that the vice has not declined over the last decade, nor has the people's perception of corruption positively changed. Due to its prevalence, it has become normalised to the extent that citizens can easily predict both the pattern of graft occurrence and its outcome. The trend is clear: billions of shillings go missing in the public sector, suspects are named and, after much public pressure, these public officials are briefly arrested or step aside only to be later released before the case goes cold for years.

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3. Ethics and Anti-Corruption Commission (EACC), Corruption and Ethics Survey Report, 2014 (2015), retrieved from <http://www.eacc.go.ke/docs/Corruption-Ethics-Survey.pdf>.

4. PSCU, President Uhuru Kenyatta declares corruption a national security threat (2015), retrieved from <https://www.standardmedia.co.ke/article/2000183336/president-uhuru-kenyatta-declares-corruption-a-national-security-threat>.

5. M. Peaceloise, Fraudsters stole Sh791 million from National Youth Service, says Devolution Cabinet Secretary Anne Waiguru (2016), retrieved from <https://www.standardmedia.co.ke/article/2000176045/fraudsters-stole-sh791-million-from-national-youth-service-says-devolution-cabinet-secretary-anne-waiguru>.

In 2010, five principal secretaries who had been implicated in acts of corruption were suspended. However, even before the investigations were concluded, a few of these people had already been reappointed to their respective ministries or moved to other ministries.[6] In early 2015, several cabinet ministers stepped aside for investigation after they were accused of using their respective public offices for private gain. However, those cases against the implicated officials have either been dismissed or not prosecuted, even after the anti-corruption agency found glaring evidence of their involvement in corruption-related activities.

Although corrupt activities have been on the rise, the three administrations of Arap Moi, Mwai Kibaki, and Kenyatta have attempted to establish legal and institutional frameworks to address corruption and unethical practices, especially in the public sector. For instance, in the 1990s, the Moi administration established an anti-corruption agency referred to as the Kenya Anti-Corruption Commission (KACC), which was mandated to investigate corrupt conduct and activities and to institute civil cases in court for compensation or recovery of public property, among other functions.[7]

The Ethics and Anti-Corruption Commission (EACC) replaced the KACC in 2010 as per article 79 of the Constitution of Kenya. It was established as a public body under section 3 (1) of the Ethics and Anti-Corruption Commission Act of 2011 as part of anti-corruption initiatives mandated to combat and prevent corruption. Kibaki's administration implemented adequate legislation and agencies aimed at fighting corruption, which were geared towards regulatory and institutional frameworks. President Kenyatta has continued to provide funding, with lawmakers recently approving an increased budget for the EACC. However, there has been a clear gap or a disconnect between the executive's actions and the cries of the public against corrupt leaders, brought on by an unwillingness on the part of top public officials to act against those implicated in acts of corruption.

While corruption remains one of the most discussed issues in Kenya today and Africa generally, Kenyans are not impressed by the current anti-corruption initiatives. A large amount of public funds has been spent on developing new legislation at the national level without much success. Majority of Kenyans have expressed their discontent of the state's efforts. The state seems oblivious of the spread of corruption. This failure of significant progress can be attributed to structural decay due to the rent-seeking culture that prevails in every sector in Kenya. Therefore, this article examines the factors that have fuelled corruption and the scope and nature of the problem. It finally offers solutions to address the vice. It concludes that anti-corruption efforts

6. J. Adan, Graft: Four PSs on suspension yet to know fate (2010), http://www.standardmedia.co.ke/?articleID=2000009800&pageNo=1

7. Kenya anti-corruption commission. http://www.icac.org.hk/newsl/issue24eng/button1.htm

must seriously focus on the prevailing cultural patterns that promote the vice instead of focusing on political expediency.

II. CONTEXTUAL ANALYSIS

A. Defining corruption

Corruption can take many forms. It is a complex issue with a vast array of determinants and effects that are often context-based and country-specific. Regardless of the many challenges in defining corruption, it can be stated that it is any activity that is illegal, unethical, or dishonest, which is carried out by either public or private citizens for personal gain.[8] This definition attempts to capture corrupt activities that occur in any sector and is an admission that any citizen has the capacity to engage in corruption as a receiver, giver or be complicit as an enabler. In the past, the focus has been on activities carried out by those holding public office and on political personalities, which narrowed the scope of the investigations to public officials while ignoring evidence of corruption occurring in other sectors, especially the private sector and civil society. As a result, many corrupt practices in the private sector were not reported or investigated.

