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Foreword

The Covid-19 pandemic has affected all aspects of life in the same measure. Lives have been lost. Markets are in jeopardy. Education is on its knees. The only thing that Covid-19 could not cripple are the avenues for public expression. As long as the avenues still exist, we can continue debating a whole range of issues related to justice and human rights. The Human Rights and Peace centre (HURIPEC) is privileged once again to facilitate debate on diverse issues affecting rights.

Jimmy Spire Ssentongo, Monica Aciru, Tom Ogwang and Stephan Parmentier delve into the debate on the nexus between modernist and community conflict resolution mechanisms in the Acholi land. Identifying intersections and the existing tributaries of these two differing systems can help in most areas where conflict is a regular occurrence.

Oscar Kamusiime Mwebesa highlights the fate of businesses in the face of the responsibility to pay taxes. The discussion takes you through a tripartite relationship between the courts on one hand and the revenue body and business on the other. The issue of refugee rights is also put on the forefront by Ruth Muhawe who discusses the violations that ensue when refugees are forced to create a digital footprint as a survival mechanism.

Most interestingly for this issue, three papers take us through domestic issues that have always been and continue to cause contention among several families. Kabazzi Maurice Lwanga assesses the gender implications of a case in which a widow, and not a mother, is granted powers to determine the burial ground of her husband and the traditional devaluation of women that stems from patriarchy after the death of a husband/son.

Hadijah Namyalo-Ganafa and Grancia Mugalula interestingly discuss the violation of rights surrounding women inheritance of marital homes after the death of a husband. Finally, the paper by Caroline Adoch makes an inquiry into the law on rape in Uganda especially considering that such cases have been on the rise during the Covid period. She explores the experiences of women who seek to report and prosecute cases of rape by a spouse and elaborates the daunting task of successfully prosecuting cases of such nature. I hope you enjoy the issue.

Zahara Nampewo
Managing Editor

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AN IMPOSSIBLE QUEST FOR JUSTICE: AN INQUIRY INTO THE PROSECUTION OF MARITAL RAPE IN UGANDA

Caroline Adoch*

ABSTRACT

Rape is the most commonly reported crime in Uganda. Studies show that rape by a spouse or a domestic partner is a common experience for women in Uganda. However, cases of rape by a spouse are rarely reported to the police and a review of decided cases shows that there have been no reported prosecutions of marital rape since the passage of the Domestic Violence Act, 2010. Against this backdrop, this article makes an inquiry into the law on marital rape in Uganda and explores the experiences of women who seek to report and prosecute cases of rape by a spouse. It highlights the distinction in the legal framework on rape and rape by a spouse. It concludes that it is difficult to prosecute cases of marital rape because the law on marital rape is unclear. Further, rape by a spouse rape is normalized and not perceived as a form of violence. When women make attempts to report, the police do not take their cases seriously. Instead, they are blamed and victimized by the community and are often left without a legal remedy.

I. INTRODUCTION

Rape as a form of violence, affects both men and women. Historically, rape was a considered a gendered crime that could only be committed by a man against a woman. However, international human rights standards have expanded the scope of rape provisions to cover all persons. It is however, undeniable that world over, rape affects disproportionately more women than men.[1] In Uganda, it is estimated that rape is the first sexual experience of up to a quarter of Ugandan women and 51 percent of partnered women aged between 15-49 years will experience intimate partner and sexual

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* LLD Candidate, Makerere University School of Law. Email: <caroline.adoch@mak.ac.ug>. This article is an extract from my LLD Dissertation titled, 'Access to Justice in Uganda: A Feminist Analysis of the Experiences of Rape Victims in the Reporting and Prosecution Processes', due to be submitted to Makerere University School of Law.

1. CEDAW., General Recommendation No. 19, para 6. Retrieved from https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm accessed on 10th October 2021.

violence in their lifetime.[2] According to the Annual crime reports released by the Uganda Police each year, rape constitutes the highest percentage of reported cases, these reports do not document any cases of rape by a spouse.[3] Further, although spousal rape is criminalized as an act of violence under the Domestic Violence Act, a review of decided cases shows that there have hardly been any prosecutions of marital rape as an act of domestic violence.

This article explores the law on marital rape or rape by a spouse in Uganda as well as the experiences of women who seek to prosecute cases of marital rape. It argues that there are almost no prosecuted cases of marital rape because women who experience spousal rape face several difficulties that make it impossible for these cases to proceed through the criminal justice system. Broadly, these challenges are at least two-fold; the legal framework on marital rape is vague; the lack of clarity in conceptualization of the crime of marital rape makes it difficult for victims to situate their experiences within the law, and the normalization of marital rape means that it is particularly difficult for women to report and have their cases of rape by a spouse taken seriously by the police.

II. THE LAW ON MARITAL RAPE

A. The International Legal Framework on Marital Rape

Despite progress on gender-based violence at the international and regional level, marital rape remains a problem globally.[4] Various international human rights instruments contain a prohibition on violence against women which is defined along the lines of, "…including physical, sexual and psychological violence, which occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman."[5]

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2. *See,* UGANDA BUREAU OF STATISTICS (UBOS), UGANDA DEMOGRAPHIC AND HEALTH SURVEY REPORT (2000); UGANDA BUREAU OF STATISTICS, UGANDA DEMOGRAPHIC AND HEALTH SURVEY (2011); and UN WOMEN, GLOBAL DATABASE ON VIOLENCE AGAINST WOMEN, retrieved from https://evaw-global-database.unwomen.org/en.

3. See for instance, UGANDA POLICE, POLICE ANNUAL CRIME REPORTS 2011-2018.

4. F. Banda, *If You Buy a Cup, Why Would You Not Use It?" Marital Rape: The Acceptable Face of Gender Based Violence*, AJIL UNBOUND,109, 321-325 (2015). retrieved from file:///C:/Users/cadoch/Downloads/if-you-buy-a-cup-why-would-you-not-use-it-marital-rape-the-acceptable-face-of-gender-based-violence.pdf (accessed on 9 October 2021).

5. See for instance, UN DEVAW, CEDAW/C/GC/19 and 35.

At the regional level, the Inter-American Commission on Human Rights asserts that under all circumstances rape is a crime against society and has to be prosecuted by the state as a crime even when the victim forgives the perpetrator.[6] In Europe, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence was adopted in 2010 and the European Parliament has urged that Member States must, "…recognize sexual violence and rape against women, including within marriage and intimate informal relationships and/or where committed by male relatives, as a crime in cases where the victim did not give consent, and to ensure that such offences result in automatic prosecution and reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women.

At the African level, the Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights (Maputo Protocol) defines violence against women as including "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts in private or public life." Article 4 of the Protocol obliges States part to enact and enforce laws to prohibit forced sex in public and private life. The African Commission on Human and Peoples' Rights has noted that, "Sex-related violence against women is widespread in almost all African countries, including rape, incest, violence by a partner in the intimate space, including marital rape."[7] The Commission has also acknowledged the multi-faceted harm that sexual violence causes specifically to women's reproductive freedom.[8]

Article 2(a) of the UN DEVAW defines violence against women as including marital rape while CEDAW General Comment 35 calls upon states to ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances.[9] According to the UN Special Rapporteur on Violence against Women, the first step to prevent acts of violence against women is to enact legislation imposing criminal sanctions as well as those that provide for civil remedies including protection/restraining and/or

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6. EQUALITY NOW, RAPE AS A GRAVE AND SYSTEMATIC HUMAN RIGHTS VIOLATION AND GENDER-BASED VIOLENCE AGAINST: WOMEN EXPERT GROUP MEETING REPORT, 27 MAY 2020. Retrieved from https://www.ohchr.org/Documents/Issues/Women/SR/Call_on_Rape/EGM_EN-SR_Report.pdf (accessed on 16 October 2021).

7. General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

8. *Id.*

9. CEDAW/C/GC/35, para 33.

expulsion orders.[10] The UN Model Framework for Legislation on Violence Against Women requires states to criminalize sexual assault within a relationship (i.e., "marital rape"), either by: providing that sexual assault provisions apply "irrespective of the nature of the relationship" between the perpetrator and complainant; or stating that "no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation.[11] CEDAW imposes a further obligation on States Parties to exercise due diligence in the prevention, investigation, prosecution of and compensation for acts of Violence Against Women (VAW).[12]

There is, therefore, an international obligation to criminalize rape –including rape in a marital context– commonly referred to as spousal rape.[13] However, these international standards have not been fully incorporated at the national level and state practice remains varied. Research shows that by 2019, almost half of all Commonwealth countries require legislative reform to remove the marital rape exception in order to establish a statutory definition of rape that complies with international and regional standards.[14]

B. The National Legal Framework on Marital Rape

In Uganda, the crime of rape is provided for under section 123 of the Penal Code, Cap 120 which states that,

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10. E. YARKIN, THE DUE DILIGENCE STANDARD AS A TOOL FOR THE ELIMINATION OF VIOLENCE AGAINST WOMEN (Special Rapporteur on Violence Against Women). OHCHR. U.N. Doc. E/CN.4/2006/61 (2006) [hereinafter Due Diligence Standard], para. 35.

11. Under the model legislation, the term 'sexual assault' is recommended as an all-inclusive term for violation of bodily integrity and sexual autonomy and is to be used in place of "rape" and "indecent assault." *See*, UNITED NATIONS, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN (2009). Retrieved from https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf (accessed on 19 October 2021).

12. The Declaration on the Elimination of Violence against Women (1993) in Article 4(c), urges States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."

13. http://datatopics.worldbank.org/sdgatlas/archive/2017/SDG-05-gender-equality.html (accessed on 24 January 2019).

14. SISTERS FOR CHANGE, THE CRIMINALIZATION OF MARITAL RAPE AND INTIMATE PARTNER SEXUAL VIOLENCE ACROSS THE COMMONWEALTH (2019). Retrieved from https://www.sistersforchange.org.uk/wp-content/uploads/2020/08/719_SistersForChange_EJA_CriminalisationofMaritalRapeIPSV_CW_Nov2019_corrected.pdf (accessed on 16 October 2021).

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape.

This provision does not contain any distinction between rape by a spouse and stranger perpetrated rape. This position is supported by a number of High Court decisions where the High Court of Uganda had opportunity to consider rape in a matrimonial context. In *Uganda v Yiga Hamidu and Others,* on a charge of rape, the accused raised the marital rape exemption in his defense. The Court disagreed with him and noted,

> Section 117 of the Penal Code Act (now section 123 of the Penal Code Act) does not make any exception to a married person. It is a common law presumption that a man cannot rape his wife because consent is always presumed on the part of the wife. Some jurisdictions such as many states in the USA have expressly constituted the offence of marital rape to expressly negative the antiquated presumption of consent during the subsistence of marriage. It clearly appears to me that the existence of a valid marriage between an accused and complainant or an honest belief that a valid marriage between the two does/can no longer constitute a good defense against a charge of rape after the promulgation of the Constitution of the Republic of Uganda. The presumption of consent, even where a man and woman are validly married, in my humble view, appear to be wiped out by the provisions of the Constitution which I have referred to. Husband and wife enjoy equal rights in marriage. They enjoy equal human dignity. No activity on the part of any of the two which is an affront to those rights in relation to the other, can be sustained by a court of law.[15]

Similarly, in *Uganda v Byarugabo Erikando*[16] where the accused kidnapped and raped his estranged wife, the court noted that, the victim had the right to refuse intercourse with her husband because, "…Women have full rights to their bodies and have the choice as to when and with whom they may want to have sexual intercourse."

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15. *Uganda v Yiga Hamidu and Others,* Criminal Session Case No. 005 of 2002.
16. *Criminal Session Case No.361/2013.*

From these decisions, there doesn't seem to be any difference between rape and rape in a marital context. In essence, elements of marital rape are the same as that of stranger rape, the only exception being that the former occurs in the context of a domestic relationship. Pertinent to note that in these cases, the accused persons were charged with rape under Section 123 and the existence of a marriage and thus the marital rape exemption was raised as a defense. Further in both cases the existence of subsisting marital relations were contested.

In 2010, Uganda adopted the Domestic Violence Act, 2010. Section 2 of the Act defines sexual abuse as an act of domestic violence and it constitutes, "… any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of another person."[17] The provision was lauded and welcomed as an embodying an overt criminalization of spousal rape. However, more than a decade since the passage of the Act, there have no successful prosecutions of spousal rape brought under this provision. This perhaps explains why a clause seeking to explicitly criminalize marital rape was included in the Sexual offences Bill 2019 as discussed below.

C. Distinction between the Crime of Rape and Rape in a Marital Context: The Common Law Fiction of Irrevocable Consent

The distinction between rape and rape by a spouse emanates from the wholesale adoption of the English Common Law in Uganda. At common law, rape was a gendered offence. It could only be committed by a man against a woman. The common law created a clear distinction between rape and rape by a husband. The was based on the so called, 'marital rape exemption.'

The crime of rape turns on the question of consent. In essence, consent is the transformative element between legitimate sex and criminal sexual intercourse between adult males and females. The common law distinction between rape and rape by a spouse was based on a what is now commonly termed as, "fallacy of irrevocable consent." This was the absolute right of the husband to conjugal rights, and the irrevocable consent of the wife to sexual intercourse in the matrimonial contract.[18] This was aptly articulated by Sir Matthew Hale in his *History of the Pleas of the Crown* wrote (1 Hale PC (1736) 629): *But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the*

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17. Section 2, Domestic Violence Act 2010.

18. Banda, *supra* note 4. See also, *Marital rape: Is it a crime or a conjugal right?* Daily Monitor, retrieved from https://www.monitor.co.ug/specialreports/Marital-rape--Is-it-a-crime-or-a-conjugal-right-/688342-1720960-9b35utz/index.html (accessed on 24January 2019).

wife hath given herself up in this kind unto her husband which she cannot retract.[19] (Emphasis added).

The idea that a woman's consent to a contract of marriage could not be retracted - that it amounted to an irrevocable consent to intercourse- has been decisively disabused. It was misguided on several fronts. First, consent is not a self-defining concept. According to the Webster Dictionary, to consent is to give assent or approval; to agree. *The social act of consent consists of communication with another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform.* To consent is to waive a right and relieve another person of a correlative duty.[20] In an exhaustive judgment the Court of Appeal of Kenya grappled to define and articulate the relevance of consent in cases of rape.

> Consent is both a single concept in law and a multitude of opposing and cross-cutting conceptions of which courts and commentators tend to be only dimly aware… Consent to sex matters because it can transform coitus from being among the most heinous of criminal offenses into sex that is of no concern at all to the criminal law… Consent possesses the normative "magic" to transform sexual intercourse from being conduct that is heinousness into being conduct that is criminally innocuous. Consent matters because to locate consent with respect to sexual intercourse is to locate the normative boundary between criminal rape and non-criminal sex.[21]

Secondly, the law on rape is premised on the right to bodily integrity. Every individual has a right to bodily autonomy. Any physical interference with this autonomy is *prima facie* an assault. A woman's right to self-determination and bodily autonomy is not relational. A marital relationship cannot therefore constitute a blanket consent to sexual relations within the marriage and the existence of a marital relationship does not diminish the harm that rape causes to the victim. Ultimately, there is no difference between spousal and stranger rape because both constitute a violation of the right to bodily autonomy.

With the evolution of the international human rights framework and changes in the socio-economic and political status of women, the marital rape exemption was

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19. R v.R [1991] 4 All ER 481.
20. *R* v. *Park* [1995] 2 S.C.R. 836.
21. *Charles Ndirangu Kibue* v. *R,* Criminal Appeal No. 14 of 2014.

nullified in England in 1992. In its decision, the House of Lords noted that the common law no longer represented even remotely the position of the wife in society. The House of Lords called the marital rape exemption a, "… a common law fiction which has become anachronistic and offensive."

> The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail....[O]ne of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.[22]

The court concluded that, "… the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim." It maybe pertinent to note that the changes to the marital rape exemption at common law evolved gradually. In *R v Clarence* in 1889, the court noted that, "as between married persons, rape is impossible." In 1949 in *R v Clarke*, the courts introduced an exception holding that a husband could be charged with raping his wife where a couple was judicially separated; later in 1954 in *R v Mille*r, this was expanded to include cases where the couple was mutually separated. The change therefore came gradually with a slow whittling down of the marital rape exemption by the Courts.[23]

While the common law has changed, in much of the commonwealth where similar provisions were introduced by the British Colonial government, inspite of development in the international human rights framework and changes in the economic and social status of women, this 'offensive and anachronistic common law fiction' continues to form part of the law and marital rape remains outside the framework of the

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22. *R* v. *R* [1991] 4 All ER 481.
23. Sisters For Change, *supra* note 14.

law in many commonwealth countries- a direct legacy of British colonial rule.[24]

In Uganda, unsuccessful attempts to explicitly criminalize marital rape have been made several times; in 2003, 2009 and most recently in 2019. At present, the closest legal provision with a bearing on sexual violence in a matrimonial context is under the Domestic Violence Act (DVA) 2010.[25] The inclusion of the provision for criminalizing spousal sexual abuse in the Act was highly contested among members of the public, by religious authorities, and later in parliament. The Domestic Violence Act does not use the term "rape." Section 2 of the Act defines sexual abuse as an act of domestic violence and it constitutes, "… any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of another person."[26] It is punishable by a fine or two years of imprisonment. This makes it a much lighter offence than rape under the penal code which is potentially a capital offence. The provision of the Domestic Violence Act do not meet the CEDAW call for the criminalization of marital rape, taking into account consent and coercive circumstances or the guidelines set out by the UN. It is thus grossly inadequate as a framework for prosecuting marital rape.

Further, under the Domestic Violence Act, marital rape can only be prosecuted as an act of sexual abuse. However, strictly speaking, 'sexual abuse' is not the same as rape. In common usage, the expression 'sexual abuse' is a loose all-inclusive term, used to describe all and any unwanted sexual activity, with perpetrators using force, making threats or taking advantage of *victims not able to give consen*t. (italics added).[27] The law has therefore been described as 'nearly marital rape law.'[28]

In practical terms, there is no difference in the experience of rape by a stranger and rape by a spouse except for the fact that spousal rape is likely to occur within the context of an abusive relationship with other forms of abuse and may be repetitive. Rape laws are intended to protect the human right to bodily integrity. Non-consensual sexual intercourse is a violation of this right. According to a victim of marital rape,

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24. The Commonwealth - Countries retaining marital rape exemptions, retrieved from https://home.crin.org/commonwealth-map-marital-rape-exemptions (accessed on 7 July 2021).

25. There have been unsuccessful efforts at various times to enact such a law including a current proposal in the Sexual Offences Bill, 2015.

26. Section 2, Domestic Violence Act 2010.

27. See for instance, the APA definition of sexual abuse, available at https://www.apa.org/topics/sexual-abuse/index.aspx (accessed on 28 December 2018).

28. A. Roberson, *The profitability of ending the marital rape exception: Ugandan societal norms impeding women's right to say no,* 16(2) INTERNATIONAL LAW REVIEW (2020), at 222.

> So what is marital rape like? Anyone can imagine it who has seen a film in which a woman is attacked, beaten and raped in a park, in her own apartment or anywhere else. The thing is: it is exactly the same as any other rape. Someone grabs your hair, slaps your face or hits it with a clenched fist, kicks you in the stomach, or simply holds a knife to your throat . . . The difference between rape in films and marital rape is that we cannot scream, as our child might wake up in the other room. Or that our child is right there, next to us, her or his face distorted with terror. And another difference is that the person who does this to us is someone we used to love, someone we once trusted more than anyone else. And there is another difference, too: that others say that we invented the whole thing. That we tell lies.[29]

For a criminal provision to be meaningful, victims must be able to situate their experiences within the law. Victims must have both a language and a name for the experience to see it as applicable to their own experience.[30] Explicit criminalization is important because it codifies rights and creates a potential source of power for victims to get access to legal remedies when those rights are violated. In this way, the law's power is both symbolic and practical. Criminalization of sexual assault in marriage can and should operate on both levels.[31] The provision of the Domestic Violence Act fails on both counts.

As stated by the Court in *R v R*, "…a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."[32] The relational context within which rape occurs should not be a relevant consideration in defining rape. However, in reality it is. Under the Domestic Violence Act (DVA), rape by a spouse and other forms of sexual abuse within a marriage is treated the same as any other form of domestic violence. While rape is a form of violence, it is not the same as battery. A woman who has been raped would not say she has been battered in the same way as one who has been beaten. The two are different. Once an experience is classified as sexual then it is characterized as private, shameful and personal. Feminist theory opposes the classification of rape as anything other than violence because sexuality in

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29. M. Randall & V. Venkatesh, *The right to no: The crime of marital rape, women's human rights, and international law*, 41(1) BROOKLYN JOURNAL OF INTERNATIONAL LAW (2015), at 161.

30. K. YLLÖ & G. TORRES, MARITAL RAPE, CONSENT, MARRIAGE AND SOCIAL CHANGE IN A GLOBAL CONTEXT. UK: OXFORD UNIVERSITY PRESS.

31. Randall & Venkatesh, *supra* note 29, at 170.

32. [1991] 4 All ER 481.

rape is socially constructed as shameful and or embarrassing.

All offences under the Domestic Violence Act can be tried by a Local Council Court, a Magistrate's Court or Family and Children's Court and are punishable by a fine not exceeding forty-eight currency points or imprisonment for two years (or both).[33] Marital rape is therefore, a less serious offence than rape under the penal code and yet the only difference between marital rape and other forms of rape is the relationship between the perpetrator and the victim. It is pertinent to note that with the exception of rape and defilement, the relationship between the perpetrator and the victim is not a relevant element for any offences against the person.

Referring to marital rape as sexual abuse or anything other than what it is delegitimizes the experiences of victims. In Uganda, it would be difficult for most people to articulate, accept or understand marital rape as an act of domestic violence– something that harms, injures or endangers the health, life and limb– as provided for under the Act. Ordinarily, domestic violence is understood in terms of physical violence. Unclear laws do not protect women. The lack of clarity in the law means that victims cannot locate their experiences within the provision of the law. It also means that law enforcement personnel are unlikely to take appropriate action.[34] The unequal gender inequalities and power relations make it imperative to have a more nuanced and explicit criminalization in the law. Failure to do that is a manifest denial of the right to equal protection of the law. The silence in the law not only creates impunity for men who rape their wives or intimate partners but it legitimizes this particular form of violence against women.[35] Any attempts at criminalization of marital rape require a re-thinking of rape in general. It is therefore not surprising that there have been no reported prosecutions of cases of marital rape under the Domestic Violence Act.

III. THE NORMALIZATION OF MARITAL RAPE

The second challenge in accessing justice for marital rape is the normalization of marital rape: the acceptance that marital rape is an immutable part of married life. This poses several obstacles to the prosecution of marital rape: it means that women may not even recognize that a wrong has been done to them. Secondly, it makes it particularly difficult for women to report and have their cases of spousal rape taken seriously by the

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33. Section 4, Domestic Violence Act 2010.

34. MEURENS N, D'SOUZA, H, *ET AL*. TACKLING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE IN EUROPE: THE ADDED VALUE OF THE ISTANBUL CONVENTION AND REMAINING CHALLENGES. EUROPEAN PARLIAMENT, BRUSSELS (2020).

35. Randall & Venkatesh, *supra* note 29, at 155.

police and there is a high likelihood of victim blaming and secondary victimization where they attempt to make a report.

The best illustration of the normalization of marital rape is in the numerous failed attempts at an explicit criminalization of marital rape in Uganda dating back to the 1970s. The first attempt at criminalization came when the Marriage and Divorce Bill was tabled in the 1970s, and about forty years later it was re- tabled in 2003, as it was again in 2006, 2009 and again in 2013. Clause 114 of the Marriage and Divorce Bill 2009 provided for certain narrow circumstances under which a spouse may deny the other conjugal rights and criminalized non-consensual sex in certain specified grounds. It provided for both civil and criminal liability for non-consensual sex.[36] Laudable as the move was, the Bill had several shortcomings. The proposed punishment for spousal rape was far less than that of rape, and it did not use the term 'rape.'

The Bill also explicitly made consent an element of spousal rape; however, it provided for the grounds upon which consent could be withheld including ill health, surgery or fear of psychological harm. It was therefore premised as an *exception to the exercise of conjugal rights and not in recognition of the right to bodily autonomy*. Sexual intercourse should be consensual sex in all circumstances and a spouse should not need to have a reason to be able to exercise their individual autonomy. The proposed provision was therefore a token 'regulation' of marital rape at best. It simply criminalized marital rape in certain specific circumstances.

In spite of the very low threshold of criminalization, the Bill was strongly opposed by a section of religious leaders, parliamentarians and members of the public, with the clause on spousal rape cited as one of the most contentious. It was eventually shelved pending further consultations. The resistance to the Bill and any attempts at criminalizing marital rape in Uganda were not new or exclusive to Uganda. It raised the stereotypical ideas about marital rape that have been raised in other jurisdictions when similar proposals have been made[37] namely, fear of false allegations because women are vindictive liars who can easily make false claims, the question of privacy or intimate affairs, the absolute right of the husband to conjugal rights, and the

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36. Clause 114 (2) of the Marriage and Divorce Bill 2009 (Bill No.19 of 2009) provided for a maximum sentence of five years imprisonment or a fine of one hundred and twenty currency points or both.

37. M. Adinkrah, *Criminalizing Rape Within Marriage: Perspectives of Ghanaian University Students*, 55(6) INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, 982–1010, retrieved from https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.990.3086&rep=rep1&type=pdf (accessed on 10 October 2021). See also, Banda, *supra* note 4.

irrevocable consent in the matrimonial contract.[38] Marital rape is too often understood as an oxymoron due to the fact that the ideology of permanent consent underlies the cultural definitions of sex in marriage.[39]

The fact that such a law was proposed, considered, widely discussed and rejected speaks to the broader context of inequality and the acceptance as well as normalization of marital rape. Rape laws are intended to protect the right to bodily autonomy. The right to individual self-determination and autonomy is not extinguished on contracting a marriage nor does a woman lose her right to bodily autonomy on entering into a marriage or other domestic arrangement. However, it is even more challenging to base criminalization of spousal rape predicated on lack of consent. Autonomy can be diminished or facilitated by social conditions.[40] Explicit in the rejection of the marital rape clause in the bill, is the demonstration of the illusory nature and value of the concept of autonomy and consent, specifically in highly patriarchal societies.

The latest attempt at an explicit criminalization was made in the Sexual Offences Bill 2019. The clause on marital rape met with similarly strong opposition. The opponents of the proposal described the it as intrusive and intended to regulate bedroom affairs between couples.[41] The provision was opposed not only in parliament but amongst the general public. Opposition came from both men and women who reiterated an unquestioning acceptance of the husband's right to sexual intercourse with his wife in all circumstances.[42] As one Ugandan man is alleged to have succinctly asked: "Why would you buy a cup if you could not use it?"[43] According to a survey by the *Daily Monitor* Newspaper, the bill was opposed by women with views ranging from according to one respondent,

> 'Can anyone call you a thief for eating your food?' She asks. Even with the explanation of a husband forcing himself upon a probably sick wife, she still does not see it as rape. 'A wife is obliged to look after her husband's needs. In the bedroom and out.'

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38. Marital rape: Is it a crime or a conjugal right?, *supra* note 18.

39. Torres & Yllo, *supra* note 30.

40. R.M. Ryan & E.L. Deci, 'Autonomy is no illusion: Self-determination theory and the empirical study of authenticity, awareness, and Will' In HANDBOOK OF EXISTENTIAL PSYCHOLOGY (Jeff Greenberg *et al*, eds., 2004).

41. S. Turyarugayo, *MPs drop clause criminalising marital rape*, THE NEW VISION, retrieved from https://www.newvision.co.ug/articledetails/9028 (accessed on 20 July 2021).

42. *Marital rape: Is it a crime or a conjugal right? Supra* note 18.

43. Banda, *supra* note 4.

According to another woman,

> Having sex with your wife is no crime. Besides, it is only the two of you, so who decides it is rape? …with the typical African upbringing where women are taught to be demure about sexual matters, it is upon a husband to "initiate."[44]

During the debate on the bill, perpetrators openly admitted to raping their wives. In one incident a man stated that, "I have lived with my wife for more than 10 years but at times when she is not in the mood, I somehow force her…she has never complained to anyone. If such laws are put in place, I might end up in prison."[45] Ultimately, the inclusion of the provision was a token nod to the advocacy of women's rights activists over the years.

