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POLITICAL INCLUSION OF WOMEN AND AFRICAN FEMINIST ACTIVISM: THE STRUGGLE FOR WOMEN'S RIGHTS AND GENDER PARITY

Tabitha Mulyampiti*

ABSTRACT

Using the lens of theories of gender, feminism and African feminism, the article analyses the political inclusion of women and the corresponding challenges using examples of Africa countries. It aim is to stimulate thoughts around the future of African feminist activism and its role in delivering gender equality. Specifically, the article discusses the theory and practice of African feminism and its contribution to enhancing an increase in African women in politics (i.e. the politics of inclusion). The article further examines how the politics of inclusion leads to co-optation on one hand, and an enduring struggle for parity on the other, and provides thoughts to clarify the relationship between academia and activism in ways that enhances the growth of African feminist research and activism. The major question is whether feminist African activism is strong enough to withstand the rigors of patronage politics, massive corruption and co-optation that is prevalent in the current African politics. To this effect, the article adds weight on the argument propagated by several writers that in Africa, a number of factors (i.e. fragile institutions for democracy, the backlash on gender and feminism, and the economic crisis) exacerbate the precarious situation of women in politics and weaken the opportunities of feminist movements for self-expression in their struggle for political rights. However, the different feminisms that have emerged in specific places have made it possible to characteristically analyze gender oppression and strengthened the capacity to demand for equality from the State and society.

I. INTRODUCTION

This article places women at the centre of analysis, examining the potential and promise of the struggles for political rights as a fundamental development objective and is essential to enabling women and men to participate equally in society. The major aim is to assess the impact of women's political inclusion and the methods they use to

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survive while in politics. By centring the arguments about how women do their politics or how they influence decision makers to address matters of gender equality, we are in essence recognising that politics is central to changing unequal gender relations of discrimination and oppression. The central question is whether African feminist activism can support to diverge the ever-increasing capture of the gender equality struggle by state survival regimes through supported political inclusion.

The article analyses the political inclusion of women and the corresponding challenges using examples across African States. The overall aim is to stimulate thoughts around the future of African feminist activism and its role in delivering gender equality. Specifically, the article discusses the theory and practice of African feminism and its contribution to enhancing an increase in African women in politics (i.e. the politics of inclusion). In the same light, this article further examines how the politics of inclusion leads to co-optation on one hand, and an enduring struggle for parity on the other, and provides thoughts on clarify the relationship between academia and activism in ways that enhances the growth of African feminist research and activism.

Feminist African activism is used as an approach to examine the ways in which women have struggled against systematic male dominance as elected or non-elected participants in the legislative and executive political arenas. It is hoped that such discussions may provoke thoughts around the future of African Feminism and activism. This follows from African feminist researchers concerns that whereas women's organizations or feminist movements help to set the political agenda and to put pressure on governments to act in the interest of women, when this essential link blurs, it is difficult for women/feminists in the state to resist co-optation in male-dominated environments without having to face the risk of being isolated and marginalized.

Methodologically, feminist research differs from traditional research. It actively seeks to remove the power imbalance between research and subject. It is politically motivated in that it seeks to change social inequality, and it begins with the standpoints and experiences of women. The methodological approach focused on synthesizing the scattered literature in order to identify concepts and empirical insights that were central to developing a feminist-based approach to the analysis. In addition, purposely selected interviews with a cross section of women in politics and in the academia helped to bring home the empirical insights needed to support most theoretical arguments.

This article is laid out in sections which include: a snapshot on the state of gender equality in Africa; a literature review on the understanding of gender, feminism and African Feminism; then goes ahead to make the link to the subject of African women in politics and their enduring struggle for parity. The article further discusses the political notion of survival or co-optation—co-optation of feminism in Africa using

examples; and finally provides a discussion on the way forward for African feminist activism.

Gender Equality in Africa Today

Historically, transitions to democracy, have also often led to the creation of structures in the State to promote gender equality. These structures—called national gender machineries or policy agencies—have had the ability to consolidate policy initiatives or to rally support among women in government for specific policy issues and legislative demands by women.[1] Countries like South Africa, Tanzania and Uganda have surpassed the 30% benchmark in legislative representation by women.[2] Rwanda, a small East African country with a population of 10 million, is the highest in the world with 61.25% in a single legislature,[3] thus being considered as having one of the best in the world. To follow suit, a few countries, including Nigeria and Uganda, have seen women assume non-traditional ministerial portfolios, for instance in defense and finance, Prime Minister and Vice President.