Corruption is not just one single act. It takes a variety of different forms and practices and is carried out among different people in different ways. It involves behaviours such as bribery, kickbacks, nepotism, favouritism, embezzlement of funds, looting, misappropriation, fraud, abuse of office, seizing of public properties, and conflicts of interest. Bribery involves giving of rewards to pervert the judgment of a person in a position of trust. Nepotism is the bestowal of patronage because of ascriptive relationship rather than merit. Misappropriation involves the illegal appropriation of public resources for private use.[9]

The literature clearly suggests that bribery is the most prevalent form of corruption followed by nepotism, embezzlement, and abuse of office. According to a study conducted in 2014 by EACC, 70 percent of the respondents stated that bribery was the most prevalent form of corruption followed by 55 percent who mentioned favouritism and 34 percent who cited abuse of office. Evidence shows that Kenyans pay bribes in order to acquire services such as permits, utilities, access to public schools, hospital services, and to avoid arrest by the police. For example, according to the EACC (2011a) report, 66 percent of the reported cases in Kenya involved low level

8. V. Tanzi, Corruption around the world: Causes, consequences, scope and cures. IMF Staff Papers 45 (1998), 559–94.

9. J.S. Nye, *Corruption and political development: A cost-benefit analysis,* 61 AMERICAN POLITICAL SCIENCE REVIEW (1967), at 419.

personnel such as police and clerks in the public sector.[10] Those who cannot afford bribes are denied goods and services that should be extended to any citizen.

The rampant levels of corruption woven deep into the fabric of the lives of the Kenyan people have debilitating economic, political, and social effects that are experienced by all Kenyans, though most severely by the low-income citizens. Corruption is a major threat to any government as it undermines its legitimacy. It distorts the allocation of public resources and services, which is one of the essential roles of any functioning government. It results in an increased cost and an inequity in the provision of public goods and services. According to the 2012 National Survey on Corruption and Ethics survey conducted by the EACC, most Kenyans mentioned that underdevelopment was the leading effect of corruption, followed by high poverty levels, poor service delivery, low economic growth, oppression of the poor, and increased inequality.[11]

B. Level of Corruption

Evidence clearly shows that public perception of corruption in Kenya is widespread and continues to rise. Graph 1 below, which is based on available data from 1998 to 2014, shows that the Corruption Perception Index (CPI) has not declined in a significant way.[12] Before the end of Moi's administration in 2002, there was a slight drop, but since then, corruption has been on the rise with the highest increase occurring towards the end of Kibaki's administration in 2012. This bump, however, seems to be on the decline since Kenyatta's administration began in 2013. Similar studies confirm a high prevalence of corruption. A national survey carried out on behalf of EACC in 2009 showed that 76.5 percent of the respondents perceived corruption as being rampant, compared to only 10 percent who felt that it was declining.[13] Another EACC study in 2014 reported similar perceptions as 67.8 percent of the respondents said that corruption was widespread, an increase from 64.1 percent in 2012.[14] The evidence

10. ETHICS AND ANTI-CORRUPTION COMMISSION (ECCA), CORRUPTION AND ETHICS SURVEY REPORT 2011 (2012), retrieved from <http://www.eacc.go.ke/docs/Corruption-Ethics-Survey.pdf>.

11. ETHICS AND ANTI-CORRUPTION COMMISSION (ECCA), CORRUPTION AND ETHICS SURVEY REPORT 2012 (2013), retrieved from <http://www.eacc.go.ke/docs/Corruption-Ethics-Survey.pdf>.http://www.eacc.go.ke/docs/National-Survey-Corruption-Ethics-2012.pdf.

12. Transparency International. *Corruption perceptions index report*. Transparency International Secretariat (1998-2014).

13. ETHICS AND ANTI-CORRUPTION COMMISSION (ECCA), CORRUPTION AND ETHICS SURVEY REPORT 2009 (2010), retrieved from <http://www.eacc.go.ke/docs/Corruption-Ethics-Survey.pdf>.

14. ETHICS AND ANTI-CORRUPTION COMMISSION (ECCA), CORRUPTION AND ETHICS SURVEY REPORT 2014 (2015), retrieved from <http://www.eacc.go.ke/docs/Corruption-Ethics-Survey.pdf>.

indicates that corruption is not only prevalent, but has also been on the rise over the years.

There has been continuous exposure carried out by media, civil society members, whistle blowers in both the public and private sectors, and by people who are affected by it. According to a survey conducted by Afrobarometer in 2014/2015, 40.8 percent of respondents mentioned that the level of corruption in Kenya had increased by quite a degree. Of the people surveyed, 23.2 percent reported that it had increased to some extent while only 14.2 percent reported that it had stayed the same. More than 60 percent of the respondents perceived corruption as being on the increase in Kenya.[15]

According to the 2012 EACC report, 56.2 percent of the respondents indicated that corruption was on the increase while 25.5 percent said that it was on the decline.[16] Among the business sector respondents, 46.4 percent indicated that corruption was on the increase while 34 percent thought that it was decreasing. Interestingly, however, 52.5 percent of public officer respondents thought that corruption was decreasing and only 25.6 percent thought it was increasing.[17] This shows a disconnect between the perceptions of the supply and demand sides of corruption. It can also be argued that the public officers, who are mostly on the demanding or receiving end, have normalised and rationalised their practices to the extent that they are no longer perceived as unethical anymore. Another explanation would be that these public officers sought to portray existing anti-corruption efforts by the government as effective in regulating and monitoring their practices. If these officials feel less inclined than in the past to engage in corruption, they probably interpret that to mean that corruption has indeed declined.