Placed within the broader context of gender-based violence, not only is violence perceived as a normal expression of masculinity but women are led to believe that violence from a partner is an expression of love. Many women therefore do not view rape by a spouse as a wrong or even as a violation. It is not understood to be as traumatic as the stranger rape because it is often assumed, spouses have been sexually intimate. However, rape by a spouse is likely to happen repeatedly, and usually within the context of an already physically, emotionally or economically abusive relationship. In many cases, the women who opposed the criminalization of marital rape reiterate sentiments such as, "He is your husband, you may let it (intercourse) happen without necessarily saying yes…."[46] Or as stated by another woman, "Prove rape by my husband, for gosh sakes… this kind of thing just takes another chink out of the sanctity of marriage... There are some areas the state just doesn't belong in ... there are personal things."[47]

While CEDAW calls for criminalization of rape based on consent, against a background of internal and external oppression, most women cannot give meaningful consent to sexual intercourse because not only are they not aware that they can withhold consent from their husbands, they cannot conceive of themselves as autonomous independent individuals. Therefore, although they may experience rape, they do not

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44. *Marital rape: Is it a crime or a conjugal right?, supra* note 18.

45. G. Olukya, *Marital rape bill splits Ugandans,* THE AFRICA REPORT*,* 7 March 2013, retrieved from https://www.theafricareport.com/5973/marital-rape-bill-splits-ugandans/ (accessed on 30 May 2020).

46. *Marital rape: Is it a crime or a conjugal right?, supra* note 18.

47. C. Karadas, *Comparative study: Development of marital rape as a crime in USA, UK and Turkey*, 10(4) TURKISH JOURNAL OF POLICE STUDIES (2008)*,* at 114.

perceive it as such because they think it as part of their marital obligations. This is illustrative of the fact that criminalization and the law in general are insufficient for the protection of women. Which gives credence to feminist critique of the inadequacy of the law as tool for the emancipation of women.

The normalization of marital rape means that women who seek to report cases of marital rape are going against the norm. They therefor face numerous challenges within the community and in simply having their cases recorded and investigated by the police. They are usually negatively perceived as being wayward or frigid[48] and can be literally laughed out of the Police Station. In interviews with the police, when asked, "Have you received any cases of marital rape?" Without exception, the immediate response was either a laugh or an expression of disbelief. Research has shown that the attitudes of law enforcement officers to violence against women determines their actions when dealing with this type of crime.[49] If police officers do not believe that a man can rape his wife, or that doing so is a serious crime, then they will treat it as such. According to one woman, Kyesubira[50] she decided to stop having sex with her husband after he was involved in several extra marital affairs and refused to take HIV tests. He moved out of the matrimonial home returning to their house once in a while.

> …when he did he would rape and beat me. I was forced to report him to the police because he would rape me even during my menstrual periods and in front of our children… the last time he attempted to strangle me. I wanted to shout but our children were sleeping. He won and raped me again. The next day very early in the morning I went to the police.

She was asked for 5,000/= as a 'commission' for taking her statement, and another 10,000/= for the police to arrest the perpetrator. She paid the money. When he wasn't arrested and she made a follow up, she was asked to pay an additional 20,000/= which she did. However, her husband was never arrested. She made several trips to the police station but there was no progress. Instead she was repeatedly extorted. The husband has since raped her more than 15 times. When he learnt of her attempts to file a police case, he threatened to kill her if he was ever arrested or embarrassed. Efforts to involve the

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48. *Id.,* at 113-132.

49. E. Farris, *Public officials and a 'Private' Matter: Attitudes and Policies in the County Sheriff Office Regarding Violence against Women*, SOCIAL SCIENCES QUARTERLY (2015), 2.

50. Names have been changed to protect victim identity. Interviews were done as part of my LLD thesis.

local leaders and other family members, even from her side of the family, have been futile as they do not see anything wrong with what he is doing. Instead, she has been accused of being difficult, embarrassing the family, and forcing him into adultery.

> My family wasn't helpful because they thought I was being unfair to deny my husband sex because it his conjugal right but I had my reasons. They also claim "*Omusajja asajjalata*" meaning a husband has a right to have many women which I don't agree with…" She adds that, "He had raped me more than 15 times… I wanted the police to arrest (summon) him and warn and counsel him but they failed…. he still comes by sometimes and rapes me to date but the police claim he is my husband he cannot be arrested.

Another woman, Koote (not real neames) was raped by her husband when she refused to have sex with him during her menstrual period.

> … he slapped me several times, tore my clothes and raped me claiming I was denying him sex because I was giving it to other men. I couldn't shout because I didn't want the children to hear. After he was done, he bathed and put on new clothes and locked me in the bedroom and went to the sitting room. I was bleeding heavily and in intense pain.

The next morning, she reported to the police. The immediate response from the police at the reception was, "You woman you have a problem; you are going out with other men. That is why you don't want him." The policeman who took her statement asked for money for facilitation and she paid 10,000/=/. However, he did not take her case seriously. "…he was busy counseling me and taking the issue to be minor and yet I personally wanted the perpetrator to be arrested." She was referred to and received a medical exam from the police surgeon. The perpetrator was never arrested nor even questioned. In spite of several visits to the police, she did not get any feedback or update and eventually gave up.

While cases of repeat rape, perpetrated by the same individual against the victim, are rare, in marital rape, the violation is often repeated. And while rape is rarely accompanied by other offences, marital rape is almost always committed alongside other forms of domestic violence. Even in cases where marital rape is exacerbated or accompanied by other forms of violence, it is not treated seriously.

IV. CONCLUSION

The futile attempt to pursue redress for spousal rape has been aptly described as quite literally, adding insult to injury. The experience of the injury itself is combined with the insult of being unable to seek redress for that injury in court.[51]

There are varying propositions for addressing marital rape and other forms of domestic violence, however, there is consensus that legal, social, and institutional details are critical.[52] Second, as illustrated by the experiences of women with the Uganda criminal justice system, quick-fix statutes and doctrinal change do very little, and may even backfire, unless they are backed by changes in attitudes.[53]

The criminalization of marital rape without systematic structural changes –as with the Domestic Violence Act - creates a false premise of protection for women. Instead, it pits individual victims daring to seek the protection of the law against all the male privilege in marriage, conferred by patriarchy, and ultimately exposes the victims to ridicule and secondary victimization. It reinforces the critique that the criminalization of marital rape on its own is not a safeguard for women. For the prohibition to be successful, legal prohibition of marital rape must be accompanied by changes in the attitudes of the prosecutors, police officers and society in general…moral and social awareness plays a vital role.[54]

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51. Megan Carpenter, *Bare Justice: A Feminist Theory of Justice and Its Potential Application to Crimes of Sexual Violence in Post-Genocide Rwanda*, *41* CREIGHTON L. REV. 595 (2008).

52. *See,* Nigam Shalu The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities (2015), retrieved from http://dx.doi.org/10.2139/ssrn.2613447.

53. Stephen J. Schulofer, *The Feminist Challenge*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW (1995), at 2151.

54. *Id.*

POST-DISARMAMENT COMMUNITY CONFLICT RESOLUTION AND JUSTICE MECHANISMS IN KARAMOJA REGION OF UGANDA

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ABSTRACT

Through a qualitative study of the property-related injustices and conflicts arising/continuing in Karamoja region of Uganda after massive disarmament, this article analyses the responsiveness of traditional and community-based mechanisms in a context of local shifts in traditional authority and thin formal institutions. The article notes that whereas the authority of traditional institutions and elders has diminished due to a number of factors, they remain important in dispute resolution and administration of justice. Mechanisms like the Nabilatuk Resolution which came in as a hybrid response to the demands of the times are seen to be effective in addressing cattle theft, thus filling the void left by the weak and unfamiliar formal structures. But there is indication that both the formal and community-based (including the traditional) approaches have their own gaps. The traditional and community-based approaches were also found wanting in dealing with injustices committed by government and other more potent powers. In view of these dynamics, we argue for the integration of the two approaches, carefully consolidating the powers of each while fixing both their internal and relational contradictions.

I. INTRODUCTION

Over the years, Karamoja region had acquired a reputation of high insecurity, especially due to cattle rustling by Karamojong warriors who unlawfully possessed guns. Some of these guns had been acquired from Arab, Greek, and Abyssinian traders in exchange

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for ivory during British rule.[1] Others are said to have been looted from Moroto barracks after the fall of President Idi Amin Dada in 1979.[2] All this was not helped by the porosity of the national borders with Sudan and Kenya, which increased the availability of guns.[3]

Arms trafficking involving Sudan, Kenya, Ethiopia, and Somalia became an important economic activity in the area because people needed the guns both for personal security against rustlers and rival communities, and for rustling. President Museveni further explains the proliferation of arms in Karamoja thus:

> You know very well that since 1979, defeated armies have retreated to the north and north-east of our country with their weapons. You also know that since the colonial days huge parts of the north-east have never been effectively administered: They were alienated by hostile administrations.[4]

According to the government of Uganda estimates, in the 1980s, there were over 30,000 – 40,000 AK47 guns in Karamoja region. There have been a number of attempts to disarm the population in the region, oftentimes, characterised by violence. In the first disarmament attempt in 1987, the national army lost over 300 soldiers.[5] Narman as well indicates that in subsequent confrontations in the 1990s, over 400 Karimojong were killed by the army, which added to deaths incurred during fights amongst the sub-groups in the region.[6] Cattle raiding, which is said to have emerged as a cultural practice among pastoral communities as an adaptive response to famine, drought, and

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1. C.P. Welch, Pastoralists and Administrators in Conflict: A study of Karamoja District, 1897-1968 (M.A.D. Thesis, University of East Africa, 1969). A. Närman, *Karamoja: Is Peace Possible?* 30 REV. AFR. POLITICAL ECON. 129 (2003). L. Jabs, *Where two elephants meet, the grass suffers: A case study of intractable conflict in Karamoja, Uganda*, 50 AM. BEHAV. SCI., 1498 (2007).

2. A.B.K. KASOZI, SOCIAL ORIGINS OF VIOLENCE IN UGANDA, 1964-1985, (1994). E. Welty, M. Bolton & W. Kiptoo, *Local Peacebuilding in East Africa: The Role of Customary Norms and Institutions in Addressing Pastoralist Conflict in Kenya and Uganda*. In LOCALLY LED PEACEBUILDING: GLOBAL CASE STUDIES (S. L. Connaughton & J. Berns eds., 2019).

3. A.K. Mkutu, *Small Arms and Light Weapons among Pastoral Groups in the Kenya-Uganda Border Area*, 106 AFR. AFF., 47 (2007). R.A. NSIBAMBI, NATIONAL INTEGRATION IN UGANDA 1962 – 2013 (2014).

4. Y.K. MUSEVENI, WHAT IS AFRICA'S PROBLEM? (2000), at 80.

5. Närman, *supra* note 1.

6. M.O. ODHIAMBO, WORKING WITH CUSTOMARY AGRO-PASTORAL INSTITUTIONS IN CONFLICT MANAGEMENT: THE KADP APPROACH (2000).

disease,[7] now became more entrenched in the community and more violent with the force of fire power.

So widespread was the devastation that a study conducted by Sandra Gray, an anthropologist from the University of Kansas, in 1998 and 1999, in which she interviewed more than 300 women of the Bokora and Matheniko sub-ethnic groups, revealed that "virtually every one had lost either a husband or at least one male child to intra-tribal violence."[8] These events raise a feeling that, unless something significant was done, there could still be some pain, trauma, and bitterness among and between communities in the region.

On top of the region being largely abandoned both by colonial and post-independence governments,[9] the insecurity became one of the key reasons that caused Karamoja to lag behind.[10] Another significant development over the period of insecurity is the gradual weakening of traditional conflict resolution mechanisms,[11] especially because of the dwindling authority of elders and the *ekokwa/akiriket* councils that were used for adjudicating cases following traditional customs. Earlier, the raids were conducted by use of spears and body-to-body fights. Since such weapons required large groups for effectiveness, there was need for group mobilisation and direction of the warriors, which was offered by elders of the groups. But now that raids could be done in small groups, by the might of the gun, power shifted from elders to warriors.[12]

By the might of the gun, power gradually shifted from elders to gun holders. This shift of power from local custodians of communal ethos subsequently shook social moral grounds and thus exacerbated social violence. However, Knighton has argued that the idea that elders lost their authority is a myth mostly propagated by the elders themselves because Karamojong do not like talking freely with strangers about the

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7. M. HALDERMAN *ET AL.*, ADDRESSING PASTORALIST CONFLICT IN THE KARAMOJA CLUSTER OF KENYA, UGANDA AND SUDAN: ASSESSMENT AND PROGRAMMATIC RECOMMENDATIONS (2002). S. Gray *et al., Cattle raiding, cultural survival, and adaptability of East African pastoralists*, 44 CURR. ANTHROPOL. S3 (2003).

8. Jabs, *supra* note 1, at 1498.

9. P. Otim, *Water Resources and Survival: A look at Pastoral Livelihood, in* CONFRONTING THE CHALLENGES OF THE 21ST CENTURY: PROCEEDINGS OF THE FORTY-NINTH PUGWASH CONFERENCE ON SCIENCE AND WORLD AFFAIRS (J. Rotblat ed., 2001).

10. M.A. Nsamba, *Decentralization and territorial politics: the dilemma of constructing and managing identities in Uganda*, 5 CRI. AFR. STUD., 48 (2013).

11. M. Wepundi & K. Lynge, *Evolving Traditional Practices Managing Small Arms in the Horn of Africa and Karamoja Cluster*, Armed Actors Issue Brief, 3, 1 (2014).

12. Jabs, *supra* note 1.

intricacies of their social cohesion;[13] and scholars have swallowed the narrative without question.

Quinn has also argued that whereas it could have weakened over time, many instances have shown that the authority of elders is often stronger than that of government-appointed law enforcement officers.[14] For instance, one of her respondents narrates: "… a clan may come to the police to demand a prisoner's release because conditions in prison are too good. Therefore, they will go to the prison and pull him out, and the police do not dare say no because they will have to deal with 500 armed warriors!" This observation resonates with Logan's observation that in most parts of rural Africa traditional leaders are a 'resilient lot', often "carving out new political space for themselves, especially in the arena of local governance".[15] Somehow, in many African societies, even where the State has been candidly hostile towards them, traditional authorities have eluded disintegration.

This article shows that each side carries some truth. Our findings show that whereas elders have gradually lost some powers, they still command high trust in society–hence the fact that the government is increasingly involving them in its initiatives.

In 2001-2002, the government initiated a disarmament programme where several guns were collected from the people of Karamoja.[16] Whereas some guns still remained in the hands of the people, the reduction in arms in the community by around 2012 changed a number of socio-cultural dynamics. Cattle rustling reduced, but there emerged other forms of crime (especially cattle theft) mainly by those for whom the gun was the main source of livelihood.[17] As a Uganda Peoples Defence Forces respondent in this study put it, whereas the Karamojong had been physically disarmed, their minds were not. Some of the old inter-group rivalries also still remain and occasionally come to the surface although reduced access to guns decelerated the associated violence.

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13. B. KNIGHTON, THE VITALITY OF KARAMOJONG RELIGION: DYING TRADITION OR LIVING FAITH (2005).

14. J.R. Quinn, *Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice*, 8 HUM. RIGHTS REV., 389, (2007) at 402.

15. C. Logan's *The Roots of Resilience: Exploring Popular Support for African Traditional Authorities*, 112 AFR. AFF., 353 (2013), at 354.

16. Office of the Prime Minister, Karamoja Integrated Disarmament and Development Programme: "Creating Conditions for Promoting Human Security and Recovery in Karamoja, 2007/2008-2009/2010", <https://www.refworld.org/pdfid/5b44c3ee4.pdf> (accessed 2 July 2020). K. Mkutu, Disarmament in Karamoja, Northern Uganda: Is This a Solution for Localised Violent Inter and Intra-Communal Conflict? 97 RT (London), 99 (2008).

17. E. Stites & K. Howe, *From the border to the bedroom: Changing conflict dynamics in Karamoja, Uganda*. 57 J. MOD. AFRI. STUD. 37 (2019).

There have been several civil society efforts to revive and strengthen the institution of elders and other community-based forms of conflict resolution, especially in a bid to boost sustainable capacity to locally prevent crime and provide justice. Key among these, for instance, in reflection of the idea that tradition is sometimes "updated, adjusted, and opened to new accretions in order to stay alive through changing times",[18] the community came up with the Nabilatuk Resolution,[19] which is one of the most pronounced local inter-community initiatives discussed in this article- meant to deal with cattle theft. Despite its popularity, the community initiative has raised a number of contentions over its effectiveness and legitimacy.[20] The contentions are among people in particular communities, between communities, and between its adherents and some State organs.

In view of informing ongoing broader debates on how we can sustainably address the evolving forms of crime and social injustices, this article comes in to establish the extent to which the local initiatives in Karamoja have gone in boosting peace and rendering justice in the region. The article is rooted in the theoretical assumption that peace and justice initiatives are more sustainable where there is local involvement and ownership,[21] plus cultural grounding. However, the above condition is not sufficient. Studies on different contexts have showed that local experiences and perceptions are sometimes contrary to the normative assumptions and values widely ascribed to conventional traditional justice efforts.[22] It would also depend on how authority is locally constructed and deployed, which is a site of many questions in the context of Karamoja where authority has taken on various changes in locus and form.

Broadly, this article sought to assess the effectiveness of post-disarmament community-based social conflict resolution and justice mechanisms in Karamoja sub-region. In this vein, we specifically establish: How community-based social conflict

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18. I.I. Zartman, *Conclusions: Changes in the New Order and the Place for the Old, in* TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT 'MEDICINE' (I.I. Zartman ed., 2000), at 7.

19. FAO & Tufts University, Comparative Analysis of Livelihood Recovery in the Post-Conflict Periods - Karamoja and Northern Uganda, <https://www.fao.org/resilience/resources/resources-detail/en/c/1253601/> (accessed November 2019). See also, Stites & Howe, *supra* note 17.

20. Stites & Howe, *supra* note 17.

21. E.E. Osaghae, *Applying Traditional Methods to Modern Conflict: Possibilities and Limits, in* Zartman, *supra* note 18.

22. A. HINTON, TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE. (2011). R. SHAW & L. WALDORF, LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE (2010). A. Macdonald, *Transitional Justice and Ordinary Justice in Post-Conflict Acholiland, in* PURSUING JUSTICE IN AFRICA: COMPETING IMAGINARIES AND CONTESTED PRACTICES (J. Johnson & G.H. Karekwaivanane eds., 2017).

resolution and justice mechanisms are administered in Karamoja; how local people perceive existing community-based social conflict and justice mechanisms in the area; and how responsive community-based initiatives are to the justice and peace needs of the region.

The article is based on two-months of qualitative field work in the Karamoja region conducted in 2018-2019 in Moroto, Nakapiripit, and Napak districts. The qualitative study with an ethnographic approach was meant to capture the lived experiences of the people located within the life-world we sought to understand.[23] The approach enabled us to access the meanings the people attach to the mechanisms and processes under study through their subjective evaluation of how they relate with them. It also provided insight into "the 'inherently relational' and 'inherently contested' nature of the sociolegal dynamics under study."[24]

Participants included community elders/clan leaders, relevant civil society organisation agents, judicial officers, former warriors, local police officers, youths, and security officials. These were purposely selected on account of their rich experiences or/and positions held. The key data collection methods were: qualitative interviews; Focus Group Discussion with elders, youth, and women; and both participant and nonparticipant observation of relevant events, activities, and everyday aspects of social life. The findings were thematically analysed in view of the research questions and other themes that emerged from the data.

The study shows that whereas the authority of traditional institutions and elders has diminished due to a number of factors, they remain important in dispute resolution and in administration of justice. Mechanisms like the Nabilatuk Resolution which came in as a hybrid response to the demands of the times are seen to be effective in addressing crime after disarmament, especially in filling the void left by the thin and unfamiliar formal structures. But there was indication that each of the approaches has its own gaps, mostly evidenced by the fact that many times people will not report their cases to police or courts of law but to other local alternatives, while in some cases they will go straight to police or courts – even when they feel dissatisfied with local forms of justice. The traditional and community-based approaches were also found wanting in dealing with injustices committed by government and other better-placed powers. In view of these dynamics, we argue for an integration of the two approaches, carefully consolidating the powers of each while fixing both their internal and relational contradictions.

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23. W. NEUMAN, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES (2014).

24 Macdonald, *supra* note 22, at 267.

We proceed by first locating the discussion in debates on community justice and about the dynamics of culture, society, conflict and justice mechanisms in the literature on Karamoja region. We then explain how traditional and community-based mechanisms are used in administering justice and resolving conflicts, and assess their responsiveness to local issues.

II. COMMUNITY-BASED JUSTICE AND CONFLICT RESOLUTION MECHANISMS

Due to a number of challenges emerging in 'modern' judicial systems, especially in light of handling community-based conflicts, there is increasing emphasis on alternative justice and conflict resolution systems.[25] There is growing realisation that "the resolution of disputes and wrongdoing is a practical and consequentialist process in which wrongdoing and punishment are defined and determined by context and circumstance".[26] This is especially the case in handling severe crimes and offences after periods of conflict/atrocities or in transition from oppressive systems where the tasks of restoring justice and rebuilding peace are overlapping and complementary.[27]

Community-based justice systems have particularly been cited among the viable alternatives and complements to sustainable conflict resolution and promotion of justice. These take on different shades, ranging from traditional measures that have been categorised under customary in some countries, and other community-based innovations. Park conceptualises "community-based justice" as practices that are not directly associated with the State, that take place in the community, that involve the participation of the community as a whole or a big section of the community, and which, at least in part, emerge endogenously within a community, notwithstanding external assistance, cooperation, or collaboration.[28] Examples of this approach include traditional systems adopted in Sierra Leone after their long civil war, the *Gacaca*

25. A.S.J. Park, *Community-based restorative transitional justice in Sierra Leone*, 13 CONTEMP. JUSTICE REV. 95 (2010).

26. Macdolnald, *supra* note 22, at 278.

27. R. MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR (2002)

28. Park, *supra* note 25, at 95.

system of Rwanda,[29] and *Mato oput* among the Acholi in northern Uganda.[30]

Generally, the approach involves public hearings, giving testimonies, apology from offenders/perpetrators, and rituals – such as pouring of libations in reconciliatory gestures facilitated by traditional leaders such as headmen, chiefs, clan leaders, kings.[31] The inclination is mainly towards principles of restorative justice and reconciliation than retribution and punishment. Nagy has clarified though that the transitional and community-based justice community has largely moved past the initial debates of "peace versus justice" and "truth versus justice" towards the idea that there can be no lasting peace without some kind of accounting and reconciliation, and that truth and justice are complementary approaches to dealing with the past.[32] As such, ideally, community-based justice systems should not be thought to be always in parallel competition with "modern" approaches.[33] They should be seen as complimentary, at least that there is a possibility to harmonise them. We shall later demonstrate how this is being done in Karamoja and other inherent possibilities.

According to Zehr, restorative approaches to justice regard crime and other such offences as a violation of people and relationships.[34] Crime creates obligations to make things right both with the directly affected individuals and the community. This is especially the case in community-based justice. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, reassurance, and social harmony. Restorative justice is mainly grounded on a pragmatic politics that seeks to establish innovative ways for social transformation while being as inclusive as possible in order to break the cycle of retaliation and violent

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29. S. AGABA, PARTICIPATORY JUSTICE: AN OVERVIEW OF GACACA COURTS IN RWANDA (2006). S. Oola, *A Conflict-Sensitive Justice: Adjudicating Transitional Justice in Transitional Contexts, in* WHERE LAW MEETS REALITY: FORGING AFRICAN TRANSITIONAL JUSTICE (M.C. Okello *et al.,* eds., 2012).

30. B. KABIITO & M. ANGUCIA, REMEMBRANCE, RECONCILIATION, AND COMMUNITY REINTEGRATION: LIVING THE HEALING OF WAR MEMORIES IN NORTHERN UGANDA (2017). A. Szpak, *Indigenous Mechanisms of Transitional Justice as Complementary Instruments to State Justice Systems: Cases of mato oput in Uganda*, *bashingantahe* Councils in Burundi and Navajos' Custom of *naat'aani,* 46 POLISH POLITICAL SCIENCE YEARBOOK, 55 (2017).

31. C.B. Soyapi, *Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill*, 17 PER/PELJ 14441, (2014). *See,* Park, *supra* note, 25. See also, B. TSHELALA, TRADITIONAL JUSTICE IN PRACTICE: A LIMPOPO STUDY (2005).

32. R. Nagy, *Transitional Justice as a Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275 (2008).

33 Szpak, *supra* note 30. See also, Macdonald, *supra* note 22.

34. H. ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (1990).

conflict.[35] Reconciliation here involves the restoration of trust in a relationship where it has been violated, sometimes repeatedly.[36] The forgiveness that may come forth from this exercise, where it does, is based on knowledge from remorseful confessions of the offender. It is a process akin to what happens in truth and reconciliation commissions such as in the cases of Sierra Leone in 2002 - 2004[37] and South Africa between 1996 and 1998[38].

The African Human Security Initiative summarises the following as key strengths attributed to traditional courts in their administration of justice:[39]

> (i) There is a sense of ownership by the people as the community is bound by its rules. The people are more comfortable because they are included in the process and are under a law that is indigenous and not foreign.
> (ii) The processes are flexible, simple and familiar, with no rigid rules. The language is not foreign and people can easily follow the process. It has also been found that the informal procedures of customary courts have the advantage of leaving less room for technicalities and having the real substance dealt with.
> (iii) The system is based on mediation and is more restorative than retributive. In this regard, the community is more important and relations are meant and expected to exist after the process. There is, thus, a measure of bringing unity and togetherness.
> (iv) The courts are accessible, inexpensive and speedy. It is important that by virtue of their being geographically closer to the people there are often no [or minimal] travelling costs involved.

Osaghae[40] and Macdonald[41] add that local justice mechanisms tend to be generally more immune to corruption. The above strengths notwithstanding, we should not uncritically study traditional courts and systems of justice in general in a one-sided romantic view

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35. P. Gobodo-Madikizela, *Reconciliation: A call to reparative humanism, in* IN THE BALANCE: SOUTH AFRICANS DEBATE RECONCILIATION (Du Toit Fanie & E. Doxtader, eds., 2010).

36. Kabiito & Angucia, *supra* note 30.

37. Park, *supra* note 25.

38. DU TOIT FANIE & E. DOXTADER EDS., IN THE BALANCE: SOUTH AFRICANS DEBATE RECONCILIATION (2010).

39. Soyapi, *supra* note 31, at 1444–1445.

40. Osaghae, *supra* note 21.

41. Macdonald, *supra* note 22.

of only their merits. As the AHSI, Agaba, and Kabiito and Angucia caution, they as well come along with a number of challenges.[42] AHSI points out the following:[43]

> (i) There is no presumption of innocence as the inquisitorial nature of the proceedings amounts to a presumption of guilt against the accused because he [she] has to prove his innocence …
> (ii) The process is said to be patriarchal because males are considered to be superior. Women are therefore thought to be inferior, and when it comes to the determination of issues that have to do with the household, the man is the head.

It should also be noted that the fact that the courts do not often provide for legal representation could be both a positive and limiting element, especially for those that may not have the courage, confidence, and eloquence to speak for themselves. Sometimes the conflict resolution procedures are rushed, which may compromise the process – as some of the relevant details of the cases may not be accessed and considered. This is not helped by the fact that the traditional leaders central in such processes may not have some relevant skills for criminal investigation.

However, it still remains important to understand how such mechanisms go about these limitations in the administration of justice and resolution of conflicts in practical terms. It is on account of such knowledge that we can envisage how to better them, especially in consideration that even "modern" approaches are not without their challenges that sometimes exclude certain members of community and perpetuate conflicts and injustices. Park and Macdonald contend that community-based restorative justice has received little attention in scholarly literature examining community-based justice practices and their potential as defined by local practitioners.[44] It is partly this gap that motivates this article, particularly in communities such as Karamoja where traditional leadership structures are as well still recovering from the corrosive effects of a violent past.