To date, in Africa, a number of women have fulfilled their dreams of becoming national presidents like Ellen Johnson Sirleaf, President of Liberia (January 2006 – January 2018); Slyvie Kiningi, Acting President of Burundi (February – October 1993); Joyce Hilda Banda, President of Malawi (April 2012 – May 2014); Ameenah Gurib-Fakim, President of Mauritius (June 2015 – March 2018); Sahle-Work Zewde, President of Ethiopia (October 2018 – present); and Samia Suluhu Hassan, President of Tanzania (March 2021 – present).

Furthermore, Africa is supported by a strong array of legal and policy instruments that, when adopted by the national governments with the support of key lobbyists for gender equality agendas, result in instrumental opportunities for women's advancement. These include: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions

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1. A. Gouws & A. Coetzee, *Women's movements and feminist activism*, 33(2) AGENDA, 1-8 (2019).

2. A. Okedele, *Women, Quotas, and Affirmative Action Policies in Africa,* in THE PALGRAVE HANDBOOK OF AFRICAN WOMEN'S STUDIES (O. Yacob-Haliso & T. Falola, eds., 2020), at 1-5.

3. Second globally is Cuba (53.22% followed by Bolivia (53.08) and the United Arab Emirates (50%).

and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights.

Furthermore, there has been explicit commitment to the promotion gender equality and the empowerment of women by leaders on the African continent. Nearly all countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women and over 50% have ratified the African Union's Protocol on the Rights of Women in Africa.[4] Worthy to mention here is that the African Union's declaration of 2010–2020 as the African Women's Decade was another milestone. The World Bank and other development partners were committed to funding more gender-informed projects, monitoring their results more closely, and making sure that projects increasingly considered gender in their designs. For instance, since fiscal year 2013, 99% of World Bank lending to African countries took gender into consideration.[5]

The importance of gender is not limited to the work of the Bank alone, but it also applied as a special theme of International Development Association (IDA), which is providing close to $50 billion in credits and grants to the poorest countries since 2011—many of which are in Africa.[6] For example, for Burkina Faso, Chad, Côte d'Ivoire, Mali, Mauritania, and Niger, the Sahel Women's Empowerment and Demographic Dividend (SWEDD) project is aimed at enhancing women and adolescent girls' empowerment, increasing access to quality reproductive, child and maternal health services, and improving regional knowledge sharing globally. Investing in girls' education and keeping girls in school is a critical first step in opening opportunities for women.

The African Union's (AU) Parity Policy has ensured equal representation of women and men in most elected official positions, including the leadership of the commissions and parliamentary committees. For instance, the AU adopted, from its inception, a 50% quota for women's representation, which is reflected in the

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4. As of July 2019, out of the 55 member countries in the African Union, 49 had signed the Protocol and 42 had ratified and deposited the instrument. The AU States that have neither signed nor ratified the Protocol yet are Botswana, Egypt, and Morocco. Although South Sudan has not officially ratified the Protocol, it has passed the parliamentary motion for ratification, and through its parliamentary committee for Gender, Child and Social Welfare and Religious Affairs, has indicated reservations on several Articles, including on one which discourages polygamous marriages.

5. THE WORLD BANK, IMPROVING GENDER EQUALITY IN AFRICA, THE GENDER DATA PORTAL (2014).

6. INTERNATIONAL DEVELOPMENT ASSOCIATION (IDA), FINANCING FOR SUSTAINABLE DEVELOPMENT REPORT (2021).

composition of the AU Commission.[7] The AU's Agenda 2063[8] envisages a non-sexist Africa, an Africa where girls and boys can reach their full potential, where men and women contribute equally to the development of their societies. Under this vision, it is envisaged that there will be gender equality in all spheres of life and an engaged and empowered youth. Women are recognized for their contribution to societal economies and development and without their equal and effective participation in all spheres of socio-political and economic life, the vision of agenda 2063 would not be realized as emphasized below:

> Africa of 2063 would see fully empowered women with equal access and opportunity in all spheres of life. This means that the African woman would have equal economic rights, including the rights to own and inherit property, sign a contract, register and manage a business.[9]

However, it is important to note at this point that the optimistic view that is often presented in mostly official forums is straight faced with a number of persistent challenges. Despite the positive steps in many directions, there are persistent challenges that cannot simply be removed by increased skills in education, business or in politics. There are deep-rooted social norms that continue to expose women and girls to gender-based discrimination. For instance, the 2021 Social Institutions and Gender Index (SIGI) Regional Report for Africa, a report covering 54 African countries, revealed that hidden aspects of gender inequality such as discriminatory laws, norms and practices persistently affect women in areas such as employment, entrepreneurship, health and political representation. This situation is exacerbated by the COVID-19 crisis, revealing that all types of violence against women and girls have increased since the start of the pandemic.[10]

The report further notes that on average, women in Africa suffered the highest levels of discriminatory practices in the world. For instance, 20% of women and girls aged between 15 and 24 years reported they had experienced sexual violence. This was commonest in conflict and post-conflict countries such as the DRC, Mozambique,

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7. THE AFRICAN UNION, AU STRATEGY FOR GENDER EQUALITY & WOMEN'S EMPOWERMENT (2018-2028).

8. Agenda 2063 is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity.

9. AFRICAN UNION, AGENDA 2063: THE AFRICA WE WANT, 1 (2015).

10. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), SOCIAL INSTITUTIONS AND GENDER INDEX (SIGI) REGIONAL REPORT FOR AFRICA, OECD iLibrary (2021).

Uganda and Zimbabwe. Other forms of domestic sexual abuse of women and girls that were exacerbated particularly under COVID 19 lockdowns include rape, defilement, incest, child marriage, and female genital mutilation (FGM). Gender-based violence in Africa stems from restrictive masculinity norms that perpetuate male dominance in the private sphere, combined with women's acceptance of this violence. For instance, in 2018, on average, 16% of African women aged 15-49 years were of the view that FGM should continue.[11]

According to McKinsey's Power of Parity Report, Africa's gender parity stands at 0.58 (1 would be full parity). For the continent to achieve full parity could be 140 years without drastic action.[12] In addition, with the theme of "Unpacking Constraints to Gender Equality," the Global Gender Summit[13] was for the first time held on the African soil in 2019 in Kigali, the capital city of Rwanda. The summit was attended by over 800 participants and it identified that one of Africa's most urgent challenges threatening its future was gender inequality. For instance, the summit noted that:

> Women are responsible for 60% of work done globally yet earn just 10% income and 1% of property. In Africa, 70% of women are excluded financially. The continent has a US$42 billion financing gap between men and women.[14]

The question that remains key to this gender inequality debate is whether political inclusion of women into the highly patronage politics of male dominance could lead to improved results in the lives of majority of women. If political inclusion is considered a panacea, how then might the concerned women act? What specific strategies are necessary for their success?

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11. *Id.*, at 3.

12. DEVELOPMENT AID, ADVANCING WOMEN'S EQUALITY IN AFRICA, MCKINSEY'S POWER OF PARITY REPORT (2018), at 3.

13. The Global Gender Summit is a biennial event organized by Multilateral Development Banks (MDBs), bringing leaders from government, development institutions, private sector, civil society and academia together. The first Global Gender Summit was held in 2012 in Istanbul, the second in 2014 in Manila, and the third in 2016 in Washington DC.

14. V. Egbetayo, One of the greatest threats to Africa's future: gender inequality, GPE Secretariat (2019), at 2.

Gender, Feminism, and African Feminist Activism: A literature review

A. Gender and African Feminism

The concepts gender and feminism are ingrained in the understanding of African feminism. Gender has been theorized as personality traits and behaviors that are specifically associated either with women or men (for example, women are caring; men are aggressive).[15] As a socially constructed system, gender refers to two different social groups—"men" and "women"—that are the product of unequal relationships. Hence, the gender system refers to processes that both define males and females as different in socially significant ways and justify inequality on the basis of that difference.