Corruption has absolutely spread at the national level, the most common forms being nepotism, embezzlement, bribery, fraud, land grabbing, and abuse of office. According to the 2014 survey, 25.9 percent of respondents reported that they perceived the level of corruption in the county governments as being high; 19.3 percent believed that it was moderate; and 19.5 percent said it was low. However, despite media reports of corruption cases occurring at the county level, 35.2 percent reported that they were not able to guess as to the current level of corruption.[18]

There have been numerous cases of corruption in the recent past in which millions of dollars have been lost through embezzlement, fraud, or looting. There were unsuccessful attempts to impeach several county governors and executives based on embezzlement allegations. Counties such as Meru Central, Nithi, Nyamira, and Thika

15. Afrobarometer. Afrobarometer Data Analysis: Country Selection. R6 2014/2015 (2015), retrieved from http://www.afrobarometer.org/online-data-analysis/analyse-online

16. ECCA, *supra* note 11.

17. Afrobarometer, *supra* note 15.

18. ECCA, *supra* note 14.

had the highest incidences of bribery demands as of 2011. For instance, in 2014, the EACC reported allegations of abuse of office by MCAs from Meru County who irregularly awarded themselves construction contracts worth KSH 200 million (US $ 20 million).[19]

Corruption is also persistent at the county level even though county governments have only been in existence since 2013. According to the Afrobarometer survey of 2014/2015, Members of County Assemblies (MCAs) do not fair any differently compared to Members of Parliament (MPs). The survey showed that 50.6 percent of the respondents perceived at least some of the MCAs as being involved in corruption, while 26.5 percent mentioned a belief that in fact most of them were involved. A smaller number (9.7 percent) thought that all of them were corrupt. Likewise, there have been reports of corruption charges involving MCAs.[20] There are multiple audit reports from the Auditor General in which MCAs were irregularly paid a sitting allowance contrary to the guidelines set out by the Salaries and Remuneration Commission.

In addition, there are numerous reports of MCAs engaged in non-essential foreign travel to countries like Israel, India, and Hong Kong to gain extra funds. Unfortunately, these trips do not add any economic value. In comparison to their counterparts at the national level, MPs are in fact worse than the MCAs at the county level. According to the Afrobarometer survey for 2014/2015, less than 10 percent of the population believed either that they were not involved in corruption or did not know.[21] More than 90 percent reported that some or all their MPs were involved in corrupt practices. The most recent report from EACC indicates that MPs have hit an all-time low as they have been lying about mileage costs and holding unnecessary meetings in order to receive sitting allowance.

These widespread practices are not exclusive to the public sector. They have in fact permeated many different sectors. There is enough evidence to support the claim that business executives are perceived as being corrupt just as police officers. According to the Afrobarometer survey of 2014/2015, 41.6 percent of the respondents reported that at least some business executives are corrupt; 29.1 percent thought that most executives were corrupt; and 8.7 percent considered all of them to be corrupt. Only 5.6 percent of the respondents did not perceive executives as being corrupt. This is in comparison to police officers of whom 34.4 percent of the respondents considered all as being corrupt and less than three percent did not think any anyone in the police force was involved in corruption. While religious leaders remain among the ranks of

19. *Id*.
20. Afrobarometer, *supra* note 15.
21. *Id*.

the most trusted citizens, 54.2 percent of the respondents expressed a belief that at least some of them were involved in corruption; 10 percent thought that most of them were involved; and 2.9 percent said that all of them were corrupt. However, 28.2 percent did not think any religious leaders were involved in corruption. These reports confirm that corruption has permeated every sector even those traditionally considered to be incorruptible due to high morals.[22]

Widespread corruption in Kenya is not a matter of a few "bad apples" as it has extended even beyond the public sector to the private and civil society sectors. The continued increase of corrupt activities has created an environment and a culture that encourage unethical practices in any sphere, including civil and religious organisations. Such culture has led many onto a slippery slope where the malfeasances of some have encouraged many Kenyans to engage in corruption without need to justify their behaviour.

As a matter of fact, more than half of the population reported being under some pressure to engage in corruption. Due to this pressure, 38 percent of the respondents of a survey conducted in 2011 reported that they would engage in corruption while seeking employment; 30.9 percent reported a willingness to engage in corruption to obtain government services; 26.4 percent stated willingness to bribe in order to avoid government procedures; and 24.7 percent reported a willingness to pay a bribe if arrested by a police officer.[23] While willingness should not be interpreted as actual engagement, this high number of willing people indicates the extent and normalisation of this vice across the country. This culture has led to a perception of corruption as being necessary to survive or get ahead.