Questions still remain on whether the revived and emerging justice systems command the power for social trust in resolving community conflicts and administering justice, and their convergences and tensions with formal legal systems. The scholarly

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42. AFRICAN HUMAN SECURITY INITIATIVE (AHSI), THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA: ENHANCING THE DELIVERY OF SECURITY IN AFRICA (2009). Agaba, *supra* note 29. Kabiito & Angucia, *supra* note 30.

43. AHSI, *id*.

44. Park, *supra* note 25. Macdonald, *supra* note 22.

literature about Karamoja that we have seen explains the evolution of the region to the current state and highlights the emerging challenges but does not delve into particularly studying the dynamics of the re-emerging traditional justice systems and other community level innovations in the administration of justice and resolution of evolving forms of conflicts.

III. STUDY FINDINGS

A. Administration of community-based social conflict resolution and justice mechanisms in Karamoja

Among other things, we sought to find out how the community in Karamoja uses local arrangements to address the conflicts and justice demands that emerged or continued after the disarmament exercise. The gun had become an arbiter of its own, claiming its special space both within traditional mechanisms and above them. As such, its removal from the equation set in motion new dynamics with their own complexities and demands for peaceful co-existence. It should be noted that in the dispensation that ensued, neither the old traditional nor the formal "modern" modes prevailed over the other. Loyalties were mixed and authority divided in ways that were not permissive of any of the two modes to prevail on their own. Our main interest here is in understanding how the community negotiated mechanisms for dispensing justice within these circumstances.

1. Context of community-based mechanisms—Scholars have asked why traditional authority tends to be resilient in Africa.[45] In the case of Karamoja, community-based social conflict and justice mechanisms should in the first place be understood in view of state presence/absence/responsiveness in the area. A Uganda People's Defence Forces (UPDF) intelligence officer based in Karamoja that we interviewed explains that for so long, Karamoja region had been a lawless (in reference to state law) area due to unregulated gun ownership and use. For a number of reasons, all post-independence governments had not put committed administrative attention on the area. The current government, which came into power in 1986, had in its first twenty years put much of its attention on the war in Northern Uganda. Thus Karamoja thrived in a semblance of the Hobbesian *state of nature*, especially in the sense of insecurity. It was not until Joseph Kony's Lord's Resistance Army was pushed out of

45. P. Englebert, *Born-again Buganda or the Limits of Traditional Resurgence in Africa*, 40 J. MOD. AFRI. STUD., 345 (2002). Logan, *supra* note 15.

Uganda around 2005/6 that Karamoja started getting official attention, especially towards the problem of guns.

Up until this time, it was some resilient elements of traditional authority and gun power that provided "justice". According to a Grade I Magistrate in Moroto, due to the insecurity in the area, courts have not been working. Some judiciary officials posted to the area would refuse, others would have to commute from distant places. Courts are just taking ground after the disarmament and people are still getting acquainted with judicial systems and services, with many striking differences from what they are used to. Here we see a vivid demonstration of Macdonald's observation that the majority of people in conflict and post-conflict places, particularly those in rural areas, are subject to pluralistic forms of public authority, ranging from administrative systems associated with formal State government to regulatory frameworks of customary law and traditional societal authorities such as clans and spiritual healers.[46] In this transitional period, community-based mechanisms come in to fill the vacuum, with the aid of civil society organisations and some government organs – especially the army that remained very active in the area in ensuring peace and security, and continuing with the process of disarmament.

Because State justice systems are still new and strange to some people, they relate with them with some degree of ambivalence and, at times, distance. Some deem them to be unjust and unnecessarily disruptive of traditional order. One of the elders we interviewed explicitly brings out this qualm: "if we let only the modern systems guide us, then the world is headed to a deep dark pit".[47] Besides being strange, many elders expressed the worry that the human rights discourse on which State law is built creates a lot of room for young people to disobey elders and it disempowers elders by criminalising some traditional forms of punishment.

The status of the elder is key in Karamojong socio-political structures. Whereas Faure postulates that in many traditional (mostly rural) settings "elders have a status, based on age and experience equated with wisdom, that provides them with enough authority to be the final decision makers in a conflict solved through arbitration",[48] this status is not mainly on account of age and experience. More importantly, it is the preserve of elders that have lived a life of integrity, hence building social trust. Their authority is considered to be God-given:

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46. Macdonald, *supra* note 22, at 294.

47. Interview with a respondent from Rupa County, Moroto District, 27th November 2018.

48. G.O. Faure, *Traditional Conflict Management in Africa and China, in* Zartman, *supra* note 18, at 157.

> … they are chosen by God from the wombs of their mothers, and a leader can easily be seen. We listen to such people and their instructions are followed… They would not fail to solve any conflict. It's in these days that I see things starting to fail, because of too much use of the modern laws. We are now told of getting arrested should we beat our children; even the child has been given rights.[49]

2. The authority of elders and tradition in Karamoja: Ruptures, continuities, and evolution—The other lingering question earlier hinted on in the introduction is whether the elders and the institutions they preside over lost their authority to the gun-wielding youths or still retained it to levels permissive of presiding over conflict resolution and arbitration exercises. Our findings show that this question has been oversimplified, resulting into a false dichotomy. It has been argued as though it is either that the elders retained their power or did not, without leaving room for other possibilities. Among the Tepeth, Matheniko, Jie, Bokora, and Dodoth that constitute the Karamojong group, answers to this question vary from one sub-group to another. In all of them, the authority of the elders reduced, but did not completely wane out. In some sub-groups, it dwindled significantly, while in others to a small extent. This study did not extend into establishing the reasons for these differences in effect.

The participants who maintained that the authority of elders did not die out in the era of the gun evidenced their case with the observation that in many instances raids had to be first blessed by elders and seers who had to officiate over sacrificial rituals and foretell the outcomes by interpreting cow intestines. According to one of the soldiers who took part in the disarmament exercise, "… when they [elders] say you will succeed, that is a blessing, you must go. And if they say don't go and you go, you will get a problem - that is a curse. They were totally respected". Among the Tepeth, an elder intimated, when a raid was successful, elders were rewarded with cows (*loluka*) for their blessings. The UPDF soldier we interviewed further elaborates this power structure with an example;

> … if the youth had guns and the elders had a sitting, they would not sit infront of the elders. The youth would sit behind; whether they had guns or not. They ranked themselves and knew who was older than whom ... So, to say that it [their authority] was completely washed away, I don't think so.

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49. Interview with an elder, 27 November 2018.

However, in some contexts, the gun determined who spoke or gave direction regardless of age or character. "… Whenever we tried to even advise the youth not to fight against each other, they would just tell us, 'you will eat fire'. So, as an elder, I just take off and live them alone".[50] Instances were also cited where armed youths actually killed elders that "stood in their way". Whereas these could be treated as isolated instances that do not reflect the whole picture, their effect on the authority of elders cannot be overlooked.

The spread of Christianity in the area has further alienated some people that have come to look at ritual practices as satanic. This trend should be understood in the context of the general extroversion of African being facilitated by colonial experience[51] and Christianity's prejudiced approach to many African practices right from the onset of missionary evangelisation in Africa.[52] An elder aired this frustration in an FGD: "What has made all the traditional ways of solving conflicts to die off is the fact that so many people are becoming Christians. They have joined the Born Again and Catholic faiths. Sometimes when we want to perform rituals, the elders who are now in church say it is evil".

All this was not helped by the forceful disarmament by the UPDF, which sometimes involved beating up (humiliating) and arresting uncooperative elders and disorganising (dispersing) the culturally significant *Ekokwa* and *Akiriket* gatherings under the suspicion that they were planning for raids. The UPDF intelligence officer we interviewed indeed confirmed this and added that they would arrest those involved to "isolate them from the community to show them that he has [they have] fewer powers". Nevertheless, albeit bruised, the elder's authority still survives and is seen to be evolving with the times.

Ekokwa are meetings headed by elders at which issues concerning the community are discussed and disputes resolved. These are at a level above the family unit, but not binding the entire community within any of the Karamojong sub-groups. Above the *Ekokwa* is the *Akiriket,* which is the supreme sacred council of elders among the Karamojong, and constitutes their politico-socio-religious organisation. It could either be held by a sub-group or combined with other sub-groups, depending on the

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50. Male elder in FGD.

51. P.J. HOUNTONDJI, ENDOGENOUS KNOWLEDGE: RESEARCH TRAILS (1997).

52. J.S. MBITI, AN INTRODUCTION TO AFRICAN RELIGION (1975). S.T. Masondo, '*Why do you hate me so much?' An exploration of religious freedom from the perspective of African religion(s)*, 73 THEOL. STUD. 4628, (2017).

issue(s) at hand. In resolving disputes, they listen to both sides (complainant[53] and offender) and ultimately the elders rule, often in that very sitting. The guilty party will then be asked to offer a bull for sacrifice to be eaten at the gathering - but also as a gesture of reconciliation. Action taken would vary from case-to-case. Sometimes, under what is called *Ameto*, there would be "… serious beating of such a boy by his peers under the instruction of the elders. After the beating, such boys would be told to kill bulls for the elders and then they would transform completely".[54] The defiant ones who refuse to be disciplined are cursed (such as, *Totwan'kaina' - die on the spot*), and it is believed that the curse often comes to pass. Elder women also act as judges in their own tribunal, and they can try anyone – male or female, as long as that person infringes on women affairs – mostly agriculture and water. But generally, as observed by AHSI,[55] although culturally protected from many abuses, women command much less powers in dispute resolution.

Up to now, these gatherings still sit, although their significance in conflict resolution is lessened by the fact that there exist other formal arbitration authorities above them to which some people may prefer to go – and by which some of the decisions of the former could be trumped.

Traditional approaches to justice in Karamoja are not totally devoid of the retributive element commonly ascribed to modern justice systems. Public punishment plays a key role in the Karamojongs' understanding of disciplining and taking accountability for offence. However, as argued by Zartman, the goal is to re-include the offending/guilty member within the community, rather than excluding them.[56] In an FGD with elders, it came out that elders often encourage families of the offender and victim to visit each other and intermarry after their dispute has been settled, and the elders follow up on the visits. There is a conciliatory inclination in the process. "The purpose is to re-create the community balance that has been challenged and everyone has to play a part in this task. This is why an apology has to be made publicly, for the solution concerns the whole community, as it is for the commitment of the culprit".[57] It is as well the practice in most modern courts that hearing and sentencing is done publicly in a public display of justice, but reconciliation is not often privileged – and there is hardly any follow up after the hearing and sentencing. The purpose in this

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53. There may not always be a complainant though. If the community or elders find a matter worth addressing in the seating, it will be presented and discussed.

54. Female elder in FGD.

55. Soyapi, *supra* note 31.

56. Zartman, *supra* note 18.

57. Faure, *supra* note 47, at 159.

comparison though is not to project one system as better than another,[58] rather it is to comparatively highlight the processes and purposes in view of contextually understanding the dynamics of justice and people's choices.

The importance of traditional authority in resolving conflicts was as well emphasised by government agents from the army, judiciary, local government, and police.[59] The police Human Rights and Legal Officer at Moroto Police Station observed:

> … unless the conflict is taken at a personal level, but if it attracts the attention of the community, then Police and other institutions will not settle any conflict in Karamoja without the involvement of elders. Elders are respected people, and their words are respected ... Even if we are to follow the legally established procedures, we need the backing of elders. Minus that, you may push and push, but you will not achieve the result you want.[60]

Whereas the army is said to have contributed to the weakening of traditional authority, the intelligence officer we interviewed indicated that they worked together with elders to convince people to surrender their guns, with some level of success. Today, when they may want to communicate something, sometimes army officials, area Members of Parliament, and Resident District Commissioners participate in *Ekokwa* and *Akiriket.* Although the above traditional authority could be partly attributed to the campaigns of civil society organisations such as Mercy Corps and Karamoja Development Project, it mostly appears to be grounded in resilient cultural order. It is out of understanding and appreciating the significance of cultural structures in addressing local challenges that CSOs have come in to promote and empower them. Of course, whereas working with traditional structures comes with several advantages, it poses some legal and other practical challenges which we shall discuss later under the section on perceptions on community conflict resolution mechanisms.

3. Key issues addressed by traditional and community mechanisms—Among the key issues addressed through traditional and community conflict resolution mechanisms are: animal (cattle) theft, fights, marital and land disputes among community members. However, elders and Kraal leaders reported to be relatively

58. Szpak, *supra* note 33.
59. Knighton, *supra* note 13. Oola, *supra* note 29.
60. Interview held on 29 November 2018.

incapacitated in resolving disputes between communities, and, more especially, between the community and State agencies. Most participants made reference to the Lokiriama Peace Agreement of 1973 as one of the landmark intercommunity engagements that has helped to some extent in promoting peace between the Matheniko, Turkana, Tepeth, and Jie; and now extending to include the Nyangatom, and Topotha. Originally, the Agreement, which is named after a small town in north Western Kenya, was only between the Matheniko and the Turkana of Kenya. It involved commitments to peaceful co-existence and symbolically burying weapons. Until today, these communities meet every 21st September (World Peace Day) in commemoration and re-affirmation of this agreement. At this event attended by civil servants, politicians, cultural leaders, kraal leaders, and community representatives, they eat, drink, dance, and make pronunciations of peace.

Sometimes friendly communities[61] with grievances will send emissaries to meet and settle them in an *Ekokwa*, especially in view of preventing offences by individuals being used against the entire community. According to the Police Human Rights and Legal officer we interviewed,

> … because of the desire for peace and building cohesion, they will not cause a situation where another clan [subgroup] is seen as an enemy of the other. For example, if the Matheniko here does something wrong to a Bokora, the Matheniko will isolate this person by ensuring he/she is exposed and the person faces the reality. The same with the other side. Because of that, it has created a feeling that there is true intention of being together by isolating wrong elements that cause confusion in the community.

When it comes to conflicts where a government body/actor is the aggressor, traditional mechanisms sometimes become toothless due to the power asymmetries involved. Osaghae's view that "the applicability of traditional strategies to modern conflicts is determined, among other factors, by the extent to which the nature of modern conflicts can be shown to be similar or comparable to conflicts in traditional societies" is evidenced by the case of Karamoja where emerging conflicts not within the range of local experience and power are a challenge beyond the stretch of traditional systems.[62] For instance, a number of participants were still in pain over their people killed and

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61. Some communities, such as the Pokot and Karimojong groups, were traditional enemies. Amongst these, any act of aggression will most likely be followed by revenge.

62. Osaghae, *supra* note 21, at 206.

animals lost during the forceful disarmament operations but have nowhere to seek redress and have not gotten any healing outlet. In an interview with an elder, he got so emotional over this:

> My own child was shot dead with a baby on her back. When I think about how the army killed my people, I feel so bitter… It's okay to kill a boy who has a gun; it's good to kill the men who had guns; [but] it is a very heart aching story to tell of those women and elderly men who were killed yet they never held a gun.

Many participants also observed that "peace" in Karamoja has opened the gates to many outsiders for business, land, and jobs. Considering that Karamoja has abundant mineral deposits,[63] it is attracting both more government and private interests. Uganda WildLife Authority has also become more active in claiming back protected land for Kidepo Valley National Park and three other conservation areas with a policy that strictly prohibits grazing there.[64] The reverse effect is for local people to be pushed off the land and to get the feeling that a lot is being taken out of their land without their benefit, while they grapple with famine. We visited some places where marble is being quarried, and the local feeling was that the sector was controlled by outsiders in connivance with local government authorities. One elder in Rupa Sub-county said, with hand on cheek:

> …there is a lot of force when taking away some land. How I wish what they pick from the land is even shared, it would be very good. But even whatever they take from the land, they take it only for themselves… The government is using modern laws and is saying, the land is yours but what is inside is not yours.[65]

In the face of such injustices, the community only expressed fear and helplessness–mostly counting on the advocacy and activism of civil society agents.

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63. Karamoja has gold, marble, glass-making sand, copper, graphite, limestone, platinum, iron, wolfram, gypsum, tin, and lithium. *See,* RUGADYA *et al.,* TENURE IN MYSTERY: STATUS OF LAND UNDER WILDLIFE, FORESTRY AND MINING CONCESSIONS IN KARAMOJA REGION (2010). See also, Human Rights Watch, "How Can We Survive Here?" The Impact of Mining on Human Rights in Karamoja, Uganda, <https://www.hrw.org/sites/default/files/reports/uganda0214_ForUpload.pdf> (Accessed 28 October 2019).

64 Rugadya, *id*.

65. Interview with an elder held on 30 November 2018.

Literature that generically acclaims higher vitality of community-based mechanisms in provision of justice fails to consider the differentials that come with the various kinds of disputes and the actors involved. The vulnerability of a community like Karamoja in dealing with big business agencies and government should be assessed in view of the limits of local knowledge (such as on mining and procedures in getting licences; land titling processes, etc.) which often triggers local withdrawal from complexity and creates fissures for exploitation by "local elites".

This power asymmetry that as well alienates the local community from the alternative "modern" justice systems in turn produces gun nostalgia. Hence sentiments like: "Everyone will tell you that their guns were taken and so they could lose their land or they are powerless to protect their land. For example, people will tell you that, 'it was the gun that was securing our land and now that the gun is not there, we are losing our land too.'"[66] Such sentiments are not helped by the fact that most evictions and guarding of "occupied" sites is by armed men. Whereas overall there is deep appreciation for the peace ushered in through the disarmament exercise, the emerging injustices easily feed into the counter-narrative that there was something sinister behind the exercise.

We shall come back to discussing community perceptions on "modern" justice systems as a problematic alternative in the current transitional circumstances. Let us first look at the Nabilatuk Resolution, the most pronounced and interesting hybrid community mechanism for dealing with the residual problem of cow theft.

i) The Nabilatuk Resolution—In part, this transitional provision, typical of what Boeg *et al.* call 'arrangements that work' or 'ordinary justice',[67] specifically focuses on the cow because, "if you touch the cow, you have touched the heart of the Karamojong".[68] On the other hand, it could be because, as argued above, the other pressing violations are deemed to be out of reach – talk of biting within one's chewing capacity.

Named after Nabilatuk town in southern Karamoja where it was birthed, the Nabilatuk Resolution was first adopted in 2012. Whereas the people had been disarmed, some of them continued with the old habits but on a smaller scale. The source of the Resolution is disputed, with some voices attributing it to the army while others say it was jointly drafted by elders, the army, youths, women, and other local government leaders as a trans-group stopgap measure to fill the void between the

66. Interview with a local civil society official, 24 November 2018.
67. Macdonald, *supra* note 22, at 294.
68. Interview with a Kraal leader in Napak district.

incapacities of traditional justice measures and the strangeness of the "modern". Beyond this contest though, none of those it is attributed to disowns it – although with insistence that they did not singly craft it. The Resolution was as well later extended in 'jurisdiction' to northern Karamoja under the name Moruitit Resolution, but basically with similar provisions. The discussion here regards both as exemplifications of the various ways in which top-down and bottom-up forces interact and foster something contextually unique.[69]

Although the Nabilatuk Resolution carries a number of provisions, the Resolution's most pronounced provision by which it is known in the community is that when one is caught with stolen animals, they are punished by paying double the stolen number, plus one (x2+1). The extra one is for the Peace Committees (PC) which are entrusted with the work of tracking the stolen animals. The PC is constituted of selected community members and elders. Representation of women on the committees is emphasised. One elder we interviewed who chairs a PC noted that his deputy is a woman, which is a positive development in view of Karamoja's generally patriarchal cultural power dynamics. Further probing however showed that, even in the PCs, the voice of women does not find equal space for expression when it comes to deliberations.

With regard to conflict resolution and justice, the above observation raises concern on two fronts: one, the injustice in the limited inclusion of women in matters concerning them and their society; two, whether matters of women are fairly addressed if they do not substantively participate. A detailed gender analysis on this aspect would need to be followed up in another study.

For smooth enforcement, the army is also part of the team. In the event that the thief is found to have no animals apart from the stolen, or less than the formula requires, then they would have to take from the relatives. The punishment is set as a deterrent measure, because no one would want to steal 10 cows only to lose 11 from what they already had. Relatives wouldn't as well want to lose, so they wouldn't condone/protect any thief. Each family is expected to police itself in collective responsibility. We learnt from the Police of instances where families took their own children to the police after losing animals several times in fines. An elder relatedly narrated in an FGD that:

> I arrested the son to my sister because he was ever stealing from the people of Nabilatuk. I arrested him before he causes trouble. This man has made life so hard in the village. Even when a girl is married

69. Sharp, *supra* note 25.

> from the family, the cows [dowry] would be taken away from us due to his theft. We have lost hundreds of cows with the Nabilatuk Resolution due to his theft.

This kind of penalty is partly rooted in Karamojong culture. In his ethnographic study of Karamojong religion, Knighton explains that in the event of an offence where there was need to mend relations/ restore harmony, sacrificial animals (usually bulls) would be picked by elders from the kraal of the offender to be sacrificed at the *Akiriket*.[70] The difference from the Nabilatuk Resolution is that these animals would not be taken by some, rather, they would be eaten together with the offender after praying that *Akuju* (God) forgives him/her. The exercise was oriented to restoring broken relations, with some pinch on the offender. It was usually when the offender escaped justice that relatives would take the punishment. For instance, when a murderer fled out of reach, the brothers of the deceased could kill a half-brother of the murderer, or another person from their clan. By all means, cases had to be settled, and everyone was supposed to take it upon themselves to ensure that justice is done – or else, they could pay the price.

The Resolution was scored highly by all the people we talked to in lieu of its contribution to reducing cattle theft in the area. As attestation to its effectiveness, it was cloned as Moruitit Resolution (MR) in northern Karamoja as well in 2014. Unlike the traditional measures explained earlier, these hybrid resolutions do not extend to considering aspects of reconciliation after administering punishments. The focus is exclusively on recovering stolen animals and administering fines. Their preference to formal justice systems is mainly on account of the faster process of their justice and simplicity/clarity of procedures. Nevertheless, their successes notwithstanding, they were also reported to be posing/facing a number of challenges lately.

ii) Limitations of the Nabilatuk Resolution—Some respondents held the feeling that whereas the Nabilatuk and the Moruitit Resolutions were necessary and very effective for some years after disarmament, they were supposed to be transitional measures that should be rethought now. This is because they are now infiltrated with corruption. Sometimes more cows than provided for by the Nabilatuk Resolution formula are taken by soldiers while some will as well demand for "fuel". Sometimes the recovered cows get lost in the process! Whereas, as earlier discussed, the clause that permits taking relatives' cows in case the culprit does not have is credited by some, others find it to be unfair. Faure has argued that in such traditional settings, "the group

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70. Knighton, *supra* note 13.

always has some responsibility for what people do, or do not do, as it plays a central role in the education of its members and the position they later on occupy".[71] But when such communitarianism is extended to penalties as in the Resolution, it becomes unjust. "It extends liability to the people who are not involved in the commission of the crime".[72] Indeed, it is mostly the families of the 'thieves' that have cried out against the clause.

The implementation of the Resolution is also problematic because it contradicts the laws of Uganda which provide for individual liability. The Police and Judiciary thus insist that the Resolution, which is not even a by-law, is an illegality and if anyone reports to them that their animals have been taken on the basis of it, then that will be treated as an offence. The Magistrate says that "compensation is a discretion of court". On the other hand, the army, a government organ too, is in favour of the Resolution. The interviewed UPDF intelligence officer said,

> The *wanainchi* (citizens) themselves looked for a measure that can benefit them, the Karamojong like hands-on solutions… Yes, it may contradict legally but traditionally, they have owned it and it helped. In some areas we have got some learned people who have challenged it. But the elders have said; No! It has helped.

It should be noted too that modernist notion of individual liability does not settle at ease in a communitarian setting where each one's being and doing is seen to be interlinked with that of everyone else.

There is a political side to the Resolution, which, it is feared by some political actors, may not be achieved if it is withdrawn and cattle thefts resume. It is partly the reason why Police would say that they are not party to it yet watch on as it is being used! For the Karamojong to surrender their guns, they were promised that their animals would be protected by the State, particularly by the army. Continued theft would therefore mean failure by the State and thus attract gun nostalgia. This could be the reason why the army, which was at the forefront of disarmament, would support whatever works to pacify Karamoja; be it a pragmatic illegality. The other vested interest of no less significance is that the Resolution is materially beneficial to the tracking teams.

It is as well deemed unfair by some people that the process does not give adequate hearing to the "alleged thieves", and once "convicted" by the Peace

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71. Faure, *supra* note 47 at 159.
72. Interview with the Police Human Rights and Legal Officer.

Committee, there is no room for appeal, not even appealing against violations/abuses of the Resolution by the UPDF – because the army wields more power than that of the Committee members.

But, because the Resolution is generally found to be effective, whereas the Police and Judiciary want it banned to "give chance to the legal process",[73] a number of respondents from the community instead suggest that it is reviewed to amend the problematic clauses and foreclose possibilities of abuse. The analysis of perceptions on formal approaches in the next section provides the key reasons as to why many people would still prefer that the Nabilatuk Resolution is polished instead of being dropped. It is partly because of the inconveniences and contextual complexity of the modern systems (though their appreciation is increasing), and how local alternatives provide outlets deemed to be fairer albeit wanting.

IV. LOCAL PEOPLE'S PERCEPTIONS ON THE RESPONSIVENESS OF COMMUNITY-BASED SOCIAL CONFLICT RESOLUTION AND JUSTICE MECHANISMS TO THEIR ISSUES

In order to understand local people's perceptions on the community-based social conflict mechanisms explained above, it is helpful to first contextualise them by looking at their views on 'modern' justice systems, which in some ways influence their association with the former.

A. Community perceptions on modern justice systems

All the people we talked to, while acknowledging the gaps in community-based mechanisms for justice and conflict resolution, noted that the "modern" justice system is imbued with inconvenient and unfair practices. Some of these should be understood in lieu of their strangeness to a community emerging from a considerably different arrangement. Others are general operational challenges attributable to flaws within the formal system itself. Macdonald's study on transitional justice in Acholiland showed that "the choice of who to turn to depended on the proximity of the authority to the location of the dispute, the perceived integrity of the individual, his (almost always 'his') range of relevant knowledge, and the degree to which he is both trusted by the community and nested within it".[74] To these factors, as this section shows, we should add duration of arbitration processes, cost, and familiarity with the processes involved.

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73. *Id.*
74. Macdonald, *supra* note 22 at 277.

Like many other traditional societies,[75] the Karamojong expect their case to be resolved in the quickest way possible. When their cow has been stolen, first and foremost, they are interested in recovering it. The Human Rights and Legal Police Officer we interviewed explained that the Karamojong do not want to be told that their recovered cow is being kept at the police station as an exhibit as investigations are being done. They will find that unfair. On some occasions, they have attempted to steal their cows (exhibits) from police at night. There is also an element of mistrust, especially considered against stories we got of cows said to have gotten lost in the barracks where they had been taken for protection. When it comes to trust, which is very crucial in perceptions of justice, the elders command more of it than agents in formal systems.

The formal justice system is faulted for being tardy and bureaucratic. "They use prolonged and intricate technicalities when trying a man who has been caught in the market place indulging in what society regards as improper and corrupt practices".[76] A suspect will have to be arrested, evidence collected, aligned before the court for hearing, await a sentence, and sometimes go through an appeal process. Because court staff are few and cases could be many, a case could drag on and on. Meanwhile, the complainant/victim is expected to continue reporting to court. "…by the time you will reach in the middle or towards the end, you will find when the traditional System has already concluded the matter and both parties have lost interest in the case. And that is how we have been losing cases and both parties are staying together and the conflict is resolved."[77]

The strangeness as well extends to language.[78] Court business is mostly conducted in the official language, English. The locals, most of whom are barely schooled, can only communicate through an interpreter and may not always be sure that the mediation is accurate. When this issue came up in an FGD with youths, they all confessed that it is very difficult to make sense of court proceedings. Unlike in their traditional setting where they can personally make and defend their case, in formal courts, it is risky to do so – for a lot depends on unfamiliar technicalities. In an FGD, a female elder gave us a picture of the dynamics:

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75. A. Nsibambi, *Corruption in Uganda*, 15 UFAHAMU: J. AFR. STUD. 109 (1987).

76. *Id.,* at 110.