Gender relations are recreated hierarchically where one group of people (men) have power and privilege over another group of people (women).[16] These practices then become normative and reflected through ideas, beliefs and norms of specific social structures. The continued everyday acceptance of the gender system is inculcated in both people's experiences and cultural beliefs in ways that justify men's greater power and privilege.[17] It is generally agreed that gender differences are to be understood as a central feature of patriarchy, a social system in which men have come to be dominant in relation to women. Hence, gender is imposed on individuals as a result of the material conditions and social structures in which they live.[18] People may identify with genders that are different from their natal sex or with none at all. These identities may include transgender, non-binary, or gender-neutral. There are many other ways in which a person may define their own gender.

Critiques of the gender binary have added that gender is a broad spectrum. A person may identify at any point within this spectrum or outside of it entirely. People born with a mixture of sexual markers, for example, with both an ovary and testes present in their body, challenged the idea that there is one "true sex" in every human body.[19] People may identify with genders that are different from their natal sex or with none at all. These identities may include transgender, non-binary, or gender-neutral. There are many other ways in which a person may define their own gender.[20]

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15. D. Richardson, *Conceptualising Gender*, in Introducing Gender and Women's Studies (Robinson, V & Richardson, D. eds., 2015), at 3-22.

16. C.L. Ridgeway & L. Smith-Lovin, *The Gender System and Interaction*, 25 ANNUAL REVIEW OF SOCIOLOGY (1999), at 191-216.

17. *Id*.

18. C. West & D.H. Zimmerman, *Doing Gender*, 1 GENDER & SOCIETY (1987), at 2.

19 Richardson, *supra* note 15, at 10.

20. Sex and gender: What is the difference? (Unpublished).

Feminist theory, on the other hand, analyses gender inequality, and the construction of patriarchy and power in society. Feminist theory of the 1960s and 1970s can be classified into three main categories referred to as "gendered social order".[21] Other scholars have described feminism to include a range of socio-political movements and ideologies that aim to define and establish the political, economic, personal, and social equality of the sexes.[22] It is rooted in responsible to movements for equality, freedom, and justice. This article recognizes the variety of approaches to feminism and summarizes the following: liberal, socialist/Marxist, radical and post-modern feminism.

Writers on liberal feminism claim that gender differences are not based in biology, and therefore that women and men are not all that different. If women and men are not different, then they should not be treated differently under the law. Women should have the same rights as men and the same educational and work opportunities.

Marxist and socialist feminists view the family as a source of women's oppression and exploitation. Although Marx recognized that workers and capitalists had wives who worked in the home and took care of the children, he had no place for housewives in his analysis of capitalism. It was Marxist feminism that put housewives into the structure of capitalism. They pointed out ways in which capitalism exploited women. If a woman worked for her family in the home, she would be economically dependent on the husband or "man of the house," in the same way her children would. If she works outside the home, she would still expect to fulfill her domestic duties, and so she ended up working twice as hard as a man, and usually for a lot less pay.[23]

For the Radical feminists, their theoretical grounding is based in the analysis of patriarchy. Patriarchy refers to men's pervasive oppression and exploitation of women, which can be found wherever women and men are in contact with each other, in private as well as in public. Radical feminism argues that patriarchy is very hard to eradicate because it is rooted in society's beliefs of women's difference from men and their inferiority. Radical feminists argued for forming non-hierarchical, supportive, woman-only spaces where women can think, act and create free of constant sexist attacks, sexual harassment, and the threat of rape and violence.[24]

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21. J. Lorber, The Variety of Feminisms and their Contributions to Gender Equality, University of Oldenburg, Germany (1997), at 5.

22. L. Nicholson, *Feminism in "Waves": Useful Metaphor or Not?,* In FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES (C. Mccann & S. Kim, eds., 2013) 49-55.

23. Lorber, *supra* note 21, at 6.

24. *Id.,* at 17.