C. Causes of Corruption

While there is glaring evidence of corruption in Kenya, the question then becomes why it continues to thrive in the country and what motivates citizens to engage in the act. People engage in corruption due to numerous reasons which include greed, ignorance, a culture of corruption, a lack of motivation, bureaucracy, lack of institutional measures to fight corruption, a desire for quick services, and fear to report. Human greed can be explained as the selfish desire to acquire personal wealth through unethical means. Greed is not a new phenomenon, as it has existed as long as there have been human beings. Human beings have the propensity to acquire more possessions without a concern of an increase in inequality. The wealthy continue to amass more wealth while

22. *Id.*
23. ECCA, *supra* note 11.

the poor continue to sink deeper into poverty. Greed is not limited to those working in a government setting as it does affect other sectors. Business executives are willing to engage in corruption in order to acquire government tenders.

Greed in Kenya has been demonstrated in various ways. Some in the business sector have demonstrated their large appetite for money by selling fake items on the market, conning unsuspecting customers out of their money with promises of job offers, among other things. The British American Tobacco (BAT) is one of the most recent cases in which there have been reports of bribing of senior public officials to gain an upper hand against competitors to shoot down anti-smoking laws and stop rival firms from winning contracts.[24] In such cases, it is very clear that the focus is not human life or the interests of others but the maximisation of gains.

Police are willing to receive bribes instead of enforcing laws, even in cases where they know that non-enforcement will eventually lead to human fatalities. For instance, it is more likely that bribes will be given and received than for public service vehicles to receive necessary repairs. These vehicles are then used to transport members of the public who may not be aware of the mechanical issues. According to the National Transport and Safety Authority (NTSA), an estimated 3,000 fatal crashes occur annually in Kenya.[25] These are deaths that could be prevented if only the law was properly enforced. However, collusion between the police and vehicle owners and operators makes it difficult to address the problem. Those in civil society have also been accused of registering fictitious organisations to siphon funds from donors. For instance, a director of a non-government organisation was accused of diverting into his persona account donated funds originally intended for a child with a tumor on her head who was scheduled for surgery in Canada.[26] Corporate corruption due to greed and a desire to expand the profit margin has led some corporations to bribe lawmakers in order to receive policy support. When greed becomes the motivator, there is no regard for human life and the rights of the poor people are trodden by the powerful.

The propensity for shortcuts to public services like licenses and permits is another cause of corruption in the country. There are people who feel that waiting in line will delay their receiving of services. The proclivity to want to be the first among

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24. D. Connect, British American Tobacco 'bribed' Kenyan politician Martha Karua to stop action against cigarette smuggling (2015), retrieved from http://www.independent.co.uk/news/uk/crime/british-american-tobacco-bribed-kenyan-politician-martha-karua-to-stop-action-against-cigarette-a6779236.html.

25. V. Muyakane, Over 3000 people died on Kenyan roads in 2015 (2016), retrieved from http://kbctv.co.ke/over-3000-people-died-on-kenyan-roads-in-2015-ntsa/

26. Kenyan President pays travel costs for girl with rare condition to have surgery in Canada, retrieved from https://ca.news.yahoo.com/blogs/good-news/a-kenyan-baby-whos-receiving-treatment-in-canada-170941300.html.

everyone has led many to not consider the implications of their actions. Unfortunately, there are instances where bribing does not lead to faster processing of services. The people giving the bribes clog the process, which slows it down. Only those who can give the most actually get prioritised. This creates an opportunity for those in authority to ask for even more bribes and kickbacks. In the end, the process becomes even more costly and slow than it would have been if corruption was not involved.

The second factor is a need for economic conditions as depicted by Graph 2. The need can be attributed to various causes, such as poor remuneration, poverty, and unemployment. As Rose-Ackerman points out, "if public sector pay is low, corruption is a survival strategy."[27] Also, where government pay scales are not capable of attracting those with specialised skills, a selection bias will operate. These factors make people vulnerable as well as desperate to engage in any activity that will improve their economic status. In such a case, individuals faced with economic pressure are likely to give in even though they don't see themselves as being corrupt. They are likely to rationalise their actions as justified and necessary. Human beings are rational beings and utility maximisers. They are likely to select the alternative that has the highest benefit or maximum satisfaction with less cost. In this case, someone who is unemployed will hardly lose anything by giving in to corruption or unethical practice if that practice will improve his or her economic condition. The person giving the bribe can be taken as a rational actor who is determined to minimise costs while maximising returns. An employee who may be looking for a pay raise or promotion will engage in corruption if he or she thinks that they will be better off at the end of the transaction. Unfortunately, most people that engage in corruption due to need are people who fare poorly economically, people just trying to make a living.