77. Interview with Police Human Rights and Legal Officer.

78. B. Kagoro, *The Paradox of Alien Knowledge, Narrative, and Praxis: Transitional Justice and the Politics of Agenda Setting in Africa,* In WHERE LAW MEETS REALITY: FORGING AFRICAN TRANSITIONAL JUSTICE (M.C. Okello *et al.*, eds., 2012).

> It's hard for a poor person to stand against the Rich. You can imagine a situation where a rich man takes you to court because of your own land! Even without your notice, you just get a surprise letter summoning you to court! To make matters worse, the Karamojong even don't know how to secure a lawyer. Even the available ones provided by the State are not provided. The worst is transport. I can report to court once or twice depending on the availability of transport money. Once the transport money is over, I stop reporting to court. On the other hand, the rich man keeps on going to court because he has money. And since I'm always absent, he wins the case and takes the land in your absence.

The grassroots impression is that justice in formal courts is for the rich and educated (elite) who can manoeuvre through its intricacies.[79] The burden of proof is also perceived as cumbersome, or asking for too much in some regards – hence the frustration that sometimes culprits are arrested in the act, only to be released by police or courts for lack of evidence. It is thus not unusual for a suspect to be released by police, only to be ostracised by the community. Kidong-Onyang cites a case in 1998 where a Karamojong mob forcibly took a suspect from the police cells and killed him in the administrative offices.[80] In the traditional system, a person caught *in flagrante delicto* is not a suspect. There may be no need for further investigation. Of course, the danger here is that some innocent people could fall victim to such a procedure. It is in this search for proof beyond reasonable doubt and weighing the gravity of the offense that the two approaches sometimes part ways. Below are two illustrative expressions of frustration; one from a Kraal leader interview, and another from an elder in a FGD, respectively:

> Just imagine a situation where a thief is beaten and when he goes to police they instead arrest those that punished such a person. Police have given a lot of liberty to criminals from being punished by elders and community members. It is not that we kill those criminals, but we teach them how to live as expected of good people. These [traditional] systems have really been in place long before the modern leadership systems came, and we were managing our communities well. Even children now have a lot of rights; they cannot be punished for

79. Oola, *supra* note 29.
80. Knighton, *supra* note 13.

wrongdoing, they run to police.[81]

> The government is scared of the elders because they have a lot of divine wisdom. They are people who can look into just intestines and know what the future holds. And because of that, a lot has been suppressed by modern justice mechanisms. Even when we get a thief that we feel should just be beaten, the police come and arrest them. And they ask very complicated questions! They ask you about how many thieves came and how many guns they carried. Who knows how many thieves move at night to this place! We can't see all their guns! What kind of questions are those the police asks us? Can someone really count the number of thieves that come in the night?"[82]

In light of the above challenges with the modern system, community-based approaches become a point of refuge. They are seen to be relatively more just and convenient, although the community is not totally oblivious of their own bottlenecks. We found out that, for a couple of reasons, in some cases, people would rather report to police than to traditional or community structures. There are as well instances where, when they feel unjustly treated in traditional and community-based processes, they run to police. Many such cases are emerging from the Nabilatuk Resolution disputes lately as discussed earlier.

B. Modern and community-based justice systems in comparative perspective

While it is widely recognised that local alternatives to justice are more popular, our respondents from the Police and Judiciary noted that reporting of cases to the police and court is increasing over time due to sensitisation efforts. It is hoped that with time when people get to understand and appreciate formal processes, they will embrace them more. Proponents for both sides admit that they all have limitations and need each other. It would be unrealistic to expect that within this short time after disarmament, Karamoja will appreciate the procedures of formal systems like would be in other places, let alone to expect that the systems themselves will be strong enough to carry the weight of all the demands for dispute resolution and justice. The fact that some people run to the police or court when they are dissatisfied with community decisions not only demonstrates desperation and a lacuna of lack of appeal space in community-based

81. Interview held on 27 November 2018.
82. Interview held on 7 January 2018.

approaches, but also shows some semblance of trust in the police and courts. Similarly, reporting cases to elders or to Peace Committees in the knowledge of the existence of formal alternatives illustrates trust in the other side. Yet having the two somewhat contradictory systems operating in one space is in itself a threat to justice.

Our findings show that there is a possibility for the two sides to meet each other halfway, of course with some compromises on either side. The Magistrate observed that courts actually provide for reconciliation and mediation, not only punitive measures as widely conceived.[83] Beyond litigation, courts have also adopted Alternative Dispute Resolution (ADR) mechanisms into which some local approaches can be integrated. The ADRs include measures such as negotiation, mediation, mini trial, rent-a-Judge, dispute review boards, expert determination, adjudication, and arbitration.[84] In the Magistrate's view, "many cases brought to court can actually be settled by elders. But since elders have not really been in touch, cases for mediation are mostly referred to religious and Local Council leaders". But this can only happen with dialogue between the key actors on both sides and under an atmosphere of mutual respect and understanding each other's point of departure.

V. CONCLUSION

The foregoing discussion has highlighted some of the key justice and peace needs of the people of Karamoja. The key destabilising factors are cow theft, land grabbing / evictions, and famine. Community-based initiatives are weighed against these, and in comparison with formal justice systems, to assess their effectiveness. Karamoja presents an interesting case both in terms of how it exemplifies some explanations of community-based justice systems in the literature and how it presents insights peculiar to it. The resilience of traditional authority, evading death even under strangulation, is vividly demonstrated in the way the role of elders is evolving through the times ever finding new relevance. This relevance is partly reinforced by the thinness of the formal structures that are only recently gaining ground after the pacification of the area and therefore the strangeness/obscurity of their procedures to the locals.

However, the local reference to both the community-based mechanisms of conflict resolution and the formal ones leads us to the argument that each of the systems is effective in addressing certain kinds of injustice and ill-equipped for others. Community-based mechanisms are mostly effective in providing intra-communal

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83. Oola, *supra* note 29.

84. F. Mulolo *et al*., *Choice of Alternative Dispute Resolution Process in Uganda's Construction Industry*, 2 INTERNATIONAL JOURNAL OF TECHNOSCIENCE AND DEVELOPMENT, 28 (2015).

justice, especially in handling theft and arbitration of warring parties. In some cases, they also prevent and solve inter-community conflict – although solving is not one of their strong points. But State-to-community injustices and those involving 'well-connected' rich companies/individuals tend to overwhelm local systems due the acute power asymmetries involved. As such, integration of the two approaches, carefully consolidating the powers of each while fixing both their internal and relational contradictions would be the practical and sustainable thing to do in circumstances as those in Karamoja. This would involve considering making certain procedural compromises as the community progressively becomes more familiar with, trustful, and competent for formal approaches. And, in aspects where people should transition, it would be unrealistic and unjust to expect an immediate shift from traditional and local mechanisms to the modern. Generally, the impression of mutual exclusion between the two systems that is presented by some scholars is a false dichotomy that mostly arises from putting more emphasis on the differences/contradictions than on convergences and possibilities of bettering each other.

THE IMPACT OF A DIGITAL IDENTIFICATION ECO-SYSTEM ON THE HUMAN RIGHTS OF REFUGEES IN UGANDA

Ruth Muhawe*

ABSTRACT

The global migration towards a digital economy is affecting all the areas of human existence and survival, but its impact is felt differently by different communities. Digital identity is at the pivot of a functional digital economy, which is best supported by a robust digital ID eco-system. If effectively implemented, digital identity schemes could generally improve the lives of migrant communities. However, identity and personal information are intrinsically powerful and sensitive topics, and given the vulnerable nature of refugees, the complexities and risks associated with these large scale systems are amplified. Navigating these complexities requires an analytical appreciation of the unique experiences of individuals that are the subject of these systems so as to properly balance any operational benefits against the effects on exclusion, individual privacy, dignity and agency.

I. INTRODUCTION

In March 2021, the Government of Uganda was dragged to court by two civil society organisations—Initiative for Social and Economic Rights (ISER) & Unwanted Witness—over the requirement to have a national identity (ID) card before receiving the Covid-19 vaccine.[1] Although that directive was subsequently recalled by the Ministry of Health, a number of health centres still require the production of a national ID or indication of one's national identification number on the registration form before the vaccine is administered.

Identity represents a great area of interest and concern for governments, aid agencies, humanitarian organizations and the private sector all working to sustain systems of education, healthcare, financial and social services for local populations.[2]

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1. *Initiative for Social and Economic Rights (ISER) & Unwanted Witness v. Attorney General*, High Court Miscellaneous Cause No. 80 of 2021.

2. The Engine Room, Understanding the Lived Effects of Digital ID: A Multi-Country Study <https://www.good-id.org/en/articles/understanding-lived-effects-digital-id-multi-country-study/> (accessed 24 August 2021).

Identity documentation–a birth certificate, passport, driver's license, national ID card or refugee identity card–is often required for access to these services. Identity documents are currently prerequisites for opening a bank account, voting, getting a job, accessing education or healthcare, and even buying a SIM card and mobile phone.[3] For some countries, the strict identification requirement has been reduced to a national ID. In Uganda, the introduction of national IDs in early 2015 created new dimensions to the citizenship debate because so much of daily life was made contingent on possession of a national ID.[4] The further extent of this has been noted by *J. Oloka Onyango* thus:

> First and foremost, without an ID one will be effectively excluded from the Ugandan socio-political and economic community, given that section 66 of the Act [Registration of Persons Act, 2015] makes it mandatory for every citizen to possess one. Indeed, under the law, production of an ID has now been designated as prima facie evidence of citizenship. Without the ID, one can be legally excluded from the political community. Secondly, possession of an ID is now tied to access to a wide variety of public services. Section 66 requires the production of an ID with respect to the following services, inter alia: employment; voter identification; application and issuance of a passport; the opening of bank accounts; purchase of insurance policies; the purchase, transfer and registration of land; pension and social security transactions; all consumer credit; the payment of taxes; financial services; registration services; and statistical services. The full implication of the introduction of IDs was manifest in the government directive stipulating that all mobile phone SIM cards had to be registered. Aside from the national ID, no other form of identification including a passport was accepted for the purpose…[5]

The reliance on national IDs already creates a whole category of individuals without papers whereby the absence of legal documentation severely curtails the kind and scope and activities in which they can engage such as owning a mobile phone which has evolved to become an essential commodity in the 21st century given that it unlocks

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3. *Id.*

4. J. Oloka-Onyango, *From Expulsion to Exclusion: Revisiting Race, Citizenship and the Ethnicity Conundrum in Contemporary Uganda,* 12(1) MAZAWO (December 2017), at 14.

5. *Id.*

access to almost every amenity and service.[6] Complete or substantial reliance on digital identity systems makes it even worse. While there is at present no requirement that legal identities be digital, many governments and multi-lateral organizations are increasingly adopting the use of digital technology to provide identification. Many institutions and aid agencies now gather biometric data as part of their ID systems. Additionally, people are increasingly having to navigate complex digital ID infrastructure in order to gain and retain access to basic government and humanitarian services.[7] But as these systems proliferate, concerns about their negative effects on vulnerable individuals and marginalized communities have emerged.

Technology is already affecting refugees in many ways, but society has yet to appreciate the different uses of technology in the migration management field and their effects.[8] Institutions, associations, and organizations at all levels are looking to increase their use of technology to collect and store migrants' personal data for more efficient service provision.[9] However, there is lack of coherent regulation and policy guiding the use of ID technologies by these actors. It is therefore crucial to investigate how digital IDs and their eco-system would affect the welfare of refugees differently.

One of the driving forces behind the focus on big data initiatives such as digital identification systems is the expectation that they can provide solutions to the significant and complex challenges faced by the humanitarian sector.[10] But innovation is linked to experimentation and risk-taking, which is particularly problematic when applied to vulnerable populations like refugees.[11] Weighing the value of such systems against the potential risks to migrant safety and fundamental human rights begins with understanding how policy decisions, digital technology, and identity data are both

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6. J. Oloka Onyango, Exploring the Multiple Paradoxes and Challenges of Uganda's Refugee Law, Policies and Practice, (Paper presented at the Stellenbosch Institute of Advanced Studies (STIAS), South Africa, October 28, 2019), at 20.

7. The different elements that together result in self-actualization of the individual are now dominated by digital processes. From democracy and governance (digital elections), banking and finance (digital financial services), transport and communication (e-passports, travel apps, smartphones and social media), to access to health and education (e-learning), employment and social security, digital migration has radically transformed the survival of mankind as previously understood and experienced.

8. J. Bither & A. Ziebarth, *AI, Digital Identities, Biometrics, Blockchain: A Primer on the Use of Technology in Migration Management,* 9 BERTELSMANN STIFTUNG MIGRATION STRATEGY GROUP ON INTERNATIONAL CORPORATION AND DEVELOPMENT (June 2020).

9. Latonero, Hiatt, Napolitano *et al., Digital Identity in the Migration and Refugee Context: Italy Case Study,* 18 DATA & SOCIETY (2019).

10. M. Madinau, *Techno colonialism, Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises,* 3 SOCIAL MEDIA + SOCIETY (2019)

11. *Id.*

constraining and enabling forces for migrants and refugees on the ground, right now.[12]

In December 2018, the UN General Assembly affirmed the Global Compact on Refugees and proposed a framework for a multi-lateral sustainable solution to refugee situations.[13] The United Nations High Commissioner for Refugees (UNHCR) then commenced investigation into the use of digital IDs for refugees to facilitate the goals of the Compact, such as enhancing self-reliance and expanding access to third-country solutions.[14] The UN agency committed to: provide resources to contribute to national capacity for registration and ID; to promote digitization, bio metrics and other relevant technology; and to collect, use, and share quality registration data in line with relevant data protection and privacy principles.[15] UNHCR also committed to support the inclusion of asylum seekers and refugees in states' civil registration and ID systems.[16] The progress on the implementation of this commitment thus far can be assessed through the next sections of this article.

II. THE DIGITAL ID ECO-SYSTEM

Digital identification schemes have become important development initiatives in many countries around the world, given the impact they have had on the ability of governments to manage their populations, improve the efficiency of public service delivery, and increase national security.[17] The demand for digital IDs is further fueled by the migration into a digital economy where transaction, service provision and human interaction happens electronically. The digital economy ultimately promises to make lives easier, governments and businesses more efficient, to drive growth and deliver

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12. Latonero, Hiatt, Napolitano *et al., supra* note 10, at 7.

13. A. Hopkins, The Global Compact on Refugees and Identity, UNHCR June 2019, <www.id4africa.com > (accessed 24 August 2021).

14. The first objective of the Compact is registration and documentation, which plays a crucial role in the assistance and protection of refugees. "*We want every refugee to have a unique digital identity. This will enhance accountability and facilitate two-way communication between refugees and service providers."* The High Commissioner, Opening Speech at the UNHCR Executive Committee, October 2, 2017.

15. Global Compact on Refugees 2018, Objective 1.

16. This objective has been further developed under the UN Strategy on Digital Identity and Inclusion 2018 that lays out three main targets: empowering refugees by providing them with legal identity, strengthening state capacity to enable development of integrated or interoperable civil registries, and using the above to ultimately improve service delivery.

17. JOSEPH J. ATICK, DIGITAL IDENTITY: THE ESSENTIAL GUIDE (2016) 1.

cost savings to all.[18] But for interactions in this eco-system to function seamlessly, digital identity is key. In any context, digital identity is a platform which transcends both economic and social sectors. It ensures that services are accessed and delivered to the rightful person in a digital society.

Without robust identity, a functional digital economy is hardly possible. In low-income countries like Uganda however, digital ID is primarily used for identification purposes rather than e-services. It helps a country meet its identification needs in the physical world like enhancing national security and public administration without passing through a traditional ID system first.[19] But the increasing level of mobile payments is an indicator that soon even low-income economies will be adopting digital ID not just for identification but for service delivery.

Identification systems usually develop in response to a specific application such as elections, tax, social protection, relief, security, or are simply developed as universal multi-purpose systems capable of supporting the entire range of needs for legal identity across all applications. But no matter what the country context is, a strategy must be adopted that guarantees identity for all.[20] Absent of such strategy, a fragmented identity eco-system shall be created with a patchwork of competing schemes lacking interoperability, consistency, and fueling systemic exclusion.

The UN goal of establishing a legal identity for all raises the question as to whether a universal biometric identity card will eventually be required for everyone to access vital services such as healthcare or education, employment, or opening a bank account. SDG target 16.9; "*to provide legal identity to all, including birth registration, by 2030,"* urges States to ensure that all have free or low-cost access to widely accepted, robust identity credentials.[21] This is because robust identification is instrumental to achieving many of the sustainable development goals and directly relates to other clusters like social protection, access to economic resources, maternal and child health, and equity of fiscal policy.[22]

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18. The expanding impact of disruptive technologies such as mobile devices and social media has a broad multi-sectoral impact and has thus created a deeply digital society. Information is portable and accessible anywhere at any time, can be subjected to practically unlimited processing and data analytics can be used to inform decisions on better service delivery.

19. *Id.*

20. Atick, *supra* note 18, at 4.

21. Legal Identity was included as the first target in SDG Goal 16: *To Ensure Good Governance and Effective Institutions.*

22. M. Dahan & A. Gelb, The Role of Identification in the Post-2015 Development Agenda, World Bank Working Paper 98294, 5 (2015).

However, there is a very thin line between requiring identity credentials as a precondition to access services and the creation of an additional exclusion barrier. In fact, overzealous or inflexible ID requirements are sometimes seen as a move to block individuals from accessing services or executing their rights.[23] And yet by principle, no one should be denied access to social or economic participation or to public services for lack of identification credentials. If made necessary, such credentials must then be available throughout the life-cycle of the individual, to both the rich and poor, and be sufficiently robust to be widely accepted under all regulations and practices of the country concerned.[24]

Therefore, while digital ID systems could facilitate development, they present numerous challenges especially amongst marginalized communities. These range from low levels of public and civil society involvement to barriers to registration and use, lack of informed consent, concerns about data use and protection, lack of shared language on digital ID and the failure to consider local context.[25] Other key tensions within digital ID ecosystems include empowerment versus surveillance, data sharing versus data privacy, and benefits for some versus harm to others.[26] Institutions developing and implementing digital ID systems often prioritize their own needs—efficiency in benefits distribution, national security, financial benefit—over observance of human rights and ethical considerations.

A. Digital IDs and humanitarian activity

Many refugees flee their homes without formal identification since many of them either lose such identification documents or are destroyed during their journey. And yet, proof of identity for them has been termed a lifesaver.[27] Official proof of identity is a key enabler for their access to healthcare, education, food, and other essentials. Organizations that distribute food, clothing, and other basic needs need to collect data and statistics on the populations they help for accountability and sustainability purposes. Therefore, migrants without documents, with expired documents, or with unrecognized documents have no or limited access to services.

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23. *Id.*
24. *Id.,* at 8.
25. The Engine Room, *supra* note 3.
26. *Id.*
27. Latonero, Hiatt, Napolitano et al., *supra* note 10, at 3.

When refugees enter the host State, they also enter a network of organizations and systems that are part of the humanitarian response.[28] As the government and these organizations interact with individual refugees, they create records and issue credentials in order to identify and authenticate that people are who they say they are.[29] The process is becoming increasingly digital, with biometric and biographical data recorded in computerized systems. The data collected is usually stored in ProGres, the identity management software used by UNHCR. In addition to collecting the refugees' biographical information, UNHCR also records their biometric data, including fingerprints, iris scans and facial images, which are typically stored in its Biometric Identity Management System (BMS) that integrates with ProGres.[30]

A number of challenges regarding managing identities have been underscored in the humanitarian sector.[31] First, registration is time-consuming and laborious. The process can take an average of three days to complete, and registering with so many organizations while providing the same information over and over again leads to confusion and frustration among refugees.[32] Secondly, renewing and updating data is difficult. In addition to renewing the UNHCR identity documents, registration information must be updated upon changes in personal status such as getting married or bearing children. Thirdly, identity systems lack transparency at the point of data collection, update, use, and sharing. Humanitarian organizations for instance are aware of principles like informed consent but are faced with overwhelming numbers. Additionally, the information provided is sometimes linked to vulnerability assessments with no transparency on the criteria by which these assessments are calculated. Lastly, there are issues of data privacy and protection amidst all the information sharing across entities.

In light of all these challenges, humanitarian organizations around the world are increasingly embracing sophisticated digital systems to manage the identities and

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28. E. Shoemaker, G.S. Kristinsdottir, T. Ahuja et al., *Identity at the Margins: Examining Refugee Experiences with Digital Identity Systems in Lebanon, Jordan, and Uganda,* in PROCEEDINGS OF THE 2ND ACM SIGCAS CONFERENCE ON COMPUTING AND SUSTAINABLE SOCIETIES 206-217 (2019), at 4

29. In interacting with these diverse organizations and services, refugees collect different identity credentials, from the UNHCR document that identifies them as a recognized refugee, to temporary project-related credentials issued by NGOs. As such, they frequently end up being identified by multiple organizations, processing and managing multiple identity credentials, with different identities holding different functions and levels of importance in their lives.

30. Shoemaker, et al., *supra* note 29, at 6.

31. *Id.,* at 6-7.

32. *Id.,* at 5.

personal data of the beneficiaries they serve.[33] These digital identity management systems have the potential to facilitate simplified reporting, reduce fraud, improve service delivery, and increase convenience for both organizations and refugees.[34] The use of new technologies has generally allowed the humanitarian sector to respond faster, more efficiently, and at less expense to the complex and growing numbers of refugees while at the same time limiting fraud and misuse in assistance distribution.[35] Biometrics also afford refugees a credible means of establishing their identity, even where they lack other documentation, and increases the political viability of projects designed for their benefit by improving accuracy and resistance to fraud.[36] It further enables interested parties to accurately identify the size of refugee populations and more effectively deliver aid to those who need it most.[37] This allows for workable solutions to changing policy priorities, like the increasing preference for cash-based assistance programs.[38] But despite the seemingly convenient features of biometric-based aid delivery solutions, these systems raise a number of issues related with individual autonomy and privacy.

Through these biometric procedures, data then defines the refugee's legitimacy and right to access vital services. According to some scholars, compulsory registration of refugees and their biometric enrolment create a form of humanitarian governance which exchanges 'aid for discipline.'[39] The design of digital humanitarian systems generally follows a top-down approach, focusing on governments or organizations as the users of such systems, catering to their needs, priorities and perspectives, and making the refugees legible in ways determined by those governments or organizations.[40] Ultimately, the design of current digital identity systems does not prioritize refugees.[41]

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33. Currently, the two largest databases are WFP's SCOPE, a web-based platform containing data on over twenty million persons, and UNHCR's PRIMES with over ten million entries. 8 in 10 refugees registered by UNHCR now have a biometric identity. *See*, Bither & Ziebarth, *supra* note 9, at 13; Hopkins, *supra* note 14.

34. Shoemaker, et al., *supra* note 29, at 1.

35. Bither & Ziebarthn, *supra* note 9, at 13.

36. A. Farraj, *Refugees and the Biometric Future: The Impact of Biometrics on Refugees and Asylum Seekers,* 42 COLUM. HUM. RTS. L. REV. 891 (2010), at 891.

37. *Id.*

38. The program *Building Blocks* by World Food Programme for instance, allows beneficiaries to buy groceries or access cash-based service by accessing the UNHCR-managed refugee biometric database via iris scan.

39. *Id.,* at 472.

40. Shoemaker, et al., *supra* note 29, at 10.

41. *Id.*

B. Uganda's Refugee Response to-date

The emergence of new technologies raises concerns in host developing States like Uganda that are heavily dependent on foreign aid and constantly in need of measures to help manage their refugee response.[42] Since 2016, the violence in South Sudan, Democratic Republic of the Congo and Burundi has added to the country's refugee numbers. Uganda is the 3rd largest refugee host country in the world and the first in Africa with approximately 1.5 million refugees, majority of whom are from South Sudan.[43] The open door policy for refugees into Uganda guarantees their right to find work and move around the country.[44] Refugees mainly settle in specific rural areas, where they are allotted a plot of land.[45] Registered refugees receive food, vouchers or cash from UNHCR and the World Food Program (WFP). They also bring their own resources to their settlement communities, including movable assets and flows of remittances from relatives elsewhere.

Uganda's response towards the refugee influx is considered a model worth replicating for other countries.[46] In 2017, the government of Uganda adopted the Comprehensive Refugee Response Framework, a multi-stakeholder mechanism currently led by the Office of the Prime Minister (OPM) and facilitated by UNHCR that seeks to bridge emergency and development assistance.[47] The government's obligations under the Framework are embodied in the 2006 Refugee Act and the 2010 Refugee Regulations, which provide for the right of refugees to access territory and the principle of non-refoulment, provision of individual registration and documentation, access to social services, the right to work and the right to establish a business.[48] Social services such as health and water/sanitation are constructed in such a manner as to ensure that they are shared between the refugees and the host communities.[49] Education is also

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42. Annabel Mwagalanyi, *Collected for One Reason, Used for Another: The Emergence of Refugee Data in Uganda,* in PROCEEDINGS OF THE ETHICOMP 2020: PARADIGM SHIFTS IN ICT ETHICS 306-308, at 306.

43. Last updated September 30, 2021; https://ugandarefugees.org/en/country/uga <accessed October 25, 2021).

44. Oloka Onyango, *supra* note 7, at 10-12.

45. GCAF, UNCHR & SIDA, 'Assessing the Needs of Refugees for Financial and Non-Financial Services: Uganda' July 2018, 2; A. Malik, E. Mohr & Y. Irvin-Erickson, Airtel Uganda's Partnership with DanChurchAid, High Tech Humanitarians Research Report, July 2018, at 6.

46. *Id*., at 8-11. See also, Oloka Onyango, *supra* note 7, at 1-2, 8.

47. *Id.*

48. The Refugees Act 2006, §§ 28 – 36.

49. Wilson Asiimwe, *Gov't equips communities hosting refugees*, NEW VISION August 5, 2019, at 16.

provided through an integrated model, allowing both refugees and nationals to access free education at public schools.[50]

However, the growing refugee influx naturally strains basic service delivery and livelihood opportunities. Therefore, implementation of the refugee policy is compromised by weaknesses in local infrastructure and social services delivery, market access in refugee settlements, and especially by identity and registration complications. But in humanitarian work, the issue that has arisen the most and seems to have the greatest impact is that of consumer identification.[51]

Valid ID is required for SIM registration, mobile money access, and eligibility under relief or assistance programs.

UNHCR issues ID cards to refugees which in other countries are accepted for official purposes, but Uganda only recognizes the IDs issued by OPM.[52] The OPM ID card is the one that gives a refugee official status in Uganda, serving as the equivalent of Uganda's national ID. The refugees in Uganda receive support for basic needs either in cash or in-kind, but the balance in recent years has been shifting in favor of financial transfers.[53] In 2016, humanitarian agencies and implementing partners realized that a lot of money was being spent on food distribution in Northern Uganda – close to USD $12 million a month.[54] A strategic decision was reached to convert this in-kind support into cash transfers. Digital payments were seen as a more effective method of assistance than the distribution of physical aid.

As such, there is a growth in partnerships between mobile network operators and the humanitarian sector to provide cash transfers via mobile money.[55] However, a major setback faced is refugees being stuck at different times without the OPM refugee ID required for SIM registration and access to mobile money.[56] In early 2017 for example, the Uganda Communications Commission invalidated SIM cards held by persons without Ugandan national ID cards.[57] Humanitarian agencies and their partners

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50. Malik *et al*, *supra* note 46, at 7.

51. *Id.,* at 25.

52. GCAF *et al*, *supra* note 46, at 10.

53. Malik *et al.*, *supra* note 46, at 10.

54. *Id.,* at 19.

55. For example, the partnership between International Rescue Committee and MTN in Bidibidi settlement in 2017, and between MercyCorps and Airtel to provide both mobile access and cash transfers in Yumbe in 2016. Additionally, DanChurchAid, an NGO serving the poor, contracted Airtel to provide bulk mobile money payments to beneficiaries in the Bidibidi refugee settlement as well.

56. Malik *et al.*, *supra* note 46, at 21.

57. *Only National IDs allowed in new 7-day UCC sim-card deadline,* THE INDEPENDENT, April 11, 2017 <https://www.independent.co.ug/national-ids-allowed-new-7-day-ucc-sim-card-deadline/> (accessed 6 September 2021). This in effect meant that refugees could not in their own right register for

reverted to physical cash deliveries until they were able to persuade authorities to accept OPM refugee ID cards as equivalent to national ID cards, and then worked to get large numbers of refugee SIM cards re-registered.[58] Therefore, a bit of flexibility is required to accommodate the refugees who do not yet have formal IDs.

Digital solutions enable effective performance in settling and supporting refugees. For instance, electronic transfers offer a faster, more secure and more transparent means of assistance compared to physical cash or in-kind aid.[59] Mobile money access brings with it potential for beneficiaries' access to other tools of financial inclusion such as digital savings, credit, utility payments, and international remittances. Such advancements also facilitate sustainability, as market mechanisms can in theory continue even after donors leave.[60] Therefore, significant investment is needed to ensure that humanitarian cash transfers can be done successfully at scale.

The streamlining of account-opening procedures enabled by Uganda's integration of identity and SIM registration systems and the recognition of OPM refugee IDs has so far been helpful.[61] In 2018, OPM partnered with UNHCR to deploy a biometric registration system to generate recognized ID and the integration of the ration card with other services.[62] Subsequently, the government through the National Identification Registration Authority of Uganda announced the nationwide distribution of digital ID cards to citizens, a process that was expected to end in December 2020.[63]

III. INCLUSION OR EXCLUSION: DIGITAL IDS AS A DOUBLE-EDGED SWORD

The identity of the refugee is increasingly becoming both the target of control as well as the basis of argument for refugee rights. For example, refugees depend on digital infrastructure to communicate and locate the resources they need, yet the same tools are

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Sim-cards or have access to mobile money, and could only use cards if registered with a national ID in the names of the holder of such ID.

58. Malik *et al.*, *supra* note 46, at 12.

59. *Id.*

60. *Id.*

61. *Id.,* at 16.

62. GCAF *et al.*, *supra* note 46, at 49.

63. In 2019, the country contracted Muehlbauer—a Germany firm—for the production of digital ID cards for Ugandans. According to the firm, approximately 30 million citizens had registered for the permanent biometrics-backed ID number by the end of that year. *See*, Ayang Macdonald, *Uganda to Begin Nationwide Distribution of Biometric Cards to Citizens,* November 13, 2020 <https://www.biometricupdate.com/202011/uganda-to-begin-nationwide-distribution-of-biometric-id-cards-to-citizens> (accessed 24 November 2021).

increasingly used to exploit their vulnerabilities—either by the multi-national corporations that build the platforms or the governments that license and regulate them.[64] Therefore, the digital ID and its ecosystem comes with a dialectical tension between the possibilities for benefit and the possibilities of harm to the lives of refugees. To an extent, refugees enjoy civil and political rights such as equality, non-discrimination, as well as the right to participate in decision making and contribute to national policies and programmes that guaranteed to minorities under Article 36 of the 1995 Uganda Constitution. However, the focus of this article is on the social and economic rights of refugees in an increasingly digital economy.

A. Infinite Possibilities

In today's digital world, lacking proof of legal identity can limit a person's access to services and socio-economic participation, including employment opportunities, a mobile phone, and a bank account.[65] This is especially so for refugees who rely on legal recognition for special protection and social inclusion.[66] Therefore, a robust interoperable digital ID system could facilitate refugees in their travel and enable them seek opportunities for education and employment with great ease. Additionally, the Global Compact on Refugees aspires towards cash-based transfers, economic inclusion, and livelihoods.[67] This involves moving away from in-kind assistance, to increasing the use and coordination of cash-based interventions using digital platforms.[68]

1. Access to services—It has been argued that the humanitarian question must be framed in a way that challenges the supremacy of legal identity rather than affirms it.[69] Rather than asking how to provide legal identity to all, focus should be placed on how to disassociate access and entitlement to relevant services and programs from legal identity so that access to basic rights is not made contingent on identity documentation but on the mere fact of existing.[70] But in reality, identification provides a foundation for other rights. However, the increasing emphasis on legal identity as a prerequisite

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64. S. Zavratnik & S. Cukutkrilic, *Digital Routes, "Digital Migrants": From Empowerment to Control Over Refugees* XXXIV DRUZBOSLOVNE RAZPRAVE 143 (2018) 148-149.

65. Latonero *et al*., *supra* note 10, at 3.

66. *Id.*

67. Global Compact on Refugees 2018, Objective 3.

68. Hopkins, *supra* note 14.

69. B. Ajana, *Digital Biopolitics, Humanitarianism, and the Datafication of Refugees,* in REFUGEE IMAGINARIES: RESEARCH ACROSS THE HUMANITIES (E. Cox, *et al*., eds., 2019) Ch. 24 at 475.

70. *Id.*

for the enjoyment of basic rights could strengthen or even create further forms of exclusion. For example, the urban refugees in Uganda face several challenges because not being housed in the refugee rural settlements means that one is generally not entitled to any assistance.[71] And yet, they also encounter obstacles related to their personal identification documentation, including the risk of deportation as illegal immigrants.[72] Digital identity presents an opportunity to mitigate this. A functional digital identity system can be used to address identity concerns and provide consistent services across time and place, like health care from one refugee setting to the next. Consistent data would reduce the number of times refugees must tell their 'story' to organizations or institutions, and would ensure that they are not denied services due to identity constraints.[73]

2. Access to work—Online labor platforms are now growing faster than traditional labor markets and comprise a significant part of the digital economy.[74] Some digital work is accessible by smart phone with payment almost immediately through mobile money. This means that with just a phone and a phone number, migrants can have both access to, and be paid for work. Uganda has been identified as one of the main locations for digital or digitally-enabled work for displaced people.[75] However, they struggle to benefit from it especially due to the barriers to identification and financial inclusion. Many of these barriers are systemic, such as different (or lacking) ID systems, and a widespread refusal by host States to accept alternate or foreign IDs.[76] Displaced people end up facing a disproportionate burden to job access due to lack of proper ID or recognized credentials, as well as the inability to have these verified. For example, a tech entrepreneur will struggle to create a sustainable digital business due to the inability to open a bank account with a refugee ID. The plight of urban refugees is even more significant, as unlike refugees in the settlements who require no formalities in order to engage in active labour, they are required to obtain work permits from the Immigration Department as though they are simply aliens or economic migrants.[77]

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71. Oloka Onyango, *supra* note 7, at 16.

72. *Id.*

73. Latonero *et al.*, *supra* note 10, at 11.

74. E. Easton-Calabria, The Migrant Union: Digital Livelihoods for People on the Move (2019) UNDP 17, <www.undp.org>documents> (accessed 26 August 2021).

75 *Id*., at 13.

76. *Id.,* at 19.

77. Oloka-Onyango, *supra* note 7, at 17.

The existing systems to try and address these issues are currently fragmented. Digital identity and credentialing solutions are often project-based or country-based, meaning there is no global standardization and systematization to recognizing identity and credentials of displaced people.[78] Globally, 161 countries have ID systems using digital technologies – but many of them are national rather than international, living displaced persons with no way to carry their identity with them digitally.[79] This impacts refugees when they move through countries, and also means that potential employers are unable to identify and access talent globally.

As a solution, digital ID and credentialing companies seek to create interoperable (coherent and transnational) digital identity credentialing and verification services and are already working with displaced people.[80] The use of digital IDs could therefore plug refugees into the digital work transformation.[81] Standardizing IDs and credentialing systems would allow them maintain acceptance of their documents regardless of the country they are in. But even more, the creation of interoperable digital ID systems would allow refugees 'carry' their identity and recognized skill set with them during flight.[82]

3. Financial Inclusion—Refugees usually have no access to essential financial services when they arrive in Uganda.[83] Meanwhile, the development and sustainability of many businesses depends on the availability of credit. Additionally, remittances already play a significant development role in the economies of displaced persons.[84] If technology enables more accessible, convenient and cheap options, the benefits will be significant.[85] Having a robust interoperable digital ID system would deal with the barriers faced by many refugees in opening back accounts and owning SIM cards. The recognition of IDs and other documentation makes the process of opening an account complicated and time consuming. One refugee reported thus:

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78. *Id.,* at 22.

79. *Id.,* at 23.

80. Easton-Calabria, *supra* note 75, at 23. For example, *Learning Machine* issues digital credentials across a variety of sectors, from the workforce to health care to education, which are verified by QR code in order to be easily read across institutions and borders.

81. Bither & Ziebarth, *supra* note 9, at 21. A recent example of this trend is the pilot program by the non-profit REFUNITE, which has allowed refugees in Uganda to earn money by "training" algorithms for artificial intelligence. It has launched the pilot project Level App in Uganda which extends digital work opportunities to refugees who have a smartphone and a mobile money account.

82. Easton-Calabria, *supra* note 75, at 38 – 39.

83. Malik *et al.*, *supra* note 46, at 15.

84. Bither & Ziebarth, *supra* note 9, at 20.

85. *Id.*

> I had to go three times to open a bank account. First, my refugee ID was refused. Then, I came with a letter (from an NGO) and this was also refused, and finally, with a documentation of the OPM, and after the OPM itself contacted the bank, the ID was eventually accepted.[86]

As more people countrywide gain access to cellphones, even those without bank accounts can access funds and other digital financial services through mobile devices. Where banking regulations permit, licensed institutions can offer clients an e-money account in which digital value is loaded in return for a client's deposit of cash.[87] In Uganda, mobile network operators have partnered with financial institutions to offer a version of this as mobile money. However, even mobile money providers must comply with the rigorous identification requirements imposed by financial, telecommunication, and money laundering regulations. The restrictions to obtain SIM cards and access mobile money services generally affect refugees more than citizens given the additional controls on the means of identification.[88]

Key stakeholders believe that markets in some parts of Uganda have the capacity to support cash transfers, which would increase refugee business investments and improve their livelihoods.[89] But in order to assess the refugee zone market, service providers want access to data on that population, such as their income levels, monthly cash-in flows, sources of income, financial needs, education levels, and familiarity with digital products.[90] Although some scattered information is available, there is not enough data on refugees for service providers to make informed investment decisions. The expansion and digitization of identity systems would mitigate this problem. The digitization of the whole assistance process could be a vehicle for financial inclusion, beginning with the provision of instruments for mobile payments rather than only cash-in and cash-out.

B. Attendant risks

As digital identity systems multiply around the world, the digital ID poses one of the gravest risks to human rights of any technology encountered so far.[91] The collection of

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86. *Id*., at 49.
87. *See,* Malik *et al.*, *supra* note 46, at 11.
88. GCAF *et al.*, *supra* note 46, at 13.
89. *Id.,* at 17.
90. *Id.*
91. Latonero *et al.*, *supra* note 10, at 7.

identity data is shaped by a number of policies, which create vast power differentials between governments and refugees with implications for social protection.[92] Digital systems can be used for surveillance by both the State and the private sector. Furthermore, they can exclude rather than include.[93] And as digital ID-related solutions proliferate in the migration and refugee context, they raise important questions about data security, privacy, access, and meaningful consent.[94]

1. Further exclusion—According to field research investigating the impact of the national ID system on human rights, the Uganda national ID has never made good on its promise to foster social inclusion, a promise repeated by proponents of digital ID systems around the world.[95] In fact, the purported inclusionary benefits of digital ID like increased access to services and strengthening of government capacity are argued to simply be selling points in international development discourse by global actors like the World Bank with selective knowledge of the ground effects of the project.[96] A digital ID system can only facilitate access to social and other human rights if individuals have easy and non-discriminatory access to such an ID.[97]

Technology determinism views digital technologies as mainly liberating and emancipatory, but there are emerging digital inequalities and complex digital divides which can produce differences in access to such technologies.[98] For example, increased digitization has already been seen to further amplify the distance between refugees and resettlement services, particularly because of their inability to understand digitized services or due to their mindset towards technology.[99] Additionally, while digital technology may help a refugee navigate education, welfare and employment systems,

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92. *Id.,* at 16.

93. For example, Kenya's national digital ID program was halted in early 2020 by a court ruling in the infamous *Huduma Namba* case citing the lack of data protection and concerns of further discrimination of marginalized groups or minorities. *See,* Abdi Latif Dahir & Carlos Mureithi, *Kenya's High Court Delays National Biometric ID Program,* NEW YORK TIMES, January 31, 2020 (accessed 16 September 2021).

94. Bither & Ziebarth, *supra* note 9, at 13.

95. CHRGJ, ISER & UNWANTED WITNESS, CHASED AWAY AND LEFT TO DIE: HOW A NATIONAL SECURITY APPROACH TO UGANDA'S DIGITAL ID HAS LED TO WHOLESALE EXCLUSION OF WOMEN AND OLDER PERSONS (2021), at 8.

96. *Id.,* at 11-12.

97. *Id.,* at 13.

98. Zavratnik & Cukutkrilic, *supra* note 65, at 146.

99. R.B. Jensen, L. Coles-Kemp & R. Talhouk, *When the Civic Turns Digital: Designing Safe and Secure Refugee Resettlement,* in PROCEEDINGS OF THE 2020 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS (2020), at 14.

it does not necessarily enable easier integration into society itself.[100] On the other hand, the nature and effect of technology is to reduce every day relational human interactions and leave new entrants into society isolated and unconnected with the places they are settling into.[101]

Even without digital systems, government bureaucracies often gravely affect marginalized communities. Historical research has demonstrated how bureaucratic information systems for sorting and classifying people implements discriminatory policies.[102] Bureaucratic classification systems have long relied on the collection of identity data and technologies that can prove one's identity like ID cards, travel papers, and registration ledgers.

In Uganda, the lack of a national ID is already the source of exclusion of persons, even citizens, from access to healthcare, social security, financial and other services.[103] Possession of national ID has become a critical gateway to access human rights and is now considered the most important official identity document.[104]

Digital identity management systems might seem to offer a more efficient method of management, but the reliance on the same databases can make an already flawed process more rigid, by limiting its adaptability to new information or unforeseen systems.[105] Any tech system for digital identity is no match for more entrenched, socially ingrained systems that exist today. Therefore, developing a robust digital ID system in the current context could simply reinforce existing structural biases, inequalities and discriminatory policies. This would simply mean a more efficient implementation of laws and policies that infringe on the fundamental rights of refugees.

Additionally, refugees may be excluded from, or actively avoid social systems of support if they feel that they are being tracked via technology. This is known as system-avoidance.[106] Individuals weary of surveillance may deliberately and systematically avoid institutional contact that puts them in the system. Outside of official reception centers, refugees may choose to avoid other support centers set up by NGOs if they feel they are being asked too many questions. For example, many migrants perceive the very act of biometric data collection as inherently connected to government and law enforcement monitoring – which they have learned to treat with

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100. *Id.*
101. *Id.*
102. Latonero *et al.*, *supra* note 10, at 24.
103. CHRGJ *et al.*, *supra* note 96, at 10-11, 24.
104. *Id.,* at 24-25.
105. Latonero *et al.*, *supra* note 10, at 26.
106. *Id.,* at 32.

skepticism.[107] Even from a security perspective, the access control central to digital services with its underpinning identification and authentication processes could re-enforce the otherness of refugees, thereby turbocharging notions of difference and exclusion rather than inclusion.[108]

Therefore, developing technologies can allow for discrimination and amplify existing biases in certain policy systems which would affect refugees.[109] Technology can also reproduce existing power disparities, especially if not checked and monitored properly.[110] The kind of digital ID platform designed will determine how it affects refugees and migrants. Excluding refugees from the national digital ID system, for example, would significantly exacerbate existing vulnerabilities.

2. Data sharing, protection, and the right to privacy—Privacy, informed consent, and data protection are compromised throughout the entire process of identification. With weak data protection laws, refugees – a group perceived as citizens of nowhere, and whose interests are not represented by governments – are at high risk of exploitation. They have little to almost no control over their situation, and yet their legal identity is challenged and constructed anew by forces greater than themselves.[111] The power asymmetries involved in biometric registrations are further exacerbated by the fundamental lack of meaningful consent during refugee registrations, and the fact that refusing to register amounts to refusal to receive assistance – something refugees can hardly afford.[112]

Moreover, refugees are not ordinary consumers or users of digital systems.[113] They have specific characteristics that make them a vulnerable population.[114] Privacy concerns, for example, can be more sensitive for refugees fleeing from political persecution and violence in their home countries.[115] And yet, despite the fundamental

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107. *Id.,* at 23.

108. Jensen *et al.*, *supra* note 100, at 19.

109. Bither & Ziebarth, *supra* note 9, at 25.

110. *Id.*

111. Mwagalanyi, *supra* note 43, at 307.

112. Madinau, *supra* note 11, at 9.

113. M. Latonero & P. Kift, *On Digital Passages and Borders: Refugees and the New Infrastructure for Movement and Control*, 4(1) SOCIAL MEDIA + SOCIETY (2018), at 4.

114. *Id.*

115. *Id.* Refugees and asylum seekers are likely to consider biometric enrolment to be a more serious intrusion as compared to those who have not shared their experiences. They either face, or have faced, a well-founded fear of persecution by their governments or by persons that their governments are either unwilling or unable to control. As such, confidentiality of data is particularly important for refugees, because there is a danger that the agents of persecution or rights violation may gain access to this

right to privacy, refugees basically have no choice on whether to give up their data. For refugees seeking even the most basic resources, the price often involves handing over information about their identity. And yet, because systems are bound to suffer data breaches, the issue of who is empowered to say no to identity collection is of great importance and applies directly to refugees seeking access to borders.[116]

Refugees also have little to no knowledge of the institutional systems and processes through which their personal data is managed and used, including which organizations have access to which data.[117] In addition, they are typically unable to exercise agency with regard to the data that is collected about them. This helplessness and lack of transparency often results in confusion, disappointment, and anxiety about the safety and privacy of their information. Some refugees are so concerned about the potential consequences of data sharing that they avoid registering altogether.[118]

Moreover, storing large amounts of highly sensitive personal data including biometrics raises questions about how it is stored, protected, and about who has ownership and access. To develop functionalities, ID data is shared with other actors such as private companies.[119] But this bears potential harmful consequences for individuals, if for example cellphone data shared in one instance can then be linked back to individuals via another database.[120] The sharing of sensitive data raises concerns about 'function creep', which refers to the way that data collected for one purpose may end up being used entirely a different purpose like State surveillance.[121] Data ownership is also a major concern, as it is associated with monitoring and surveillance powers which raise both accountability and ethical issues.[122] Therefore, as more and more sensitive data on refugees is collected and made interoperable with other datasets, and as more actors (private companies, government departments) are both collectors and sharers of that information, it is crucial to investigate and regulate who has access to which personal data.[123]

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information, thus potentially exposing a refugee to danger even within his or her county of asylum. *See,* Farraj, *supra* note 37, at 920 & 930.

116. Latonero *et al*., *supra* note 10, at 7.
117. Shoemaker *et al*., *supra* note 29, at 1.
118. *Id.*
119. Bither & Ziebarth, *supra* note 9, at 14.
120. *Id.*
121. Madinau, *supra* note 11, at 7.
122. *Id.,* at 4.
123. Bither & Ziebarth, *supra* note 9, at 16.

Finally, data sharing and triangulation actually bears security implications for refugees that may not be obvious to the rest of the population.[124] The increasingly digital nature of identification systems means that it is much easier for organizations to share data now than ever before. As such, some refugees fear that sensitive information may be shared with individuals or with government agencies in their home countries.[125] The mere collection of refugees' personal data introduces risk, especially for those fleeing persecution from a government that may want to harm them or cannot protect them from powerful actors in their home country.[126] Additionally, the information obtained by humanitarian actors could easily be used to facilitate surveillance and pose threats to an individual's life and liberty.

3. Regulation—Technology, whereas acclaimed as being faster and better, also brings new actors to the scene.[127] This is bound to change both the nature and substance of policy.[128] It also brings into question issues of accountability, due to the blurred lines between private companies and public authorities. It is difficult to keep track of the ecosystem of actors, organizations and technologies that are involved in collecting and processing refugee identity data. A number of NGOs collect identity data in the course of providing services like financial aid, legal aid, medical care and language classes. There is also a growing tendency of the private/corporate sector to collect data on vulnerable populations they know little about for research, product development and marketing purposes.[129]

This is a problem for stakeholders—practitioners, policymakers, corporate actors and civil society—who need empirical, on-the-ground-knowledge to assess the

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124. *Id.* In February 2019 for example, the UN WFP entered into a partnership with Palantir Technologies, the US software firm known for its association with CIA and Cambridge Analytica, and its work on predictive policing, advanced biometrics, and immigration enforcement. The signing of this partnership raised many concerns about whether Palantir would have access to the sensitive data of the approximately 92 million people served by WFP each year. Questions were asked about the potential consequences for the privacy of some of the world's most vulnerable people. The opacity regarding the terms of the agreement prompted civil society organizations and individuals to write a letter to David Beasley, then WFP's Executive Director, asking for concrete steps to mitigate the serious harm arising from the agreement and for full transparency. See: <https://responsibledata.io/2019/02/08/open-letter-to-wfp-re-palantir-agreement> (accessed September 14, 2021).

125. *Id.,* at 12.

126. Latonero *et al*., *supra* note 10, at 11.

127. Ajana, *supra* note 70, at 465.

128. *Id.*

129. *Id.,* at 22.

benefits and risks of new technologies.[130] It is also a challenge for lawmakers desirous of protecting refugees as data subjects to enact laws that not only cater for the wide range of actors, but also keep pace with the dynamism of technology.

One of the regulatory risks that emerges from the humanitarian sector's growing use of digital and mobile technologies is unauthorized third-party access.[131] Observations made at local NGOs reveal that such data is often stored in the cloud or on the organization's own local computers or servers, which presents the risk of unintended third-party access to these databases.[132] Hacking for example is major risk point in any platform that manages and holds user data. Any database is prone to hacking and data leakage. The lack of safeguards in countries without established frameworks on data sharing and protection raises concerns about the consequences if sensitive personal data is hacked, leaked, or even shared.[133] A data breach would be very devastating for a vulnerable population.

C. Balancing Act: Individual Autonomy vis-a-viz State Sovereignty and National Security

Away from humanitarianism, digitization and datafication are emerging as prominent means of reshaping, enhancing, and intensifying the methods by which cross-border mobility and migration flows are managed and policed.[134] For example, the Global Compact on Safe, Orderly and Regular Migration (GCM) adopted by the UN in 2018 is largely devoted to increasing security by strengthening border controls, improving travel documents, collecting and sharing data, and using new technologies such as biometrics in order to track population movements and address criminal activities.[135] This shows that the same technologies and tools with the capacity to help refugees can equally make them susceptible to detection and expulsion.

Therefore, while access to and integration into digital platforms is crucial for the empowerment of refugees, it involves control over the refugees' body, movements,

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130. *Id.,* at 9.

131. ICRC & Privacy International, *The Humanitarian Metadata Problem: "Doing No Harm" in the Digital Era*, October 2018, at 14 & 75.

132. Latonero *et al*., *supra* note 10, at 36.

133. For example, during the Ebola outbreak when the emergency of the epidemic overrode data safeguards. *See*, Madinau, *supra* note 11, at 9.

134. Ajana, *supra* note 70, at 465.

135. Oloka-Onyango, *supra* note 5, at 3-4. Instrument available at: https://undocs.org/A/CONF.231/3).

and digital traceability.[136] Geo-locatable data can enable both state and non-state actors to monitor and exclude refugees, or even capture and detain them. For example, the refugee-sending countries can monitor, through electronic traces, both the geographical movements and communications of refugees with their family members left behind, thus exposing them, and especially their families in their countries of origin, to dangerous situations.[137]

Meanwhile, the assumption that everyone needs and wants an identity in a form prescribed by the authorities ignores the fact that some populations by their nature or circumstance would find the lack of official identity more convenient, such as those fleeing war and persecution.[138] The survival of our most vulnerable communities has often turned on their ability to avoid detection.[139] A digital ID eco-system would be the fastest way of compromising their autonomy and ability to survive undocumented. Lastly, it must be noted that among the most fundamental assets in a country are its identity databases or registers, which allow it to know its people.[140] Issues of interoperability pose potential conflict areas in terms of national security, especially when dealing with intergovernmental agencies and foreign companies. Ownership and access to data is therefore bound to raise national security issues.[141]

In fact, Uganda's national ID project has been classified by some as a national security project, as it was originally intended for security purposes and carried out under the watchful eye of the army.[142] The late General Aronda Nyakayirima, then Minister of Internal Affairs who was charged with overseeing the roll-out of national IDs in Uganda is quoted as having said "*...this is a way to monitor and know where people are. It is another element to be added to our arsenal of security weapons...*" and that it would serve as "*...the distinguishing feature for the general population from illegal residence.*"[143] However, while on the face of it the introduction of national IDs may have simply appeared as a bureaucratic attempt to resolve outstanding issues of identification and security, its implications have now proven to extend well beyond and

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136. Zavratnik & Cukutkrilic, *supra* note 65, at 147.

137. *Id.,* at 157.

138. Ajana, *supra* note 70, at 475.

139. Latonero & Kift, *supra* note 114, at 7.

140. Atick, *supra* note 18.

141. For example, Uganda currently uses the UNHCR biometric database to register her refugees, and yet the servers are hosted in Geneva and Copenhagen with Uganda merely having access rights.

142. CHRGJ *et al.*, *supra* note 96, at 8.

143. *Id.*

into the core meaning of citizenship in the 21st century.[144] It is argued that since the project was originally intended for security and not social development, it is not surprising that one of its major effects is to exclude those considered non-Ugandans.[145]

IV. CONCLUSION AND RECOMMENDATIONS

As migration and refugee policies evolve in an increasingly fast and mobile world, technology can contribute to addressing some pressing issues. Its use should not be dismissed as entirely problematic, as the digital world will need technological development to accompany policy making and implementation.[146] However, technology tools can never be a substitute for sound migration policy making since technology presents both new opportunities and new risks.[147]

Innovations built to address the needs of vulnerable populations increasingly take the form of cross-sector collaborations. The challenge faced by governments does not lie in motivating sectoral ministries or agencies to adopt digital identification schemes in order to accelerate socio-economic development.[148] Rather, the challenge is to prevent the emergence of redundant and conflicting systems that result in wasted investments and are a lost opportunity to create a coordinated service delivery platform. The potential for conflict is reflected in the proliferation of ID systems that are not harmonized.

In an ideal setting, all major identity registers of a country do not exist in silos.[149] Instead, they are linked, so that identity is attested in a single fashion across them all. Additionally, there are mechanisms in place to ensure that over time these registers are updated and remain synchronized.[150] This leads to a unified identification platform, a goal that policymakers need to aspire to. Within this framework, a person is known once and has to declare any update to his or her information only once. From then on, it is the responsibility of the government agencies that need identifying data to recover this information. Countries usually have a National Population Register and a National Identity Card Register. Ideally, these registers should be linked or interdependent so that identity can be traced across them.

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144. Oloka-Onyango, *supra* note 5, at 17.
145. CHRGJ *et al.*, *supra* note 96, at 9.
146. Bither & Ziebarth, *supra* note 9, at 23.
147. *Id.*
148. Atick, *supra* note 18, at 12.
149. *Id.,* at 13.
150. *Id.*

Focus should be placed on interoperability of ID and credentialing systems, including establishing standards and regulations. There must be coordination across government departments with humanitarian partners to assist in authentication and a smooth policy change. Humanitarian and development actors can use their legitimacy and access to refugees to become involved as identity authentication or attribute providers.[151] This would increase their legitimacy and open up partnerships with government, and with private actors who for example are using credentialing and ID systems to vet potential employees.[152]

Additionally, refugees need to be included in foundational ID platforms. For any digital identity system to work, there must be trust between the data collectors and data subjects.[153] Therefore, an inclusive and participatory approach is key to developing any new technologies and policies.[154] Participatory methods, in which refugees are treated as active contributors in the design of these systems, benefit everyone.[155] For example, the increased confidence in systems that better account for refugee concerns and priorities could lead to more registration and stronger protections for vulnerable beneficiaries.[156] Issues like refugees' sensitivities to fingerprinting can be overcome by adequate awareness.[157] There could also be increased efficiency as refugees work to maintain up-to-date records.[158] People in vulnerable situations that need to register via biometric information in order to qualify for assistance rarely have a choice about their data, so it is even more important to create standards of what participatory opportunities exist after this information is given.[159]

The data-centric nature of e-ID and the collection and retention of information can be seen as an invasion of people's privacy and a significant downside of these schemes as illustrated.[160] A successful e-ID program can become pervasive over time, creating digital trails of people's routine actions, linked to a unique and traceable identity.[161] To protect people's privacy, an e-ID program must be supported by a

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151. Easton-Calabria, *supra* note 75, at 30.
152. *Id.*
153. Latonero *et al*., *supra* note 10, at 38.
154. *Id.,* at 39.
155. Shoemaker *et al*., *supra* note 29, at 10.
156. *Id.*
157. Farraj, *supra* note 37, at 940.
158. Shoemaker *et al*., *supra* note 29, at 10.
159. Bither & Ziebarth, *supra* note 9, at 25.
160. Atick, *supra* note 18, at 17.
161. *Id.*

comprehensive legal framework on data protection, access, notice, and consent.[162] Institutional measures like constituting an independent body like the Data Protection Office for data oversight and for the effective enforcement of laws and regulations are also necessary.[163] There is need for responsible data policies and practices for all players engaged in the collecting, processing, and storing any type of data linked to refugee identity.