Most people on the demand side of corruption, both in public and private sectors, are among the best paid. These people prey on the poor and desperate Kenyans. The senior public officials committing grand corruption and abuse of office are among the most highly paid in the country and in the region. They also enjoy a lot many other benefits that are funded by public money. However, their huge salaries do not deter them from asking for kickbacks and from siphoning public funds into their personal accounts. Similarly, even street level bureaucrats such as teachers, doctors, nurses, clerks, chiefs, and police do have a regular salary which puts them in the middle class in Kenya where more than 40 percent live below the poverty line. Some senior police officers have hefty salaries compared to other job categories, yet they are the ones promoting corruption within their precincts. These officers and street bureaucrats still

27. S. Rose-Ackerman, Political Corruption and Democracy. Faculty Scholarship Series. Paper 592 (1999), retrieved from <http://digitalcommons.law.yale.edu/fss_papers/592>.

engage in petty corruption, which involves exchange of small amounts of money and minor favours from those seeking their services.[28]

The third factor is institutional failure. There is no doubt that corruption in Kenya is systemic, as it has permeated all sectors. Luiz and Stewart found that delays associated with bureaucracy incentivize people in the private sector to consider corruption as a means to expedite processes and to reduce the costs of such delays.[29] According to Graph 2, some Kenyans engage in corruption so that they can access public services faster.

For almost three decades, Kenyans have been arguing a need for further legislation and control measures, which are strong enough to deter people from engaging in corruption. There is no doubt that corruption in Kenya thrives on systemic failure and a lack of tight control mechanisms as there are numerous laws to deal with it. The danger of weak laws is that they create loopholes exploitable by those in authority. On the other hand, more rules make it more complicated to operate, thus leading to people being further exploited. An increase in rules leads to an increase in red tape that hinders speedier processing of public services.

Graph 2 indicates that people equate institutional failure with bad governance. Due to this failure, those who engage in corruption are not held accountable. Accountability requires answerability and enforcement protocols. Institutional failure in Kenya represents the lack of either of the two. Those who are tasked with holding corrupt people answerable are also themselves the beneficiaries of corruption. Those who are supposed to enforce the laws are simultaneously looking for opportunities to benefit from corruption. Some Kenyans have mentioned that they do not report corruption because they believe that nothing will be done in response. This perception can be attributed to the fact that people lack trust in those tasked with enforcement of the law. This leads, over the years, to increased impunity. There are different agencies and independent commissions mandated by the Kenyan constitution to promote efficiency and effectiveness. Some of these commissions oversee some of the most corrupt agencies such as the police force and judiciary. Even so, corrupt individuals walk freely, enjoying their looted wealth with minimal to no consequences.

The fourth factor is a culture of corruption. This is the least talked about yet has a tremendous impact on all other factors and on the failure of government anti-corruption efforts. Culture here is defined as a way of life for a group of people and is critical in determining how people react to various situations or circumstances. While

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28. P. Langseth, *Measuring corruption,* in MEASURING CORRUPTION (C. Sampford, A. Shacklock, C. Connors & F. Galtung , 2006).

29. J.M. Luiz & C. Stewart, *Corruption, South African multinational enterprises and institutions in Africa*. 124 JOURNAL OF BUSINESS ETHICS (2014), 383–398.

existing within a culture, people are programmed to act in a certain way.[30] Members internalise patterns of behaviour and justify their behaviours based on these patterns. When corrupt activities are internalised it is easy to justify a bribe as a necessary appreciation or gift to a deserving official.

A perception that the majority engages in corruption makes it much easier for someone to justify their own corrupt behaviour. Due to the expansive reach of corruption, Kenyans have learnt ways to deal with its demands. As a result, corruption has become an expectation and an integral part of the prevailing culture. Due to "acceptance" of this culture, people have developed norms and communication strategies that regulate this corruption 'industry." Ashfort and Anada argue that corrupt practices have been institutionalised; people are likely to engage in them without conscious thought as to their propriety. As a practice becomes habitual, all the reflexive triggers in the structures are ignored as a way to sustain the action without much thought. As practices become routine, corruption becomes normative, adaptive, and enacted without much thought.[31]

While culture is dynamic rather than static, it requires time in order to change. To change the prevailing culture that promotes corruption, one has to fundamentally change how people think and operate in Kenya. In Kenya, it can be said that one is "born in corruption, lives in corruption, and dies in corruption." Kenyans have either had to pay a bribe in order to access health care services, or they have had to attend a private clinic to receive health care because of a lack of access in public hospitals. In addition, staff paid to do a job may not be at work as they may be engaged at their own private clinics.