However, the biggest critique of harmful data is focused on its use rather than its capture. This is because once collected, data on vulnerable populations can be abused at a later stage, for example after political winds have changed or public opinion has shifted.[164] This critique is of particular importance if refugees themselves become aware of the potential negative impact of data-emitting infrastructures. Such knowledge can spark system-avoidance, where individuals choose unofficial or unmonitored channels and services as alternatives to the official ones that generate data.[165] Yet, some forms of government collection of individual data is legitimate and even beneficial to refugees. Policy making is becoming increasingly dependent on the accuracy of big data and advanced analytics. Exclusion from government datasets then, could mean losing out on essential services.

Therefore, countries need to overcome obstacles to e-ID inclusion to ensure that no one is left behind as more and more services begin to rely on the scheme.[166] This requires overcoming the enrolment obstacles of marginalized segments of the population like refugees.[167] Furthermore, the unique characteristics of refugees demand that take steps be taken to ensure that their well-being is in fact furthered by the collection, storage, and utilization of their biometric information.[168] Their data should not be retained longer than is necessary, as excessively long periods of retention increase the possibility that the data could be shared and ultimately misused.[169]

Academia can offer guidance through research and investigative studies that address more human rights implications of digital ID systems and the eco-system at large. The migration space is one where individuals are often exposed to particular

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162. *Id.,* at 14.

163. There is need to operationalize the Personal Data Protection Office as established under Section 4 of the Data Protection and Privacy Act 2019, which is mandated to among other things oversee the implementation of the country's data protection law.

164. Latonero & Kift, *supra* note 114, at 7.

165. *Id.*

166. Atick, *supra* note 18, at 20.

167. *Id.*

168. Farraj, *supra* note 37, at 891.

169. *Id.*

vulnerabilities and to the dangers of discrimination and bias. It is therefore of great importance that governments, policymakers and organizations are made aware of the potential damage that new technological developments create.[170] Ultimately, ongoing and subsequent research must consider the use of emerging technologies in policy within the context of human rights in the digital age.[171]

Civil society as well must be attuned to issues of digital identity in migration and closely monitor any developments by government, international organizations, corporations, or NGOs.[172] Foundations and donors, on the other hand, can provide support and capacity building in the implementation of data protection practices. They can also contribute to inclusive development of digital identity systems by funding technical audits, analyses of data vulnerabilities and security, as well as human rights impact assessments for any player seeking to deploy new technology that affects the migration data eco-system.[173]

Additionally, unless systemic biases and asymmetries between migrants and other stakeholders are addressed, all technological interventions should follow a precautionary approach.[174] This should be a top priority for industry players like tech companies and developers. Before the implementation of any digital solutions, it should first be determined whether they ultimately benefit or harm vulnerable populations, especially before experimenting with new technologies bound to affect refugees.[175]

In conclusion, modern identity systems promise to bring many benefits to Uganda and to Africa at large. But as they proliferate, so will the temptation to misuse them.[176] A potential solution for this double-bind is to focus on implementing

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170. Mwagalanyi, *supra* note 43, at 308.

171. Bither & Ziebarth, *supra* note 9, at 10.

172. Civil Society plays a great 'check and balance' role especially through legislative participation and litigation. A clear example is the role played by the Nubian Rights Forum and Privacy International in the *Huduma Namba* case that saw the High Court of Kenya halt the biometric identification scheme citing lack of data protection mechanisms and issues of marginalization of vulnerable communities. The Court found that the implementation of the National Integrated Identity Management System (NIIMS) was invalid and could not continue without further legislation to guarantee the security of biometric data and to ensure that the system is not exclusionary. See *Nubian Rights Forum & 2 Ors v. Attorney General,* Consolidated Petitions No. 56, 58 and 59 of 2019.

173. Latonero *et al., supra* note 10, at 40.

174. *Id.,* at 28.

175. Latonero & Kift, *supra* note 114, at 8.

176. *African Countries Struggling to Build Robust Identity Systems,* THE ECONOMIST, December 5, 2019 <https://www.economist.com/middle-east-and-africa/2019/12/05/african-countries-are-struggling-to-build-robust-identity-systems> (accessed 8 September 2021).

safeguards in proposed systems such as embedding human rights protections like privacy and efficient redress mechanisms, a strategy that must be adopted by both government and industry.[177] Finally, it is crucial that the ethics of digital advancement be preserved, with particular focus on the individuals' right to privacy, freedom of movement, asylum, and human dignity. It will then remain to be seen whether a digital infrastructure that remains part of a global, privatized and commercial space can, at the same time, be repurposed for the welfare of one of our most vulnerable communities.

177. Latonero *et al., supra* note 10, at 28.

POSTHUMOUS PATRIARCHY UNDER ATTACK? TRACING THE WIDOW'S RIGHT TO THE MATRIMONIAL HOME IN UGANDA

Hadijah Namyalo- Ganafa[*] & Grancia Mugalula[**]

ABSTRACT

This article discusses matrimonial home rights in Uganda and traces the widow's right to the matrimonial home. The article argues that although Uganda lacks a substantive law on the protection of matrimonial home rights, these rights can still be enforced through expansive interpretation of the existing laws and judicial activism. In a bid to challenge posthumous patriarchy that treats widows' rights as secondary to those of customary heirs, the article discusses the landmark decision in Herbert Kolya v. Erikiya Mawemuko Kolya, High Court Civil Suit No. 150/2016 which upheld a widow's right to a matrimonial home and also showed that the matrimonial home does not form part of the deceased's estate. The article also highlights the implications of this decision and recommends its implementation to check posthumous patriarchy.

I. INTRODUCTION

> A cultural practice where the heir inherits [the] matrimonial home denying widow's proprietary rights is discriminatory in nature.[1]

In principle, marriage leads to spouses living under the same roof, which is commonly referred to as the matrimonial home. In this place, they build their lives, raise their children, share dreams and aspirations. It is therefore absurd that at a certain point in time a woman has to fight for the right to keep this place where she has built these memories.

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1. His Lordship Judge Godfrey Namundi in Herbert Kolya v. Erikiya Mawemuko Kolya High Court Civil Suit No. 150/2016, at 7.

The Mortgage Act defines a matrimonial home as a building or part thereof where spouses and their children ordinarily reside together.[2] This can include buildings on or occupied in conjunction with agricultural or pastoral land or land given by one spouse for the exclusive use by the other.[3]

On the face of it, the law envisages that the matrimonial home is co-owned by a husband and wife (or wives, in cases of polygamous marriages) and requires that informed consent of a spouse be sought before mortgaging it.[4] Despite this, decision making about mortgaging the matrimonial home during the lifetime of the couple and ownership of the same following the demise of the husband remains elusive to several women.

The evolution of Uganda's family law from treating a wife as property[5] to safeguarding women's rights to matrimonial property[6] makes one believe that women enjoy equal rights with men upon dissolution of marriages[7] but this is far from the reality. The situation is made worse by the continued application of some laws and customs which are inconsistent with the 1995 Constitution despite the fact that such laws and customs are void.[8] Uganda's Constitution, 1995 permits the continued operation of existing laws which are construed in conformity with it[9] but somehow customary laws which are outside this realm subsist due to the largely patriarchal nature of Uganda's society, and unfortunately most of these relate to property ownership by women including the matrimonial home. The desire to protect the family's lineage dictates keeping the matrimonial home within the male descendants thereby treating a widow's right as inferior to those of the legal heir.

It is against the above background that this article traces the widow's right to the matrimonial home in Uganda with the aim of providing a resource that can be utilised to advocate for and promote women's matrimonial home rights.

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2. § 2 of the Mortgage Act No. 8 of 2009, Laws of Uganda.
3. *Id.*
4. *Id.,* § 5 – 6.
5. *See*, *R* v. *Amkeyo* (1917) 7 EALR 14, where Hamilton CJ equated a customary marriage to wife purchase.
6. *See*, *Mayambala* v. *Mayambala*, High Court Divorce Cause No.3 of 1998; and *Julius Rwabinumi* v. *Hope Bahimbisomwe,* Supreme Court Civil Appeal No. 10 of 2009.
7. Article 31(1), Constitution of the Republic of Uganda, 1995.
8. Article 2(2), *id.*
9. Article 274, *id.*

II. MATRIMONIAL HOME RIGHTS

For many families, the matrimonial home is the most cherished and single most valuable asset and this makes most couples remain in unhappy marriages due to the fear of losing out on this asset.[10] Upon the demise of one's husband, the widow usually panics and fears for the worst if the matrimonial home is solely registered in the husband's name. Whereas the other family members have a chance to mourn and get closure, most widows carry extra baggage because they feel extremely vulnerable and frightened of what their rights are.

For a long time, posthumous patriarchy has enabled men and their descendants to determine the widow's matrimonial home rights and these have been restricted to the use and occupation of the home. The situation is worsened by the absence of a substantive statutory law that specifically and exhaustively deals with the matrimonial home. Despite this, matrimonial home rights can be traced from a close scrutiny of the existing legal regime as discussed below:

A. The Right to give Informed Consent

Informed consent refers to the permission given in full knowledge of the consequences. A spouse has a right to give informed consent to his/her spouse before dealing with the matrimonial home. This right is premised on the provisions of the Land Act[11] and the Mortgage Act.

Section 39 of the Land Act[12] prohibits the sale, transfer and mortgage of land where the family resides or where it derives its livelihood without the consent of the spouse. It safeguards the matrimonial home irrespective of who the registered owner is as illustrated in the case of *Inid Tumwebaze* v. *Mpweire Stephen & Another*.[13] In that case, Ssenkima John Bosco, the husband to Inid Tumwebaze (the Appellant), pledged their matrimonial home to Mpweirwe Steven as security and borrowed money without procuring informed consent from his wife. Following the husband's failure to pay back the money, the property was attached and sold off. Unhappy with this development,

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10. Sean Musa Carter, *Sheikh Nuhu Muzaata's Wives Fighting For His Property, First Wife was Divorced but She Wants the House*, BLIZZ UGANDA, 8 December 2020, retrieved from <https://blizz.co.ug/4802/Sheikh-Nuhu-Muzaatas-Wives-Fighting-For-His-Property-First-Wife-was-Divorced-but-She-Wants-the-House> (accessed on 8 May 2021).

11. Chapter 227 of the Laws of Uganda, as amended.

12. *Id.*

13. HCT-05-CV-CA-0039-2010 <https://ulii.org/ug/judgment/hc-land-division-uganda/2013/9> (accessed on 8 May 2021).

Inid Tumwebaze filed objector proceedings before the Magistrate Grade 1 Court at Mbarara and she lost the case. She then filed an appeal before the High Court, which held that section 39 of the Land Act is mandatory and cannot be circumvented. Justice Bashaija K. Andrew stated that the whole dealing in the land was void *ab initio* for want of spousal consent and set aside the order of sale.

The Mortgage Act also prohibits transactions on the matrimonial property by one spouse without procuring the other spouse's written informed and genuine consent.[14] In order to satisfy this legal requirement, the spouse giving consent is expected to state in writing the fact that he/she received independent advice on the mortgage which is being applied for and has understood and assented to the terms and conditions of the mortgage. In *lieu* of this, the consenting spouse can state that he/she has notwithstanding the advice from the mortgagee, waived his/her right to take independent advice.

It is therefore clear from the above discussion that both the husband and wife enjoy equal rights in the matrimonial home and dealing with the home without procuring the other's informed consent renders the transaction void.

B. Equality

Equality is a cardinal principle for the success of a marriage and this applies to all aspects of marriage including the ownership of property and rights relating to the matrimonial home. In addition to recognizing ownership of property individually or in association with others,[15] the Uganda Constitution, 1995 accords spouses equal rights in marriage and upon its dissolution.[16]

The constitution laid the foundation for the enactment of a law dealing with matrimonial property following the demise of one of the spouses.[17] However, the proposed amendment of the Succession Act might not achieve equality for the widows because their rights continue to be hinged on the decisions made by their deceased husbands vide their wills thereby promoting posthumous patriarchy. In cases where the husband dies intestate, the family decides the widow's future in the matrimonial home. This is contrary to the equality principles as espoused by Uganda's Constitution and the Convention on the Elimination of All Forms of Discrimination against Women.[18]

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14. § 5 Mortgage Act.
15. Article 26(1).
16. Article 31(1).
17. Article 31(2).
18. Articles 15(1), 16(1)(c) and 16(1)(h).

C. Right to Shelter

Under common law, the husband has a duty to provide shelter for his wife[19] and an upper hand in determining the location for that home. In practice, upon marriage, the wife usually moves to live with the husband[20] and with time, couples build their own houses which they call matrimonial homes.[21] The economic situation of most women in Uganda makes men either wholly pay for this construction or women contribute a small fraction of the costs involved but this notwithstanding both parties enjoy equal ownership rights.[22] This shows that a woman has a right to be given shelter by her husband in the form of a matrimonial home and as such following the death of a husband, the family should not chase a woman out of this home.

The foregoing matrimonial home rights are important in showing the progress made by women but disregard of these rights continues either because the women are not aware of the rights or the patriarchal nature of Uganda's society interferes with the enjoyment of these rights. Since Uganda lacks a substantive law on matrimonial property,[23] judicial officers have an uphill task to solve property disputes.[24] Unfortunately, most existing case law deals with matrimonial property disputes during divorce and it is only recently that the pertinent issue of the matrimonial home has gained prominence.[25] The patriarchal nature of Uganda's society[26] has left most women with user rights of their matrimonial homes following the demise of their husbands.

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19. Lenore J. Weitzman, *To Love, Honor and Obey? Traditional Legal Marriage and Alternative Family Forms*, 24(5) THE FAMILY COORDINATOR (1975), at 531.

20. MANUH TAKYIWAA AND ESI SUTHERLAND-ADDY, AFRICA IN CONTEMPORARY PERSPECTIVE: A TEXTBOOK FOR UNDERGRADUATE STUDENTS, 101 (2014).

21. *See*, *Ayiko* v. *Ayiko*, High Court Divorce Cause No. 0001 of 2015, retrieved from <https://ulii.org/ug/judgment/hc-family-division-uganda/2017/1> (accessed on 9 August 2021).

22. *Julius Rwabinumi* v. *Hope Bahimbisomwe,* Supreme Court Civil Appeal No.10 of 2009.

23. Due to strong opposition on the Parliamentary Floor, the Marriage and Divorce Bill, 2009 was abandoned and a new law, the Marriage Bill was introduced in 2017 but this has not been passed into law to date.

24. *See*, *Muwanga* v. *Kintu*, High Court Divorce Appeal No 135 of 1997; *Mayambala* v. *Mayambala*, High Court Divorce Cause No.3 of 1998; and *Julius Rwabinumi* v. *Hope Bahimbisomwe,* Civil Appeal No.30 of 2007.

25. *See,* Conrad Ahabwe, *Why must I, a wife of 43 years be thrown out of my home? Tycoon Kiwanuka's first wife speaks out,* PML DAILY, October 17, 2019 <https://www.pmldaily.com/news/2019/10/why-must-i-a-wife-of-43-years-be-thrown-out-of-my-home-tycoon-kiwanukas-first-wife-speaks-out.html>(accessed on 10 May 2021).

26. W. Bikaako & J. Ssenkumba, *Gender, Land and Rights: Contemporary Contestations in Law, Policy and Practice in Uganda*. In WOMEN AND LAND IN AFRICA: CULTURE, RELIGION, AND REALIZING WOMEN'S RIGHTS 232-277 (L. Muthoni-Wanyeki ed., 2003).

The next part of this paper deals with this and will highlight the rights of a widow and heir to the matrimonial home.

III. WIDOWS VIS-A-VIZ HEIRS' RIGHTS TO MATRIMONIAL HOME

As earlier observed, Uganda's Constitution allows people to own property either individually or in association with others[27] and goes further to provide for equal rights between men and women during the subsistence and at the dissolution of marriage.[28] These provisions lay the foundation for a woman's matrimonial home rights as has been discussed above. On the face of it, upon the demise of one's husband, a widow should be entitled to all the matrimonial property, including the home but this is not the case in situations where the husband dies without making a will (intestate).

Women do not ordinarily participate in the intestate succession regime, and it is commonly believed that a woman should not own property[29] and male clan members or in-laws, control the major economic decisions of a widow and her household.[30] As a result, widows continue to face discrimination, opposition and rejection. Discriminatory laws,[31] social and traditional practices on marriage and inheritance compromise women's ability to own, manage, and control land and property.

Therefore, these cultural, social, and institutional barriers hinder women's access to justice and a fair share of matrimonial property. Even when women do seek relief from the courts, they face a judiciary unprepared to adjudicate non-monetary contributions and equitable distribution of property or the inconsistent interpretation and application of laws that often result in discriminatory distribution of matrimonial property.[32]

In addition, the law applicable is largely influenced by the fact that Uganda is a former British colony which adopted English laws[33] but prior to colonialization, Ugandans had existing customary rules and practices which together comprised

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27. *Supra* note 15 .

28. *Supra* note 16.

29. Uganda Law Reform Commission, *A Study Report on the Reform of the Law of Domestic Relations*, Pub. No. 2, 243-306 (2000) at 281.

30. *Id*., at 262.

31. *See*, Section 27 and Rule 9(1)(b) of the Second Schedule of the Succession Act, Chapter 162 of the Laws of Uganda

32. Women and matrimonial property rights in Kenya <https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya > (accessed on 2 July 2021).

33. *See*, Article 15 of the 1902 Order-in-Council.

customary law. The introduction of Islam in the seventeenth century and the popularization of Christianity in eighteenth century changed this status quo[34] and Uganda ended up with statutory law, common law, doctrines of equity and customary law as the law applicable.[35]

Customary law creates problems for women because in some cultures, women are never able to own, and independently make decisions, over land and property within the context of the traditional marriage in the first place. Upon the demise of the husband, a widow faces opposition from the husband's family and relatives who are eager to take over the deceased's property including the matrimonial home (inheritance through the male line) and sometimes the widow herself ("widow inheritance") because of the belief that men of that society would care for all of the women and children.[36]

The statutory law applicable to widow's matrimonial home rights is the Succession Act which deals with properties of persons who make wills prior to their death (testate) and properties of persons who die without disposing off their property vide a valid will (intestate).[37] Persons who die testate enjoy liberty to dispose of their property as they desire and most people make wills in accordance with their customs and cultural beliefs. On the face of it, this would seem a good practice but it usually enables chauvinists to trample on the rights of women to the extent that the surviving spouses do not get a share of the deceased spouse's property.[38]

In a bid to control misuse of power, the government set up the Kalema Commission to create harmony between existing customs and the laws regulating marriage, divorce and the status of women in Uganda.[39] The Commission recommended that there should be some checks and balances on the liberty of the individual to dispose of his property as he likes in the interests of social justice.[40] It is the persistent failure of male testators to protect the interests of their wives that continues to result into violation of widow's matrimonial home rights.

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34. Elizabeth Isichei, *A History of Christianity in Africa from Antiquity to the Present,* (London: SPCK) (1995), at 31.

35. §15 (1) Judicature Act, Chapter 13 of the Laws of Uganda.

36. Nonkululeko Letta Bhe v. Magistrate Kayelitsha, 2004, Case Nos. CCT 49/03, CCT 69/03, CCT 50/03 (CC) at 48 (S. Afr.).

37. § 24 of the Succession Act, Chapter 162 of the Laws of Uganda.

38. Hadijah Namyalo, *An Illusionary Shield? Gendered Governance and the Role of Customary Law in Protecting the Rights of Widows in Uganda,* HURIPEC Working Paper No.27, March (2010) at 3.

39. *Id*.

40. Report of the Commission on Marriage, Divorce and Status of Women, (the Kalema Commission Report), (1965) at 70.

The situation is not different for widows whose husbands die intestate because their matrimonial home rights are exhaustively dealt with under the second schedule to the Succession Act. Some of these rights— include the widow's occupation of the residential holding upon the demise of the husband,[41] cultivation, farming or tilling any land adjoining a residential holding owned by an intestate prior to his death.[42] It is important to note that these rights come with duties— such as the payment of existing and future rates, taxes, charges, duties, assessments relating to the residential property,[43] keeping the property in good and tenantable repair and condition and decoration[44] and desisting from assigning, letting, charging, parting with or sharing possession of the residential holding.[45]

In addition, save where timber is needed for domestic purposes, the widow is not permitted to cut or fell any timber on the residential holding,[46] the widow cannot build or permit or suffer to be built or erected any building on the residential holding,[47] the widow cannot utilise the property for anything besides its original use[48] and upon termination, she must return the property and all its additions, fittings and fixtures in good and tenantable repair.[49] The most exasperating provisions of the Succession Act relate to the automatic termination of the widow's occupancy rights upon remarriage[50] or ceasing to occupy the residential holding for a continuous period of six months.[51]

These restrictions are not only discriminatory but also provide an avenue for the posthumous patriarchy following the demise of husbands because relatives utilise them to deprive widows of their right to the matrimonial home. It is pertinent to note that the termination of the widows' occupancy rights to the matrimonial home does not leave it vacant because the legal heir's interests are usually looming in the background. The legal heir (sometimes referred to as customary heir) is the nearest lineal descendant and a male is usually the preferred choice.[52] The special position enjoyed by heirs is rooted in the English law of *primogeniture* where the eldest living son (the ″heir at

41. Rule 1(1) of the Second Schedule of the Succession Act, Chapter 162 of the Laws of Uganda
42. Rule 2, *id*.
43. Rule 7(a), *id.*
44. Rule 7(b), *id.*
45. Rule 7(c), *id.*
46. Rule 7(f), *id.*
47. Rule 7(g), *id.*
48. Rule 7(j), *id*.
49. Rule 7(k), *id.*
50. Rule 8(1)(a), *id.*
51. Rule 8(1)(d), *id*.
52. § 2(n)(ii) of the Succession Act, Chapter 162 of the Laws of Uganda.

law″) inherited all the real property of the father if the father died intestate.[53] Uganda's Succession Act requires an intestate's personal representative to hold his principal residential holding in trust for the legal heir whose rights are subject to the widow's occupancy rights earlier discussed.[54] The Succession Act's exclusion of the matrimonial home from distribution[55] has been interpreted to support Uganda's patriarchal customary system which deprives widows of the matrimonial home and allows sons to inherit it together with the household property. [56] These statutory protections show that the matrimonial home legally belongs to the legal heir who is usually the first male child of the deceased.[57]

On the international and regional level, both the Convention on Elimination of Discrimination Against Women (CEDAW) and the Maputo Protocol require states to act against discriminatory customary practices. CEDAW requires states to take all appropriate measures— to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[58]

Similarly, the Maputo Protocol obliges states to commit to eliminating harmful cultural and traditional practices through appropriate legislative, institutional and other measures, as well as public education, information, education and communication strategies.[59]

Furthermore, in August 2018, the African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution proposing that states parties to the Maputo Protocol enact legislation to ensure that women and men enjoy the same rights in case of separation, divorce, or annulment of marriage.[60] The ACHPR resolution reiterates the Constitutional requirement of equality upon dissolution of marriage and states that women and men have the right to an equitable sharing of joint property deriving from

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53. Phil Norfleet, Law of Primogeniture in the South <http://sc_tories.tripod.com/law_of_primogeniture_in_the_south.htm > (accessed on 24 June 2021).

54. § 26(1) of the Succession Act, Chapter 162 of the Laws of Uganda.

55. *Id*., § 29.

56. Florence Akiiki Asiimwe, *Statutory Law, Patriarchy and Inheritance: Home ownership among Widows in Uganda*, 13(1) AFRICAN SOCIOLOGICAL REVIEW (2009), at 125.

57. V. RUKIMIRANA & A. BATESON LAWS OF THE REPUBLIC OF UGANDA. KAMPALA: UGANDA LAW REFORM COMMISSION (2000), at 3805.

58. CEDAW Article 5(a).

59. Maputo Article 2(2).

60. ACHPR/Res. 401 (EXT.OS/ XXIV) 2018 <https://www.achpr.org/sessions/resolutions?id=317 > (accessed on 8 July 2021).

the marriage in circumstances of separation, divorce, or annulment of marriage. Furthermore, the resolution frowned upon some countries which maintain regressive standards when it comes to defining 'equitable share,' such that women are not able to enjoy equal property rights upon separation, divorce or annulment of a marriage.

This means Uganda's government should fulfill its international and regional commitments by ensuring that women's rights are protected within the legal framework, as well as customary, traditional, and religious laws in Uganda's plural legal system. In light of the above, it can be seen that the practice of glorifying heirs above the widow with regard to the matrimonial home that has been entrenched in Uganda's inheritance laws by virtue of customs and the provisions of the Succession Act should be challenged. If this is successfully done, husbands that used to make wills bequeathing the matrimonial home to their heirs would have to check their decision before doing so. This previously accepted practice was successfully challenged in the Landmark decision by His Lordship Justice *Godfrey Namundi in Herbert Kolya v. Erikiya Mawemuko Kolya*[61] which is discussed in the next part of this article.

IV. HERBERT KOLYA V. ERIKIYA MAWEMUKO KOLYA

Briefly, the decision in this case checks posthumous patriarchy by prohibiting the practice of husbands bequeathing the matrimonial home to their legal heir thereby upholding Article 31(1) of the 1995 Constitution. In addition, the court found a will defective for bequeathing the matrimonial home when it does not comprise part of the deceased's estate. The facts leading to this case are as discussed below.

A. Facts of the case

The Plaintiff (Herbert Kolya) instituted this suit against his grandmother (Erikiya Mawemuko Kolya) who had obtained letters of administration to the estate of her deceased husband without annexing the will. The defendant's deceased husband (the late Israel Kikomeko Kolya) had, prior to his death made a will and he had bequeathed the matrimonial property comprised in LRV 1139 Folio 1 Kibuga Block 10 Plot 864, land at Namirembe to his heir, Herbert Lukanga Kolya, the Plaintiff's late father. The Plaintiff's father had prior to his demise been permitted by his parents to construct a house on a portion of the land comprising the matrimonial home but the plaintiff wanted the whole matrimonial home and not the aforementioned portion. He argued

61. High Court Civil Suit No. 150/2016, judgement delivered on July 3, 2020.

that his deceased grandfather's will had allowed the defendant to stay in the matrimonial property until she died or remarried and thereafter the heir would take over the property. Instead, the defendant had concealed this will, refused or failed to distribute the entire estate and, without a justifiable cause, failed to make a full and true inventory.

In her defence, the defendant admitted the existence of a will made by her deceased husband wherein he had bequeathed the matrimonial home to his heir and the bequest was to take effect upon her death or remarriage. The defendant stated that her late husband's will had been dispensed with for being defective since it had bequeathed the matrimonial home to the heir in disregard of her contribution towards its construction. The defendant admitted that a portion of the matrimonial home had been given to the plaintiff's father and he had constructed thereupon and that she did not have any interest in this portion as it did not comprise part of her deceased husband's estate.