The values passed down through society to children at an early age show them that corruption is normal and is the only way to survive. The emphasised values and norms within a nation determine how its citizens perceive reality. Unfortunately, in Kenya, the wealthy gain respect and are awarded more honours regardless of the source of their wealth. Wealthy individuals are viewed as more hardworking and smarter people who should be rewarded by society for their efforts. The wealthy are invited for fundraisers in religious organisations and to other functions. They donate generously the looted money without any reservation on how it was acquired. In a way, these wealthy people feel justified in their actions as they share their wealth with their communities.

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30. G. HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS. 2ND EDN. (2001).

31. B.E. Ashforth & V. Anand, *the Normalization of Corruption in Organizations*, 25 RESEARCH IN ORGANIZATIONAL BEHAVIOR (2003), 1-52

In other cases, wealthy people are rewarded with political offices where they gain access to opportunities to loot more money. They exploit the ignorance of others who may lack access to information on how these wealthy people acquire money. The looted money ends up in churches, religious organisations, community-based organisations, funding campaigns, as handouts in exchange for loyalty, and as support for politicians and dirty businesses.

Corruption in Kenya thrives because of the coupling together of each of those factors. When all these factors are at play, there is an unprecedented resistance that requires the whole country to join hands; this means both those who are supposed to enforce the law and those who are supposed to adhere it. Lack of empowerment among the people also helps corruption a to thrive. There are individuals who engage in corruption because they do not have information, training, and education about the consequences of corrupt behaviours. They are ignorant even of how and where to report cases of corruption. This makes it easier for those in positions of authority to continue to exploit local people.

D. Challenges to Current Anti-Corruption Efforts

The above factors explain the causes of corruption but also highlight its complexity and why it thrives in Kenya. In light of its complexity, the simplistic approach to anti-corruption strategies is incapable of dealing with such an unprecedented problem. The EACC has been viewed as the main bulwark to deal with all manner of corruption in Kenya. Due to increased incidents, it is likely to ignore petty corruption and go after the big fish. Unfortunately, securing prison time for the "big fish" is almost impossible, which makes the agency appear as ineffective. The EACC should not be perceived as the panacea to cure all forms of corruption, even occurrences in the private sector.

There is no doubt that the establishment of an anti-corruption agency is one of the efforts to deal with corrupt practices especially in the public sector. Unfortunately, this agency has little or no major results to show as corruption continues to threaten Kenya's stability and progress. For instance, in a 2013/2014 report, only 68 investigation reports were forwarded for prosecution, which was an increase from 55 reports in the previous year.[32] This agency has been overwhelmed by the sheer amount of corruption occurring in every corner of the country. It has received little to no political support especially from the lawmakers, who consistently threaten it with defunding whenever it demands higher accountability among their ranks. The agency has had leadership crises and at times has even seen some of its senior officials accused

32. Ethics and Anti-Corruption Commission (2015). Corruption and Ethics Survey Report, 2014. http://www.eacc.go.ke/docs/Corruption-Ethics-Survey.pdf

of engaging in the very corruption they have been tasked with catching. Public perceptions of its efforts to positively impact the decline of corruption have remained at their lowest.

Not only have these efforts resulted in too insignificant a decline, there has been increased skepticism and pessimism among Kenyans as to the government's ability to deal with corruption. According to the Global Corruption Barometer Index (GCB), distrustful respondents within the populace increased from 57 percent in 2006 to 62 percent in 2009.[33] If anything, most Kenyans believe that corruption has been on the increase and that the government is not doing enough to address the issue. Corruption has become ingrained in the Kenyan culture, which has perpetuated it. This culture has created a breeding ground that has provided the necessary components for the spread of corruption.

Corruption in Kenya has assumed an economic, political, and social (ethnic and cultural) aspect, making it difficult to find solutions. Due to the lack of a magic bullet and a weak agency, the majority of people are of the opinion that firing government officials and a few cabinet ministers involved in corruption and appointing others to operate in the same organisational culture does not deal with corruption as a systemic issue. The approach of demanding for resignations can only be effective if corruption was already contained within a few pockets, which is not the case in Kenya.

The huge challenge facing Kenya is that the beneficiaries of corruption are the same tasked with reforming the public sector. Government appointees are part of the larger culture that is ingrained and internalised in the minds of most Kenyans. It is ironic then that these same people are the ones mandated to address the problem of corruption. There are zero chances of changing the culture if we rely on individuals programmed to believe that corruption is a way of survival.

Ethnic diversity in Kenya has worked negatively in the anti-corruption efforts. Any effort to demand accountability from those in the government has always resulted in an ethnic division, sometimes with huge political costs. Kenyans are whipped into a righteous fury when members of other people from other communities are accused of corruption. Conversely when people associated with their own community are implicated, the tendency is to retreat into an ethnic cocoon. They are not only defended but are even applauded and praised for their ingenuity. They become community heroes, admired for their stolen money. They can extend their influence and finally buy themselves a public office by engaging in electoral corruption. They use their wealth to create a strong hedge around themselves, with people who come to their rescue and mobilise the community whenever they are called upon to account for their actions.