B. Issues & Decision

The court started off by determining whether the suit property is a matrimonial property and in resolving this issue, the court cited the decision in *Basheija v. Basheija & Anor*[62] where Justice B Kainamura held that the home of the couple irrespective of when it came into existence amounts to matrimonial property. The court also took into consideration the defendant's contribution towards the construction of the matrimonial home and relied on the decision in *Julius Rwabinumi v. Hope Bahimbisomwe*[63] to find that land at Namirembe comprised in LRV 1139 Folio 1 Kibuga Block 10 Plot 864 was matrimonial property.[64]

After classifying the suit property as matrimonial property, His Lordship Justice Godfrey Namundi declared that,

> It was unlawful for the late Israel Kikomeko Kolya to bequeath the matrimonial property to his heir Herbert Lukanga Kolya without his spouse's permission and the same could not devolve to the son when the widow survived him.[65]

62. High Court Domestic Cause No. 12 of 2005 (decided in 2013).
63. Supreme Court Civil Appeal No. 10 of 2009.
64. *Supra* note 44, at 7.
65. *Id*., at 8.

In determining widows' succession rights, the court cited the decision in *Adong Simon & Ors v. Opolot David*[66] where court decided that a widow had right to dispose of land she inherited from her deceased husband in light of Article 31(1) of Uganda's Constitution.[67] Accordingly the decision is imperative for curtailing posthumous patriarchy because the court disregarded the deceased's wishes in the will and found that the suit property comprised matrimonial property. The court also brought widows rights to the forefront when it held that the property had passed on to the defendant (widow) upon the death of her husband and she reserved the rights to deal with the said property in any way she deemed fit.[68]

C. Lessons from Kolya's case

The case reaffirms women's property rights as provided for in the Constitution and other regional and international instruments. It should be noted that even with the existence of some progressive laws, the social and cultural reality in Uganda that creates barriers to women claiming the matrimonial home after the demise of their husbands remained prevalent. With this decision the courts have reaffirmed the need to protect women's matrimonial home and other property rights. The cultural practices that alienate a woman upon the demise of her husband have thus been put in check.

The case has changed the matrimonial home rights landscape by allowing widows to remain sole owners of the matrimonial home even in cases where the husband is the registered proprietor of the same. This decision disregards the discriminatory restrictions to use and occupation provided for in the Succession Act. In addition, the legal heir is no longer given an automatic right to take the matrimonial home upon a widow's remarriage.

The case also checks the abuse of the powers of husbands that die testate because whereas it is legally permissible for a person to distribute their property as they wish vide a will, inclusion of the matrimonial home among the property for distribution renders the entire will defective. Courts cannot sever the will in order to separate bequests which are genuine from bequests which are in contention. Finally, this case illustrates the importance of judicial activism, to wit; courts can create an enabling environment for women's access to justice. Uganda's legislature has grappled with the

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66. Soroti Civil Appeal No. 46 of 2013.

67. Article 31(1) of the 1995 Constitution entitles men and women to equal rights in marriage, during marriage and at its dissolution.

68. *Supra* note 44, at 8 - 9.

matrimonial property question since the 1960s[69] but this decision shows that Courts can be an effective, accountable and gender-responsive justice institution. Courts can legally empower women to claim matrimonial property or any beneficial interest that might accrue to them as a result of their contributions during marriage.

The decision in *Herbert Kolya v. Erikiya Mawemuko Kolya* is profound and it is bound to lead to positive outcomes. However, in order to ensure success and more progressive decisions, certain issues still need to be addressed in Uganda's legal regime and society as a whole and thus the following recommendations are proposed.

There is need to promote education and awareness of laws related to family and property— including during marriage, divorce and death. This will empower women to rightfully claim their rights and challenge the existing discriminatory cultural practices. Awareness-raising can be done through legal aid service providers to ensure that disadvantaged women and marginalized individuals in rural and urban areas can access legal representation to realize their right to equality and justice.

There is need to review the law on Succession to ensure it works in tandem with the Constitutional provisions on equality in marriage, to clarify the right to matrimonial property during succession and provide for a common means of protection of women's property rights. In addition, there's need to repeal, amend or disregard discriminatory provisions under religious and customary law in order to harmonize them with the international and regional laws discussed herein.

V. CONCLUSION

This decision is a clear departure from the popular practice of placing widows at the mercy of heirs by virtue of the disposition of the matrimonial home to the heir vide the will or provisions of the Succession Act. The implementation of this decision in day to day matters concerning inheritance is bound to create a shift from male or patriarchal ownership of the matrimonial home to a joint ownership of the same. The decision also reflects the development of the status of the wife from being a docile member of the family to becoming its co-equal head. The question that remains is whether the society will receive this decision positively and sensitize the community to ensure protection of the widows rights to the matrimonial home.

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69. *Supra* note 40.

TOWARDS EQUALITY IN PARENTAL AUTHORITY IN UGANDA: DEPICTIONS OF GENDER DISCRIMINATION AFTER DEATH IN NICE KASANGO *v.* ROSE KABISE

Kabazzi Maurice Lwanga*

ABSTRACT

There is nothing that touches more intimately the feelings and sensibilities of people than controversies relating to the disposal and control of the remains of their dead. From the gender equality perspective, it necessitates a commentary on the customary law on parentage which failed a mother to have custody of the burial remains of her son. This response to the High Court decision in Nice Kasango v. Rose Kabise argues that ownership of the children vests in the father, which is discriminatory to women. It concludes that such legitimatizing of parent-child relationship from the father alone in customary law resulted in unequal access to justice to the mother as a parent.

I. INTRODUCTION

Burial disputes are an example of death fracturing family bonds[1] or, more often acting as a catalyst for the imposition of relationships which were already strained.[2] In Africa, the battle over the remains of a deceased child between parents will normally prefer the father on cultural grounds.[3] This is so because customary law prefers the father as a

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1. Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion and the Law of Burial Disputes*, 34(3) UNSW JOURNAL(2011).

2. The disagreement over the remains of the deceased (including the dispute over the place of burial), culture, religion and procedure of burial of cremation.

3. In England, the burial law confers burial duty on the spouse as opposed to the parents. That is, where a person has died intestate and no applications for letters of administration have been made or have succeeded in the appointment of a personal representative, then the hierarchy set out at section 46 of the Administration of Estates Act 1925 and Rule 22(1) of the Non-Contentious Probate Rules 1987 becomes active. This distributary chain apportions burial responsibility first to the spouse, then, where no spouse is available, to issue (ie children), then to parents, then siblings, and so on. See generally, Thomas L. Muinzer, *The Law of the Dead: A Critical Review of Burial Law, with a View to its Development*, 34(4) Oxford Journal of Legal Studies (2014), at 791-818.

'better' parent,[4] which creates an imbalance in parental rights.[5] In addition, a surviving spouse (wife) cannot determine the burial place of her husband since culture takes-it-all[6] yet a male spouse may determine the burial place of his wife.

The patriarchal preferences of men against women in family law are historical.[7] Cultural relativists argue that customary preferences are harmless and universally acceptable in the community. This article is emblematic of the long-standing conflict between relativism[8] and the 'universal'[9] character of rights as declared in the major human rights instruments.[10] On the side of cultural relativism, one would say 'children belong to the father' is valid in a patrilineal society whereas another would invalidate this view from the matrilineal family perspective. That is to say, cultural relativists stand for the proposition that they can practice their culture as they so desire because it is a fundamental individual liberty which is guaranteed. On the other hand, the theory of universalism in human rights holds that there are human rights aspects that are so fundamental and essential to every human being, that they surpass all political, cultural, religious and societal constraints.[11] This response is limited to the gender inequality issue in customary law on parentage and its interplay with the burial dispute in the

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4. The phrase 'better parent' is used sarcastically to refer to the limitations of customary parentage which prefers the man to the woman.

5. The legal relationship of parent to child is composed of rights. These rights and duties are based on parentage. *See,* Susan Maidment, *The Fragmentation of Parental Rights*, 40(1) THE CAMBRIDGE LAW JOURNAL (1981), at 135-158.

6. P. Stamp, *Burying Otieno: The politics of gender and ethnicity in Kenya* 16 Signs 808 (1991).

7. *See,* Ben Kiromba Twinomugisha, *African Customary Law and Women's Human Rights in Uganda,* cited in The Future of African Customary Law Edited by Fenrich, Galizzi et al. Cambridge University Press.

8. For a general introduction to this topic, *see*, Douglas Donoho, *Relativism versus Universalism in Human Rights: The Search for Meaningful standards*, 27 STANFORD JOURNAL OF INTERNATIONAL LAW (1991), at 354-91. For analysis of cultural relativism, *see,* Rhoda Howard, *Cultural absolutism and the Nostalgia for Community,* 15 HUMAN RIGHTS QUARTERLY (1993), at 315-38, *cited* by HARRIET DIANA MUSOKE, UGANDA LAW FOCUS 2002-2003.

9. Universalism, which draws from the natural law tradition in western jurisprudence, is the theory that there exists some set of standards which all cultures espouse. These universal principles transcend cultures and serve as the authority for adopting international human rights law. This theory assumes that all cultures value the protection of individual human dignity that they would establish similar minimum standards for protecting their individual members. The official doctrine underlying international human rights law enumerates these universal minimum standards.

10. *See,* Harriet Diana Musoke, *The clash between culture and human rights: A case of female genital mutilation*, UGANDA LAW FOCUS (2002- 2003), at 1-19.

11. Robin M. Maher, Female Genital Mutilation: The Modern-Day Struggle to Eradicate Tortuous Rite of Passage, *cited* by Musoke *id.*

decision of *Nice Bitarabeeho Kasango* v. *Rose Kabise Eseza*.[12]

Since women are the mothers to their children, they must enjoy equal parental rights in family law.[13] This is intended to decline legitimacy for applying customary law which derogates from equality of men and women in parentage cases.

This article seeks to develop the constitutional argument for parental equality as a substantive gender-equality right. The paternal preference in culture is an unconstitutional violation of gender equality because it reinforces women's status as caregivers without parental rights and enhances the societal view that children are a man's property.

In using the words, 'Parentage' I mean 'the parent-child relationship' and the source of 'legitimacy of the children'. 'Custom'[14] and 'customary law' are 'the accepted way of acting in a community or a group' and law 'which is derived by immemorial custom from ancient times' respectively.[15] Although equality of parental rights is not explicitly provided for under the 1995 Constitution of the Republic of Uganda, it is noteworthy that the Bill of Rights under Article 21 of the 1995 guarantees the right to equality of men and women in family. It is in this line that I argue for substantive protection of gender equality in customary parentage.

Given this customary law perspective on parentage adopted in the High Court decision, this article recommends inter alia, equality of parental rights between men and women in customary parentage. It concludes that reinforcing the patriarchal view that children belong to the man results in first, subordination of women; secondly, violation of the equal protection clause under Article 21 of the 1995 Constitution; and thirdly, children are men's property; and finally, discrimination.[16]

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12. *Nice Bitarabeeho Kasango* v. *Rose Kabise Eseza,* Miscellaneous Application No. 17 of 2021.

13. Family law aspects affecting children such as custody, parentage, adoption, burial rights, etc.

14. A custom is a practice that has been followed in a particular locality in such circumstances that is to be accepted as part of the law of that locality. In order to be recognized as customary law, it must be reasonable and it must have been followed continuously, and as if it were a right, since the beginning of legal memory. *See,* A DICTIONARY OF LAW, 4TH EDITION, OXFORD UNIVERSITY PRESS (Elizabeth A. Martin, ed.), at 122.

15. R. Kakungulu-Mayamabala, *The Impact of the Repugnancy Doctrine on the concept of Human Rights in Traditional Africa during the colonial era: The Ugandan Situation*, (1) MAKERERE LAW JOURNAL, *citing* Thorndike & Barnhart in the World Book Dictionary.

16. *Karuru* v. *Njeri,* [1968] East Africa Law Reports. It was stated that Kikuyu custom enjoins that children go to the father unless return of bride piece is demanded.

II. CUSTOMARY LAW AND GENDER EQUALITY RIGHTS UNDER THE 1995 CONSTITUTION

Article 37 of the 1995 Constitution provides for the right to culture and it is from this provision that we derive the constitutional enforcement of customary law. Under section 14 of the Judicature Act, customary law is noted among the sources of law. Specifically, section 14(2)b(ii) of the Judicature Act Cap.13 provides that 'any established and current custom or usage' as one of the laws applicable by courts in Uganda. Section 15 of this Act provides for customary law on the sole condition that it should not repugnant to natural justice, equity and good conscience.

Article 21 of the 1995 Constitution provides for equality of men and women before, during and at dissolution of the marriage. This provision covers parental rights in custody, adoption and parentage cases.

Under Objective III(iii) of the National Objectives and Directive Principles of State policy (NODPSP) of the Constitution, the State is mandated to promote a culture of tolerance and appreciation and respect for each other's custom, traditions and beliefs. Objective XXIV further states the need to develop or incorporate into Ugandan life those cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the constitution. In this case, equality of spouses guarantees protection of equal parental rights under the 1995 constitution.[17]

Customary parentage had not received attention from gender equality perspective until the decision of *Nice Kasango* v. *Rose Kabise.* However, the provision of gender equality article as a constitutional right has been the control of customary law in many landmark decisions by Courts of Judicature in Uganda.[18]

In the case of *Best Kemigisa v. Mabel Komuntale,*[19] the custom which denied the widow of a king from obtaining letters of administration over the personal property of her deceased husband (king) was deemed unenforceable. The Court held that a custom which denies a person the benefit of a written law is not enforceable. This case illustrates a woman's right to administer the estate of her husband, which is progressive on gender equality in culture. In relation to equality of parental rights, a mother was recognised as a capable administrator of the estate of her late husband king.

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17. The 1995 Constitution incorporates the Bill of Rights which provides for equality of persons before the law and equality of parties in a marriage.

18. The Supreme Court ranks higher in precedence than the Court of Appeal, followed by the High Court.

19. *HCCS 5/1998,* at 813 [1999] KALR.

The case of *MIFUMI v. Attorney General & Kenneth Kakuru* considered the issue of the constitutionality of refunding bride price. The court held that the customary practice of refunding bride price as a condition precedent to a divorce was found to be discriminatory and unfair to the notion of gender equality and women's rights. This point of the domestic violence argument in the MIFUMI case but was unfortunately rejected. There are decisions touching upon women's rights and gender equality in customary practices of female genital mutilation, widow inheritance, disinheritance of girls and so forth, which this article does not delve into. However, the decision under review in this article depicts gender discrimination in custody of the burial remains of a child.

III. ANALYSIS OF THE CASE

In this burial dispute, the widow (applicant) sought to stop the respondent (mother to the deceased) from interfering with the choice of burial place. There was a disagreement over which District to lay the burial remains of the deceased. The protagonists clashed over which culture to apply to the remains, which would result in the mother taking-it-all. The parent's burial place was Tororo district (eastern region of Uganda) whereas the widow's choice of burial was Kabarole district (western region of Uganda). Central to the court's determination was who determined the culture to be applied to the remains of the deceased. The court conceded that customary law dictates that a child belongs to his[20] father's culture. Using the customary law approach, the mother failed to prove parental authority to bury her son.

The spouse of the deceased adduced evidence of the children's wishes to bury their father at their matrimonial home in Kabarole district, as opposed to the respondent mother who wished to bury her son in Tororo district. The children's wishes became the best window to solve the impasse over the remains of the deceased. Hon. Justice Lydia Mugambe, convinced that the deceased's father was not of Jopadhola culture as was the mother, referred to the Best Interests of the Child doctrine as the last resort. Evidentially, the respondent relied on a land sale agreement by the deceased son. Additionally, she relied on the Jopadhola culture as applicable to her son, herself being of that tribe.

On the other hand, the applicant claimed to own land as Kasango family in Fort portal, her place of choice for the burial. She further alleged that Kasango's family did

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20. I use the 'his' because in customary law when a female child is married, she adopts the burial place of her husband whereas male child's burial place is preferred to his father's burial grounds. Between estranged spouses, the woman may be buried at her father's burial grounds.

not own land in Tororo district where the respondent resided. Additionally, she claimed that as a wife she was never taken to visit any relatives in Tororo district, and also that the deceased never expressed any desire to be buried in Tororo district.

Justice Lydia formulated these issues for court's determination:

(i) Whether the Luo/Jopadhola culture of the people of Tororo applied to the deceased.
(ii) Whether the deceased should be buried in Tororo or Fort Portal;
(iii) remedies

With regard to the first issue, the deceased's tribe alone could determine the place where his body would have to buried. Recognizing that the deceased's father was a Musoga by tribe, the court observed that since the deceased's father was of a different culture (tribe) to that of the mother, then that the mother's culture could not be enforced over the remains of her son. It should be noted that the cultural limitation predetermined the mother's authority over the choice of burial place for her son. Had the mother been a Musoga by tribe, the court could have been inclined to award the burial place to her to apply the Basoga culture. The mother had no authority due to difference in culture.

Evidence suggests that the deceased's father being not a Jopadhola[21] as his mother, the child-parent relationship was irrelevant. One can argue that customary law would have determined the second Issue and the learned judge perhaps would not have resorted to the welfare principle. That is to say, customary law precedes/overrides the Best Interests of the Child doctrine in custody cases such as this burial dispute. However, cultural affiliation was not proved thus the welfare principle came as the next option.

With regard to second issue, the court noted that children of the deceased wished their father to be buried near their home in Fort Portal, Kabarole district thus applying the Best Interests of the Child doctrine (welfare principle). The deceased's children were overwhelmingly influenced by the delayed burial arrangements(time); so, the court took into account their best wishes to bury their father near their home.

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21. The deceased's father belonged to Basoga by tribe and he was also only a migrant to Jopadhola land of Tororo district, which court reasoned that his association with that culture could not be adopted to apply to the deceased.

V. THE SIGNIFICANCE OF THE CASE

The High Court decision was significant in two ways. First, it endorsed customary law that parentage of children is based on the father alone. Secondly, the decision upheld the applicability of the welfare principle in parentage cases. This article will critique the first significance on parentage from the gender equality perspective.

The rationale for applying this customary rule that children belong to the father was based on the following: (i) one cannot change their culture and that one's tribe is determined by their father's origin; and (ii) since the issue on court record necessitated the applicability of the mother's culture to the children, the court was impressed upon to consider the patrilineal culture in Uganda. In order to ensure the applicability of the Jopadhola culture of the mother, the court invoked the custom: '*that children belong to father'*. The consequence of this finding will be dealt with in detail in the arguments against application of customary law on parentage in the next section.

A. Revisiting Customary Parentage

The customary law on parentage is largely patriarchal. Justice Lydia Mugambe took judicial notice of the custom that 'children belong to the man'[22], that is to say, parentage is derived from the *male parent* alone. This view denies legitimacy to the mother to exercise parental rights over her own children. It also deprives children of legitimacy of origin in respect to their mother. I shall adopt further arguments in contention of the customary rule on parentage in next section.

1. Subordination of women[23]—The anti-subordination principle that protects gender equality condemns laws and practices that have the effect of creating, perpetuating, or aggravating the second-class citizenship of historically oppressed groups.[24] The custom of paternal preference promotes subordination of women and gender stereotyping through relegation of women to inferior status. In this line, a customary law which disentitles a mother of equal parentage as in the case of burial

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22. This position was reinstated and emphasized by the justice in this decision.

23. A patriarchal society is designed for the aggrandizement of men. However, subordination is used in the sense of cultural preference which smacks of gender bias.

24. *See*, Owen Fiss, *Another Equality*, in ISSUES IN LEGAL SCHOLARSHIP, THE ORIGINS AND FATE OF ANTI-SUBORDINATION THEORY (Caranjit Singh ed., 2004) 3-4 (explaining that under the anti-subordination principle, certain social practices should be condemned because they 'perpetuate the subordination of the group of which the individual excluded or rejected is a member.'

rights results in denial of equal access to justice.[25] In short, customary rules which subordinate women as caregivers and which deny them equal rights in parentage violate human rights.

2. Violation of the Equal Protection Clause and *Access to justice*—The equal protection clause under Article 21 of the 1995 Constitution provides for equality and non-discrimination before courts of law. In this case, due to the fact that the paternal preference is based on customary law, the mother of the deceased was discriminated of her parental rights. It implies that she could not equally apply her parental authority despite the difference in cultural affiliation. Even though she was the psychological parent (mother) for the child, she was denied equal rights before courts of law in circumstances where the father of the child was dead. It may be argued that culture does not recognize the mother legitimation of children as opposed to the father who confers legitimacy to the children. Unsurprisingly, such a customary rule became the conduit to deny equal access to justice by the mother as was in this case.

3. Objectification of Children as men's property—The customary rule that confers parentage and parental authority on the father alone vests ownership of children as 'property' to the man. For instance, in the medieval England, this included the right of the father to the labour and earnings of his children. The father may indeed have the benefit of his children's labour while they live with him and are maintained by him; but this no more than he is entitled to his apprentices or servants.[26] For instance, custody law emphasized the concept of *patria potestas*, or paternal power, which many believe gave the father absolute rights to his children—whom he viewed as chattel.[27]

In custody cases as in burial disputes, culture always prefers the father in that a mother may be compensated for the role of raising children. To quote a Tanzanian case which is apt for illustrating women's plight in parentage, in *Angelian Reverian Mutalemwa v. Benedict Felix Mutalemwa,*[28] Mweiumo J. held that:

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25. This is clear where custom can predetermine the custody of children in favour of the father without hearing the side of the mother.

26. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND, 45.

27. *See*, Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 14 (1998). Not all scholars agree that children were mere property to their parents under the common law, *cited* by Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 JOURNAL OF LAW & FAMILY STUDIES (2008).

28. [1978] LRT n. 44.

> Should the applicant feel the urge of being compensated for the expenses she has been incurring in upbringing and maintaining the said children, then I would advise her to proceed by way of a civil claim in order to claim back expenses she incurred on the said children.

In this line, when a woman deprived of her parental rights over her children, she is usually to claim compensation for their upbringing but cannot claim parentage even rights over children's property in culture. Thus, the customary rule on parentage works to deprive women of equal access to their children's wealth and gifts. For example, if the deceased child leaves property without any lineal descendants or children of their own, it means that such property vests in the father or patrilineal family and not the mother of the deceased. This view is evident where childcare is imposed upon women for the enrichment of the patriarchal society which vests child ownership in the man. The way forward is not to inject gender equality into children's property, but rather to allow for equality in guardianship and management of estates of their children. In this way, children's property will not be left to the father alone.

Discrimination of women. It is argued that we cannot recognize that a woman is a mother of the child and not allow her to determine the burial place for her child(ren) based on custom. To deny such a mother of parental rights is outright discrimination against her gender. Thus, the parentage law should espouse equality of mother and father in parental rights. If the customary rule is not modified, the mother's role in customary parentage will remain normative in the sense of being recognized a parent on the birth certificate or otherwise.[29] That is, her parental rights have no practical effect in culture.

B. Recommendations

The gender policy makers should adopt parental rights as a fundamental aspect of equality between spouses not only over children's welfare in their lifetime but also in custody cases under customary law for instance in burial disputes. Instead of this customary rule, a mother can have equal parental rights during the subsistence of the child, and even at his or her demise.

The patriarchal family values in Uganda deny equal parentage and parental rights hence alienation of women. This is a clear affront to the marriage institution

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29. In some cultures where the child is denied by the father disputing paternity. Such child is taken on and raised by the maternal family. The mother may give her child a name and the child may be adopted into the family without any association of any father's culture.

since spouses are equal even at the dissolution of their marriage by death. It follows that the constitutional right to equality in marriage must govern equality in parental rights regardless of culture. In the alternative, a spouse should have equal authority to decide issues affecting their spouse during marriage and at their death,[30] except where parental authority is paramount.

There is also a great need to continue to appeal against judgements that ignore gender bias, as it is not enough when they are merely ruled as discriminatory. More effort needs to be made by the judiciary to set out comprehensible jurisprudence that confirms that such dissimilarity represents unlawful discrimination and breaches the rule of equality. To illustrate the gender bias in family law aspect, where the surviving parent (by reason of death of the other or disappearance or desertion), the surviving parent should carry full parental rights to decide on the affairs of children even in the context of burial rights. Unsurprisingly, the Succession Act of Uganda does not recognize the mother of a child as an equal parent to whom custody can be granted. Under section 44 of the Succession Act, the mother cannot have equal parental rights because she is not recognized as a guardian for her own children. Furthermore, the Succession Act does not recognize the mother's approval in cases of settlement by a minor yet only a father is deemed competent to provide such approval. All these provisions of Uganda's succession law reinforce gender bias which customary law entrenches against women's parental rights.

Customary law should be modified in favour of presumption on duality of culture. This is justified by the practice of intermarriages where different cultures merge. In this way, a child can benefit from both the culture of either their mother or father. For instance, a child born of a Musoga and a Jopadhola as was the case here should benefit from the parentage of their mother's culture premised on the view that presumption of dual culture gives rise to equality of parentage.

In general, the right to certainty of parentage for children born out of intermarriages should provide for duality of culture to be shared equally between the parents. Unfortunately, the case reinforces the custom that if the surviving parent is a woman, such female parent cannot carry equal rights over her own children in culture. Since children belong to the man, the woman cannot obtain equal parental rights in family law per the customs. This position is counter to the notion of equality of persons before the law and contradicts human rights standards.

There should be a review of the legal framework on children and also burial law to shift from paternal preference toward a gender-equitable parlance. This is

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30. This will help Ugandan judges to modify the rule in the Kenyan decision of Oteno

because Ugandan citizens mostly belong to cultural/tribal communities where customary law tilts the favour towards the parent against the spouse.[31] The paternal preference rule also puts the spouse at a disadvantage which needs to be revisited. In the Aboriginal community,[32] there was the decision of *Jones v. Dodd*[33] where the deceased's father wanted his son to be buried with other relatives in his geographical and spiritual homeland, while the deceased's former partner claimed that he should be buried in a cemetery close to where she resided so that the couple's children would be able to visit their father's grave. Custody case was awarded to the parent. Thus, in Uganda and the greater East Africa where customary law applies to most communities, the burial laws can be modified to allow for equality between parents and parental rights.

The Registration of Persons Act, 2015 should be reformed to align it with gender equality in parentage. The provision under Section 35 provides that only a father can dispute parentage for purposes of registration.[34] The effect is that a child has no parentage if the mother cannot establish its paternity. The argument is that if the father is not established, then the mother cannot proceed to register the birth of her child. The issue then remains that Section 35 under the Registration of Persons Act is discriminatory against a mother who cannot establish the paternity of her child. Section 35 under the Registration of Persons' Act 2015, the particulars to be registered require the name of the father to be registered. The mother is supposed to furnish the hospital in which she gives birth with her details and those of the father of the child. Failing to prove paternity, the child is deemed to have no parentage at all as if the mother cannot have a sufficient parent-child relationship. The right to parentage may be denied to children who do not have proven fathers. In short, gender inequality is not limited to customary parentage but also statutory law which for instance may not cater for adopted children by women and children by surrogacy by a woman. In the future, the law needs to be progressive to guarantee equality of parental rights to women in parentage law.

The Courts of Judicature should apply human rights framework to modify or invalidate the customary law on custody and parentage which deprives women of equal rights in parentage to bring it in conformity with human rights law. The customs if modified can create equity in the sense that the culture of the mother can also apply to

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31. In England, the priority is given to the spouse to determine the burial place as opposed to the parent.

32. Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion and the Law of Burial Disputes*, 34(3) UNSW JOURNAL (2011), at 860.

33. (1999) 73 SASR 328.

34. It leaves no room for a mother to dispute parentage.

the children. Otherwise, retaining the custom that children belong to the father alienates a mother as was the case in this *Nice Kasango* decision.[35] Thus, this personal law (customs) should not be applied at the detriment of psychological parent who provided the emotional care for the child.

VI. CONCLUSION

As of customary parentage, the debate for equality of parental rights in culture continues. The community's attachment to the father's culture should not be heralded at the expense of the mother who may have been the only psychological parent to the child.[36] Given that culture and customary law in Africa will always grow, it is necessary to interpret the rules in conformity with human rights and gender equality.

35. *Supra* note 12.

36. The author is aware of single mothers who seek to have custody of their children and exercise parental rights.

THE RIGHT TO ACCESS TO JUSTICE VIS-A-VIZ THE DUTY TO PAY TAX: A CRITIQUE OF THE CONSTITUTIONALITY OF THE 30% TAX DEPOSIT IN UGANDA

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I. INTRODUCTION

Taxation arguably breeds political contestation. A sum of money is extracted from a taxpayer by the State with the help of the law, for no item of equal value in return. The giver often worries that the taker is taking too much for so little in return, while the taker worries that the giver is ungrateful and does not give all that is due. In the circumstances, a dispute is bound to ensue, and indeed, it does ensue when the taker seeks more from the giver by way of a tax assessment. The courts being the guardians of the most sacred symbols of political life- rights/freedoms and the constitution, are the last hope for taxpayers disputing tax assessments.