33. Transparency International (2011). Global Corruption Barometer 2010/11. http://www.transparency.org/gcb201011/results

This shows the incongruity among Kenyans when politics of ethnicity and politics of corruption collide. This ethnic defense creates a group of "sacred" people who cannot be held accountable as they use corruption for their personal gain.

Another huge complication is that corruption is political. Corruption is exchanged for political support. Most corrupt people possess vast political influence, which poses unprecedented political risks for anyone willing to take a stand against corruption. These powerful corrupt people are well-entrenched in the ruling class and have well-connected political machinery. They are well-protected by those in authority in return for electoral support. Due to their wealth, these people are likely to have an easy time in mobilising their communities around a particular campaign. Any hesitancy in dealing with this group of people stems from fear of losing political support. Political parties are the primary victims as they are forced to accommodate group members into their leadership in exchange of political support. This struggle remains a zero sum game as politicians accused of corruption shift from one political party to the other threatening their accusers. Political parties place the politics of winning the presidency above the fight against corruption. Any administration that comes into power is composed of these corrupt individuals. The reality is that no amount of power will sanitise the country's politics without accountability.

E. Recommendations to Combat Corruption

The anti-corruption fight is costly and painful. Sustainable struggle and ultimate success require time and structural change across an entire culture that has been numbed by corruption. It requires changing people's perceptions and culture. Efforts to deal with corruption in Kenya can only succeed if the focus is on everybody and by everybody as opposed to only those in government or a few individuals. Corruption should be stigmatised as evil rather than put forward as a glorified way to acquire wealth with less effort. Those seeking or providing any form of corrupt service should be put on a "list of shame" available for perusal by any interested party. This will deter other people who would have wished to engage in the vice, thereby reducing cases of corruption. Corruption must be treated as a crime, one that deserves public condemnation and lengthy prison time. The guilty should be placed on the list of shame, jailed, and barred from holding any public office.

This war should involve all organisations at all levels. Religion which influences morals in a society should set a stage for this war. Those in religious organisations should start questioning the provenance of the huge amounts of money donated during their fundraising events. This will send a signal that religious institutions do not condone corruption and will enhance efforts to curb the vice.

Likewise, communities should only vote for people who are not considered corrupt. Denying the corrupt any form of support will deter other people inclined to first engage in corruption and then seek shelter within their own communities.

Professional bodies have been complicit in dealing with their members who engage in corruption. Lawyers are considered one of the most untrustworthy groups of professionals because of the pervasiveness of unethical practices such as theft from clients and bribery. Engineers, architects, and surveyors have been known to collude with contractors in the fight to be awarded tenders to build roads or other public projects. This collusion leads to poor quality work which only lasts for a short time and to loss of large amounts of public funds and in some cases to loss of life. Medical professionals have opted to open their own private clinics that are equipped with equipment and drugs stolen from public hospitals. These professional bodies should be able to constrain their members by deregistering them where possible, denying them licenses and reporting them to the authorities.

The private, or business, sector has a stake in ensuring that corruption is dealt with completely. Some business owners miss opportunities and potential revenue when their employees engage in corrupt practices. In this case, an employer who is complicit with corrupt employees should also be held liable for promoting corruption. Employees who give or receive bribes or engage in other corrupt practices should be dealt with individually. But if it is found that employers too did promote a corrupt organisational culture, then they should also bear some costs. Any bank in Kenya that receives looted funds and fails to report to the authority should be held liable and receive the toughest penalty possible. There should be public protests against businesses promoting, aiding, abetting or participating in corrupt activities in the country. Citizens should avoid those businesses and only deal with those that are willing to uphold a culture of integrity.

The government should continue to use the traditional methods of regulating and monitoring corruption using available instruments. The inducement approach assumes that individuals are utility maximisers, only motivated by coercion or manipulation with money and other tangible payoffs. Therefore, individuals will not stop engaging in corruption unless a stick is used or a carrot is dangled before them. The stick, or sanctions in this case, should have a huge penalty that will deter anyone who thinks of engaging in corruption. In addition to doing jail time, the penalty should double the amount of stolen money to be refunded or cost incurred by engaging in corrupt costs. Both the opportunity and financial costs should be considered in cases where an individual is found guilty. A higher penalty should apply to all those involved whether partially, fully, or even by association.

If one engages in any corrupt practice in any capacity, one should be found liable. Those found liable of engaging in any kind of corrupt practices should from that

point on be ineligible to hold any public office, even in the civil society. Presently, guilty parties have opportunities to bribe their way into senior public offices without any consequences.

The agencies mandated to investigate and prosecute offenders should do much more than is currently being done. They should take a proactive approach that requires performing randomised audits across all government agencies. In fact, every county should have its own agency or office in charge of prosecuting corruption cases. Each county office should operate independently, granted with powers that allow it to focus in other sectors such as the local business sector. These offices should coordinate with the EACC. Their role should not only be the identification of rogue officials but also the promotion of those who are engaging in and encouraging best practices. In each county, people of integrity should be selected as ambassadors, mandated to promote best practices. Although these are not government employees, they should have access to public records as needed. While their duty is not specifically investigation, they can act as whistleblowers. It is likely that the public will feel more comfortable reporting to these individuals. Such people should be well-trained in the art of decision-making. The public should also feel free to approach them and report anything that they think may not be working well within their county or any other governmental level.

The EACC should invest in capacity tools. Evidence shows that some people engage in corruption because they do not have full complete access to information and are taken advantage of by corrupt officials. Other people fail to report corrupt activities because they do not know how to do it and where to seek help. In response, the EACC should increase public awareness and community sensitisation on corrupt practices. The EACC should educate citizens on the consequences of corrupt practices and how that may affect their overall performance. Citizens should know their rights and be aware of the responsibility of the government in protecting those rights. If the proper training and education is provided to employees, employers, and individual citizens, they can make informed decisions to do the right thing. More avenues should be created by which one may challenge corrupt individuals within the society, regardless of their ethnic background.

As part of capacity building, it is worth targeting young minds before the prevailing culture corrupts them. In collaboration with the Ministries of Education and that for Youth, ethics and best practices should be integrated into the education curriculum. The media should continue to provide ample training and should shine a spotlight on cases as they happen. In terms of the incentives, the media can encourage NGOs to use their networks as platforms to publicise their trainings on best practices. It would be an ideal situation if media outlets would make more transparent the procurement and tendering process. Why not include media or an outside agency in the

process? This could ensure that all details are made transparent and that the contract is awarded to the most competitive bidder. The final data should be available through the open data system for public access. In such a situation, the Kenyan people will be able to question anything they may consider unseemly. It would take someone with a lot of courage to attempt to fool the public while all are watching.

The creation of an account of all recovered funds and properties in each county would be a powerful symbol. For instance, in 2016, the EACC reported that more than KSH 3 billion of corruptly acquired money and property had either been frozen or recovered.[34] While this is a good public announcement, it would have greater impact if such funds were invested directly in county projects. The national government should reward the county recovering the most funds and the most improved with fewer instances of corruption.

The above suggestions should not be taken as the magic bullet but are certainly worth considering if the prevailing culture is to change. The government needs to publish a well thought out strategic plan than can be implemented by any administration in power. Firing a few senior public officials may be politically expedient but will have no impact on changing the prevailing culture.

III. CONCLUSION

Although Kenya has made huge economic and political progress, corruption remains an enormous challenge to any future progress and to the current fragile stability prevailing in the country. Evidence indicates that corruption has spread widely and has been normalised in Kenya. Corrupt practices have been ingrained in the country's culture and become a survival strategy. Normalising and routinising corruption has made it difficult to deal with it effectively. This culture has not only tolerated corruption but has increased pressure among the people to engage in corrupt practices. Even so, little is being done to address its real causes.

There are four main categories to the factors that can be attributed to the increasing levels of corruption in Kenya. Greed remains the major cause, followed by need due to poverty and unemployment. Although most of the focus has been on institutional failure, the influence of culture has been largely ignored as the main factor that has incubated the other causes of corruption.

Turning the prevailing culture from one of corruption to one of integrity will "take a village" or collective responsibility and a great deal of time. Achieving these

34. Ethics and Anticorruption Commission. Report of Activities and Financial Statements for the Financial Year 2015/2016 for The Ethics and Anti-Corruption Commission (EACC). http://www.eacc.go.ke/Docs/AnnualReports/EACC_2015-2016-Annual-Report.pdf

changes requires a shift in the perceptions of the masses. This calls for a comprehensive approach that is both proactive and reactive. Corruption should be stigmatised as evil rather than be seen as a way to acquire wealth without effort. Kenyans must be sensitised about the dangers of both economic and political corruption. They should be empowered to engage in grassroots monitoring while also being encouraged to shame those who are engaging in corruption. If this war is waged from the bottom up, it will likely be more sustainable and effective.

Any anti-corruption strategies must address cultural change which determines the behavior of most Kenyan people. These proposed strategies aim to deter any potential corruption but also to deal with those caught in engaging in corrupt practices. At the end of the day, however, these strategies must begin and end up with Kenyans themselves. Any strategy that ignores input from the public will not be sustainable.

Finally, the Kenyan government must prove to its citizens that it's serious in its anti-corruption efforts. The government must form a bond of trust with the people as opposed to paying lip service. This can only happen if the administration in power is willing to bear the political costs that may include a backlash from those affected.