While some hindrances to access to the guardians of the most sacred symbols of political life may be permissible, the debate on the constitutionality of the provision requiring a taxpayer who has lodged a notice of assessment, to pay 30 percent of the tax assessed, pending final resolution of the objection, has been resurrected by the Constitutional Court in *Fuelex Uganda Limited v. Uganda Revenue Authority*.[1] The issue seems to have been put to rest by the Supreme Court in *Uganda Project Implementation and Management Centre v. Uganda Revenue Authority*.[2] The focus of this commentary is the right to access to justice. However, since the former is a decision of the Constitutional Court and the latter is a decision the Supreme Court, discussing the role of courts in social reform is valuable because it creates context. A comparison of the said decisions leads to the conclusion that judicial activism promotes the right to access to justice and as a result it subordinates the duty to pay tax to the right to access to justice.

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1. Constitutional Reference No. 3 of 2009.
2. Constitutional Appeal No.2 of 2009.

II. COURTS AND SOCIAL REFORM

Judicial power is derived from the people and is exercised by the courts in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.[3] Consequently, the role of courts cannot be understood without seeing them as actors in a complex and dynamic struggle over public policy.[4] The power of courts is manifested in the voiding of illegitimate legislation when championing human rights. Today, there seems to be a political consensus that it is sometimes appropriate for citizens to pursue social reform goals through the courts in what has become known as "social impact litigation."[5]

The Constitutional Court is established under Article 137 of the Constitution[6] with the mandate to adjudicate over questions such as to the interpretation of the Constitution. Proceedings can be commenced by lodging a petition[7] or a reference[8] by a court of law. The structural might of the Constitutional Court is expressed by its ability to nullify unconstitutional provisions.[9] This positions the court as an active and relevant participant in dialogue over reform[10] and litigation as an avenue for reform.

Tax reform pits revenue providers against the State in the course of contestation over reform. Revenue providers enjoy variable bargaining positions in the different arenas and as such litigation presents an opportunity to gain a favourable bargaining position when setting the tax reform agenda against the status quo. This is because litigation provides access to an influential arena where those without political power can raise issues of concern and receive attentive hearing on the merits of their cause.[11] It legitimises political issues, and even where the cases are not successful, litigation

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3. Article 126 (1) of the Constitution.

4. M.H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC FINANCE EQUITY (2001).

5. *Id.*

6. Under Article 137(1), the Court of Appeal sits as a Constitutional Court.

7. A party seeking to institute proceedings for a declaration or redress against the constitutionality of a law or anything done under the authority of any law or an act or omission by any person or authority.

8. Under Article 137 (5) of the Constitution, where any question as to the interpretation of the Constitution arises in a court of law, the court may, if it is of the opinion that the question involves a substantial question of law, and upon the request of a party to the proceedings refer the question to the constitutional court.

9. Article 137(4) of the Constitution.

10. Supra note 4.

11. S.A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

shines light on issues which may gain traction in other arenas.[12] The courts as a revenue bargaining arena inherently recalibrate the bargaining positions of revenue providers and the state since the setting of the tax reform agenda ordinarily requires political power.

Appellate jurisdiction lies with the Supreme Court sitting as a Constitutional Court of Appeal and all other courts are bound to follow the decisions of the Supreme Court on questions of law.[13] However, the *Fuelex* case attempted to defy this doctrine of precedent. The question as to whether it succeeded or not, may be answered by one's appreciation of the impact of the decision on the implementation of the 30% deposit rule. Nonetheless, the case epitomizes the role of courts in social reform. The subsequent section demonstrates how the Court of Appeal sitting as a Constitutional Court departed from the decision of the Supreme Court on the same question of law.

A. From UPIMAC to Fuelex

In 2006, Uganda Project Implementation and Management Centre[14] lodged TAT No. 16 of 2006 against Uganda Revenue Authority (URA) seeking review of the decision of the URA and a declaration that no tax was due. URA had audited UPIMAC's books of accounts, assessed the company to value added tax (VAT) amounting to Shs 394,700,051 (Uganda Shillings Three Hundred Ninety-Four Million Seven Hundred Thousand Fifty One) and demanded payment. UPIMAC objected to the demand[15] but URA disallowed the objection and proceeded to issue third party agency notices[16] against the company's bank accounts. When the application came up for hearing before the Tribunal, URA raised a preliminary objection, that the application was premature and incompetent since the petitioner had not complied with the provisions of Section 34(C) of the Value Added Tax Act. The section required a taxpayer to pay 30% of the tax assessed before lodging an application in the Tribunal. UPIMAC contended before

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12. R.A.L. Gambita, *Litigation, Judicial Deference and Policy Change*, 3 LAW & POLICY Q 141 (1981).

13. Article 132(3) of the Constitution.

14. A Non-Governmental Organisation that carried out a number of community activities during the National Housing and Population Census 2002, and voter education during the National Referendum 2005.

15. On grounds that VAT could not be charged on the said projects as there was no taxable supplies and that even if there was, the money was collectable from the Electoral Commission.

16. A third-party agency notice is written demand to a person holding money on behalf of a taxpayer, usually a bank, ordering the person holding money on behalf of a taxpayer to remit the sum specified in the demand.

the Tribunal that the requirement to pay 30% of the tax assessed before it could lodge an appeal against such an assessment contravenes Articles 21 and 126(2)(a) of the Constitution, in that it is denied the right to access justice.

In the subsequent year, Fuelex, a fuel business company, lodged TAT No. 25 of 2007 against URA seeking review of the decision of the URA regarding a tax liability of Ushs. 160,525,530 (Uganda Shillings One Hundred Sixty Million Five Hundred Twenty-Five Thousand Five Hundred Thirty) assessed against the company in respect of its fuel business. The issue of the constitutionality of the mandatory payment of 30% of the tax levy objected to arose before the Tax Appeals Tribunal.[17] The said issue was entertained by the Constitutional Court on two occasions. UPIMAC graced the first occasion pursuant to Constitutional Reference No. 18 of 2007 while Fuelex was accommodated vide Constitutional Reference No. 3 of 2009. On 10th February 2009, the Constitutional Court unanimously dismissed Constitutional Reference No. 18 of 2007, and years later (24th July 2019) Constitutional Reference No. 3 of 2009 was determined in favour of Fuelex but the court was divided.

In Constitutional Reference No. 18 of 2007, UPIMAC's arguments were premised on fundamental human rights in general, with emphasis on the right of access to justice which was claimed to be part and parcel of fundamental rights. URA contended that access to court is not denied by the impugned section and that even if it was found to be a limitation to the right to access to justice, the same can be justified under Article 43 of the Constitution. The court having addressed itself to some of the principles of constitutional interpretation,[18] ruled that,

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17. When the application came up for hearing before the Tribunal, URA raised a preliminary objection, that the application was premature and incompetent since the petitioner had not complied with the provisions of *section 15* of the Tax Appeals Tribunal Act that requires a taxpayer to pay 30% of the tax assessed before lodging an application.

18. The court cited the principles as follows:

> The principle applicable is that in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation's object and thus, its validity.
>
> In interpreting the Constitution the court would be guided by the general principles

> …There is no doubt that access to court is one of the fundamental rights and freedoms that every individual in society is entitled to. There is no doubt that the impugned provisions impose restriction to the enjoyment of a fundamental right… The question is whether the impugned section imposes limitation on the right of access to court to the petitioner and if so, whether such limitation can be justified under ***Article 43*** of the Constitution. Payment of tax is a duty of every citizen under the Constitution- See ***Article 17.*** Taxes must not only be paid but they must be paid promptly for the public good. The requirement to pay 30% seems to be premised on the fact that the assessment done by the tax authority is correct in accordance with ***section 33*** (*supra*). Service delivery by Government is dependent upon prompt payment of taxes and tax due and payable under the Act is considered a debt to Government- See ***section 35*** of the Act… We have not been persuaded that the limitations imposed by the impugned section are arbitrary, unreasonable and demonstrably unjustifiable in a free democratic society.[19]

UPIMAC appealed to the Supreme Court vide Constitutional Appeal No. 2 of 2009. Among the six grounds of appeal, two related to the infallibility of the URA/conclusiveness of a notice of assessment while the rest dealt with the 30% deposit as a hinderance to access to justice. Little was said about how the duty to pay tax is a justifiable limitation to access to court. The Supreme Court dismissed the arguments associated with the infallibility of the URA/conclusiveness of a notice of assessment on the basis that these did not form any part of the basis of the unanimous decision of the Constitutional Court but were merely a preamble to its decision. The appellate court opined that the issue for determination was whether the appellant's access to court was completely restricted by the impugned section and the appellant was discriminated against. In this regard, the court agreed with URA's argument that the appellant had

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> that (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner,(iii) there was a rebuttable presumption that legislation was constitutional, and (iv) the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction.

19. *Uganda Project Management and Implementation Centre v. Uganda Revenue Authority* Constitutional Reference No. 18 of 2007.

other avenues open to access court.[20] In regard to the constitutionality of the 30% deposit, the court concurred with the Constitutional Court and emphasized that,

> It may be hardship on the taxpayer but according to Article 17 of the Constitution a citizen has a duty to pay taxes and to do so promptly, so that government business can go on.[21]

This unanimous decision was delivered on 28th October 2010. When *Fuelex* came up for hearing, URA's argument was that the question of the constitutionality of the 30% deposit had already been determined while the taxpayer considered the matter a *fiat accompli*. The Constitutional Court was alive to the decision in *UPIMAC* and in so doing, Justice Owinyi-Dollo opined that the 30% deposit was unconstitutional but deferred to the precedent while Justice Obura ruled that there was no need to make the reference since the issue had already been determined. However, the decision of Justice Kakuru which constitutes the opinion the majority was that,

> The framers of the 1995 Constitution purposefully, intended to ensure that parties before the Courts of law are placed at the same footing. Section 15 of the Tax Appeals Tribunal Act derogates from the principle and right to a fair hearing enshrined under the 1995 constitution, to the extent that it places one party at a disadvantage, while at the same time giving an advantage to another… Under the impugned section a person who cannot raise 30% of the assessed tax is denied justice on account of inability to pay. It may be equated to a boxing match in which one of the contestant's arms is tied behind his back.[22]

Despite the finding that the provision as a whole places one party at a disadvantage while at the same time giving an advantage to another, the unconstitutionality was limited to a specific category of disputes. To this end, Justice Kakuru ruled that,

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20. He argued that if the appellant was incapable of paying 30% of taxes, he could have applied to the Commissioner General according to section 34(4) of the Act, to extend the time within which to pay or to make other appropriate arrangement. In case the Commissioner General unreasonably refused the application, the appellant could have applied to the Tax Appeals Tribunal to review the Commissioner General's decision.

21. *Uganda Project Management and Implementation Centre v. Uganda Revenue Authority* Constitutional Appeal No. 2 of 2009.

22. Constitutional Reference No. 3 of 2009.

> Accordingly, I would declare that Section 15 of the Tax Appeals Tribunal Act is unconstitutional as it is inconsistent with Article 44(c) of the Constitution so far as an objector to a tax assessment whose objection does not relate to the amount of tax payable to the tax authority, to pay 30 percent of the tax assessed.

This limitation formed the basis of the Constitutional Court's departure from *UPIMAC*. Justice Kakuru found the decision in UPIMAC *per incurium* to the extent that it did not deliberate on circumstances where the taxpayer contends that he or she is exempted from tax or where a waiver is obtained or is not a taxpayer in Uganda, or where the tax is assessed under a wrong or non- existent law. These circumstances may be close to impossible in a practical setting. However, clarification seems to have been made to the words "where the issue for determination before the Tax Appeals Tribunals does not relate only to the amount of tax payable."

The principle in *Fuelex* is yet to be invoked before the Tax Appeals Tribunal yet the challenge posed by 30% deposit prevails. This may be attributed to the confusion regarding the circumstances to which it applies. Be that as it may, the effects of *UPIMA*C underscore the value of the right to access to justice. The next section provides further understanding of the challenges presented by the 30% deposit in light of the right to access to justice.

B. Effects of UPIMAC

There was once an alternative avenue open to a taxpayer to access court without paying the 30% until the decision in *Uganda Revenue Authority* v. *Rabo Enterprises (U) Ltd & Mt. Elgon Hardwares Ltd*.[23] A taxpayer could lean on the unlimited jurisdiction of the High Court in order to survive the 30% requirement. This procedure had been sanctioned by the Supreme Court in *Commissioner General Uganda Revenue Authority* v. *Meera Investments Ltd.*[24] In *Meeara,* the taxpayer challenged an assessment by commencing a suit in the High Court. When this was objected to by URA, the High Court overruled the objection, the Court of Appeal reversed the decision of the High Court but in 2008 the Supreme Court held that the taxpayer had the liberty to choose whether to commence proceedings in the Tax Appeal Tribunal or the High Court. However, while deciding *Rabo* in 2017, the Supreme Court ruled that all tax disputes should be commenced in the Tax Appeals Tribunal thereby overruling *Meera*.

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23. Supreme Court Civil Appeal No. 12 of 2004.
24. Supreme Court Civil Appeal No. 22 of 2007.

In *Sausage Master Ltd v. URA*,[25] the latter conducted a post clearance customs audit for the period 2012-2016 and assessed the company tax in the sum of Ushs. 1,161,947,554 (Uganda Shillings One Billion One Hundred Sixty-One Million Nine Hundred Forty Seven Thousand Five Hundred Fifty Four) on the basis that the taxpayer applied the wrong customs procedures code, thus resulting into a misdeclaration of goods. However, in 2011, the taxpayer was de-registered on the basis that its products were not subject to VAT. The company applied for judicial review contesting the revocation of the decision that the goods were not vatable but the court referred the matter to the Tax Appeals Tribunal, thereby condemning the taxpayer to the 30% deposit.[26] The taxpayer lodged an application in the Tribunal vide TAT 14 of 2018 and sought a temporary injunction restraining URA from enforcing the assessment. The Tribunal declined to grant the application on the basis of non-payment of the 30% deposit. When TAT 14 of 2018 came up before the Tribunal, URA raised the 30% issue and prayed that the matter should be dismissed. Consequently, the Tribunal dismissed the application on the ground that the taxpayer did not show any intention of paying the 30% deposit and while doing so cited *UPIMAC*.

A Better Place Uganda Ltd filed TAT No. 53 of 2018 against an assessment of Ushs. 8,300,438, 951 (Uganda Shillings Eight Billion Three Hundred Million Four Hundred Thirty-Eight Thousand Nine Hundred Fifty One) by URA. In October 2019, TAT granted a temporary injunction restraining URA from collecting the tax assessed and ordered the parties to agree on how the 30% deposit would be paid. In April 2019, the parties entered into a partial consent pursuant to which they agreed that the company pays Ushs. 250,000,000 (Uganda Shillings Two Hundred Fifty Million) towards the tax the reduction of the taxes in dispute and that the parties would conduct a comprehensive reconciliation. However, by August 2019, no reconciliation had been conducted and the 30% deposit had not been paid. Consequently, the TAT dismissed the application for failure to pay the 30% deposit. The company appealed to the High Court vide Civil Appeal No. 37 of 2019. URA invoked the decision in *UPIMAC* in support of the decision of the TAT. The High Court ruled that the TAT should not have dismissed the application but rather issued a definitive order regarding compliance with the requirement to pay 30%.

In *Century Bottling Company Ltd v. URA*,[27] the Applicant was assessed Ushs. 58,141,883,182 (Uganda Shillings Fifty Eight Billion One Hundred Forty One Million

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25. HCMC No. 249 of 2017.

26. Sausage Master sought leave to appeal the said decision but the court declined to grant the same.

27. Miscellaneous Application No. 32 of 2020.

Eight Hundred Eighty Three Thousand One Hundred Eighty Two). In seeking to comply with the 30% deposit requirement, the company wrote to URA requesting to pay the said sum in instalments but the latter rejected the request. The taxpayer applied to TAT seeking review of decision by URA rejecting the request to pay the 30% deposit in instalments and also sought injunctive relief. URA cited *UPIMAC* and argued that the power to permit payment of the 30% in instalments was the preserve of Commissioner General and the decision was only challengeable by way of judicial review. The TAT entertained the application on the ground that the decision of URA fell within the definition of a taxation decision under the Tax Appeals Tribunal Act and allowed the company to the 30% deposit in five equal instalments.

Among the three cases above, *Sausage Master* and *A Better Place* may be ranked in the same category- inability to pay, while *Century Bottling* may be ranked among the outliers. The prevalence of challenge caused by the consequence of inability to pay in terms of access to justice looms. This challenge to access to justice was exacerbated by the enactment of the Tax Procedures Code Act, 2014. The Act repealed Section 100 of the Income Tax Act which permitted commencement of proceedings in the High Court. As seen above, mitigation of the burden to pay the 30% deposit is limited to reconciliation of the tax assessed and payment of the money in instalments. However, as a matter of discretion, the TAT may consider the use of some other security other than cash as a way of accommodating taxpayers when applying Section 15 of the Tax Appeals Tribunal Act.[28]

C. Change in court composition

Constitutional matters especially those that deal with rights are susceptible to perceptions of justices regarding the proper role of court in a democratic process,[29] ideological preferences[30] and to some extent personal values,[31] because of the of the degree of discretion involved. Consequently, justices may be categorised into judicial activists and judicial restraints. Gibson defines 'restraintism' as the following of precedents, strict construction of the constitution and deference to legislative intent. He defines 'activism' as subordination of precedents, statutes and deference to the judge's

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28. This was obiter dictum in *Elgon Electronics v. URA* HCCA No. 11 of 2007.

29. L. Gibson, *The Role Concept in Judicial Research*, 3 J.L. & POL'Y. Q 291 (1981).

30. B. Canes Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*: *An Analysis of Wetlands Permitting*, 47 AM. J POL SCI. 205 (2003).

31. R.J. Cahill-O'Callaghan, *The Influence of Personal values on Legal Judgements*, 40 J.L. & SOC'Y. 596 (2013)

personal attitudes, values and goals.[32] This section not only demonstrates that the variance in *UPIMAC* and *Fuelex* is attributable to the change in the composition of the court but also entails the basis of the argument that judicial activism promotes the right to access to justice while judicial restraintism hinders the enjoyment of the right by subordinating it to the duty to pay tax.

Constitutional Reference No. 18 of 2007 (*UPIMAC*) was presided over by Lady Justice Mukasa-Kikonyogo, Justice Egwau, Lady Justice Byamugisha, Justice Kavuma and Justice Nshimye. However, at the time of the hearing of Constitutional Petition No. 3 of 2009 (*Fuelex*), these had been replaced by Justice Owinyi-Dollo, Justice Kakuru, Justice Egonda-Ntende, Lady Justice Obura and Justice Muhanguzi. The Coram that presided over Constitutional Reference No. 18 of 2007 may be described as judicial 'restraintists' while the *Fuelex* Coram may be described as judicial activists. As such, the variance in the decisions is attributable from the change in the composition/Coram from judicial restraintists to judicial activists. It follows that if the Constitutional Reference No. 18 of 2007 Coram had presided over *Fuelex,* the latter would be rendered a non-starter.

It is probable that the division in opinion in *Fuelex* was as a result of existence of judicial activists and restraintists, while the outcome is attributable to the numerical strength of the judicial activists. Restraintism as exhibited by Justice Owinyi-Dollo is expressed by the following phrase:

> It is quite apparent that in coming to this decision, the Supreme Court did not fully or adequately address the issue of access to justice as a fundamental right; denial of which would be unconstitutional. While this is so, I must hasten to point out that, however, the courts of judicature operate under the discipline of hierarchical order; which ensures that the decision by a higher court of record binds all courts below that court, on the principle of *stare decisis et non quieta movere*… Thus the interpretation by the Supreme Court in *Uganda Projects Implementation and Management Centre* case…fully binds this court. I can say no more than to express my fervent wish and hope that the Supreme Court will at some point, have the occasion to revisit its decision on this matter; and settle the law in this regard with finality. In the event, despite my finding that the impugned provision of the Tax Appeals Tribunal Act contravenes provisions of the

32. *Supra* note 29.

> Constitution pointed out herein above, I would most regrettably dismiss this reference…

This when contrasted with the decision of Lady Justice Obura, showcases the varying degrees of restraintism. Upon finding that *UPIMAC* and *Fuelex* were on all fours, she opined that,

> There was therefore no need to make this reference as the question relating to the constitutionality of the payment of the tax dispute or that part of the tax assessed and the tax not in dispute, whichever is greater, by a person lodging an application with TAT has already been determined. In the premises, it follows that the answer to the question framed for interpretation by this Court in this reference is in the negative.

It follows that Lady Justice Obura saw no need to inquire into the constitutionality of the 30% deposit on the basis that it had already been answered.

Judicial activism is manifested in the subordination of *UPIMAC* and deference to the justices' views on the scope of section 15 of the Tax Appeals Tribunals Act and access to justice. Having construed section 15 of the Tax Appeals Tribunals Act and found that it did not apply to circumstances where the issue for determination before the Tax Appeals Tribunal does not relate only to the amount of tax payable, the justices appear to have limited the application of *UPIMAC* to circumstances where the issue for determination before the Tax Appeals Tribunals relates only to the amount of tax payable.

When the Supreme Court revisits the issue, it is likely to return a divided opinion on the matter because; (1) the Coram in *UPIMAC* has since retired with exception of Lady Justice Kisakye; and (2) Justice Owinyi-Dollo currently presides over the court as Chief Justice. Consequently, the effect of the change in composition of the Supreme Court will be construed from the outcome of the appeal. The subsequent section weighs the right to access to justice against the civic duty to pay tax i.e., whether civic duty to pay tax is a justifiable limitation to the right to access to justice.

III. RIGHT TO ACCESS TO JUSTICE VERSUS CIVIC DUTY TO PAY TAX

The right to access court not specifically provided for under the Constitution while the duty to pay tax is provided for under Article 17. In *UPIMAC,* the justification for the requirement to pay the 30% deposit as a limitation on the right to access justice was premised on the duty to pay tax in a timely manner. However, in *Fuelex,* the court subordinated the duty to pay tax to the right to access to justice. This section weighs the right to access to justice against the duty to pay tax on the basis of the effect of adjudication on the duty to pay tax *vis-à-vis* the effect of non-payment of the deposit, equal access to justice and the fallibility of the URA.

A. Effect of adjudication on the duty to pay tax v Effect of non-payment of 30% deposit

In order to understand the duty to pay tax, one has to understand the tax process. A tax registered citizen in fulfilment of their civic duty declares what is due from them to the state and makes payment of the declared sum.[33] If URA in examining the citizen's affairs discovers any additional tax liability, an additional assessment is issued against the taxpayer. However, contestation of the additional liability by the taxpayer does not extinguish the citizen's duty to fulfil future tax obligations nor the duty to pay the additional tax liability in the event that the contestation is found wanting.

On the contrary, the non-payment of the 30% deposit has the effect of not merely restricting or fettering, but altogether baring or serving as an absolute impediment to access courts of justice. In this regard, Justice Owinyi-Dollo (in *Fuelex*) opined that,

> Admittedly, the right to a fair trial is a component of access to justice as a right; but this is only possible where the disputants are accorded the opportunity to appear before a Court or Tribunal, or other adjudicatory body, in the first place. Otherwise, without appearing before an adjudicating body, the issue of a fair trial would not arise.

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33. This is known as a self-assessment regime.

In addition, Justice Kakuru emphasized that,

> An objector who does not have the 30%, his/her objection however plausible cannot be heard. Once the opportunity to be heard is denied on account of failure to raise the 30% of the assessed tax, Uganda Revenue authority is at liberty to recover the whole of the disputed sum whether that amount is legally owing or not irrespective of what decision the Tax Appeals Tribunal would have made… A person who cannot raise the 30% deposit is denied justice on the account of inability to pay.

However, in *UPIMAC,* the Supreme Court likened the requirement to pay the 30% deposit to an intended appellant who may be required to furnish security for the due performance of the decree or to deposit the decretal amount in court before proceeding with the appeal process. This argument is inapplicable to the extent that security for due performance is ordered where a judgement debtor has been condemned after trial and the order is made pursuant to court proceedings. In both cases, the judgement debtor has access to court unlike the case of the 30% deposit. Therefore, it is only fair that any part of the contested additional tax liability is only paid after the dispute has been resolved by an independent tribunal.

B. Equal access to justice

In *UPIMAC,* the appellant argued that the Constitutional Court gave a restrictive meaning of the word discrimination because the appellant and the respondent were both parties to a dispute before the Tax Appeals Tribunal and that both of them should have been required to pay 30% of the assessed taxes. The Supreme Court held that the respondent could not have paid the 30% of the assessed tax to itself and as such the Constitutional Court rightly considered discrimination to be treatment between taxpayers. However, in *Fuelex,* the issue was considered as follows:

> Payment of the 30% deposit is unjust as it favours one of the disputants to the detriment of the other and it is exacerbated by the provision that the objector must make the impugned payment to the adversary in the dispute… It places on an objector a burden that the adverse party does not have to bear while at a disadvantage because he or she is required to pay money before the dispute can be entertained… The framers of the Constitution purposefully intended to ensure that

> parties before courts of law are placed at the same footing. Such a hearing cannot be said to be a fair hearing.

This position is buttressed by the fact that when a taxpayer seeks a refund, and a dispute arises in regard to the refund, no part of the refund is paid by URA until the dispute is determined in the taxpayer's favour. It follows that the requirement to pay the 30% deposit is unjustifiable because it favours URA at the detriment of the taxpayer.

C. Infallibility of the Revenue Authority

In *UPIMAC,* the Constitutional Court opined that the requirement to pay 30% seems to be premised on the fact that the assessment done by the tax authority is correct. This decision formed the basis of two of the grounds of appeal. The Supreme Court, in dismissing these grounds of appeal, held as follows:

> In my view the court simply gave a background to the payment of 30% of the assessed tax. The correctness of the assessment was not the reason why the court concluded that the payment of 30% is constitutional. This was a preamble to its decision.

However, a distinction between the conclusiveness of the assessment being the basis of the decision of the Constitutional Court and the effect of such a perception of court in determining the constitutionality of the 30% deposit is worth noting. Whereas it may be argued that the conclusiveness of the assessment was simply a preamble/background, it is probable that this perception (which was based on misconstruction of the law) influenced the conclusion of the court on the constitutionality of the 30% deposit. In *Sausage Master Ltd*, the taxpayer acted on the "wrong" advice of URA but was unable to access court due to the inability to raise the 30% deposit. Therefore, since the URA is as fallible as any prudent taxpayer, imposition of the 30% deposit is an unjustifiable hindrance to access to court.

IV. CONCLUSION

Courts play a crucial role in social reform owing to their power to nullify legislation. The exercise of this power is influenced by factors attributable to the individual justices. A comparison of *UPIMAC* and *Fuelex* demonstrates that judicial activism promotes the right to access to justice while judicial restraintism hinders the enjoyment of the right. Consequently, the change in the composition of the court presents both a risk and an

opportunity for setting the tax reform agenda. This implies that the change in the composition of the court is an important variable in choosing litigation as a strategy where it has not been successful in the past.

The right to access court outweighs the duty to pay tax within the context of payment the 30% deposit. This is because: (1) even if the 30% deposit is not paid, the tax is recoverable when the decision is determined in favour of the URA; and (2) the fact that a notice of assessment is not conclusive implies that upon dismissal of an application for non-payment of the 30% deposit, the taxpayer suffers the tax burden irrespective of what decision the Tax Appeals Tribunal would have made. Therefore, since tax due and payable to the Government, remains a debt due and recoverable, while a right to access to justice when denied or taken, is unrecoverable, it follows that what is recoverable is subordinate to the unrecoverable. If such "wisdom" is found to be persuasive by the Supreme Court, it is probable that *Fuelex* will overturn *UPIMAC*. Even if it is argued that the justification of the 30% deposit was to prevent the misuse of courts by taxpayers who default against their tax obligation, the remedy lies in the efficiency of courts. This also negates the worry that Government would have to write off more taxes going forward.