However, there are other variants (or new categories) within the above three approaches that have also emerged as post-feminist and postmodernist perspectives. These feminisms deconstruct the interlocking structures of power and privilege that make men dominant and render women in a complex web of serious disadvantage. They also analyze how cultural productions, especially in the mass media, justify and normalize inequality and subordinating practices by questioning the social order that is built on concepts of two sexes, two sexualities, and two genders.[25] Instead, they posit vulnerability not as the opposite of resistance (as weakness might be to strength), but as a constituent aspect of political agency. They suggest a politics of resistance in which oppressed or endangered people turn their vulnerability toward shared capacities to act.[26]

Overall, the main point feminists have stressed about gender inequality is that it is not an individual matter, but is deeply ingrained in the structure of societies. For instance, gender inequality is deeply woven into the organization of marriage and families, work and the economy, politics, religions, the arts and other cultural productions, including the languages spoken. Making women and men equal, therefore, necessitates social and not individual solutions.

B. African Feminism

Many writers view feminism as a white women's establishment instituted to protect their rights, and identifying with the movement is coterminous to subjecting blackness to white supremacy and sustained domination[27]. African feminists in particular have argued that the Western approaches might have difficult contexts from the African feminists. Thus, African women writers and critics have had to navigate through 'feminism', 'womanism', 'African Feminism' and 'Africana Womanism' in search of appropriate theories for the interpretation of their writings.[28] In fact, many African feminists agree to the common origin of feminism as Amina Mama writes:

> African feminist political thought can be traced to the world's women's movements that formed in the context of transnational liberal

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25. K.E. Ferguson, *Feminist Theory Today*, ANNU. REV. POLIT. SCI. 20 (2017) 269–86.

26. *Id.,* at 7.

27. P.H. COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT, 2ND EDITION (2000).

28. R.C. Amaefula, *African Feminisms: Paradigms, Problems and Prospects*, 37 FEMINISMO/S (2021), 289-305.

> and emancipatory political discourses of the late 19th and 20th centuries of European empire. Out of these liberal emancipatory reformist, international labor, communist, socialist revolutionary, and Pan-African Diasporic and African nationalist movements were all formed… African feminist thought refers to the dynamic ideas, reflections, theories and other expressions of intellectual practices by politically radical African women concerned with liberating Africa.[29]

Similarly, feminism in Africa has been a boiling pot of diverse discourses and courses of action. Far from being constructed in simple opposition to Western feminism, feminism on the African continent constitutes a myriad of heterogeneous experiences and points of departure.[30] This article does not however attempt to distinguish between Western and African feminisms, but rather presents both views as mutually enriching.

A lot is written about the African society. Such writers have insisted on the need to particularly recognize the interplay of class, culture, ethnicity, religion and politics and the attendant result that African women's progressive gender consciousness differs from one African society to another. It is true that African women have been long treated as the voiceless subaltern[31] and the image of African women as passive victims marginalized without a voice has been presented in several circles.[32] In much of Africa, gender stands out as a questionable concept that is linked to feminism. There is an observable polarity in the approaches of African women to feminism, ranging from acceptance, to questioning or rejection.

African concepts of womanhood, gender ideologies, and philosophies begun to emerge. These defined gender relations and constructions, which were often stored in oral literary genres as myths, proverbs, and folklore. Women's written literary texts and biographies such as Ama Ata Aidoo of Ghana, the Nigerian writers Oyeronke Oyewumi, Obioma Nnaemeka and Buchi Emecheta, Tsitsi Dangarembga of Zimbabwe and the South African writer Miriam Tlali provided avenues for implicit and explicit

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29. A. Mama, African Feminist Thought. Retrieved from <https://doi.org/10.1093/acrefore/9780190277734.013.504> (accessed 2 June 2022).

30. J. Ahikire, *African feminism in context: Reflections on the legitimation battles, victories and reversals*, 19 FEMINIST AFRICA (2014), 7-23.

31. G.C. SPIVAK, CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA (2010), 336.

32. M.M. Kolawole, *Rethinking Feminisms and the Dynamics of Identity in Africa*, 54 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY (2002), 92–98.

gender conceptualizations.[33] Many African women interested in gender theorizing have insinuated that African women did not learn about gender only from the global movement. Instead, they have been motivated historically by accounts of women's mobilization in traditional Africa.

Hence, women's understanding of the gendered discourses that mainly disadvantaged women across Africa resulted in women's rights movements and activism. A popular view of African feminism is about its humaneness and dignity. A description of feminism as a belief/ideology in gender equity and doing something about it.[34] Following from this assertion is an extract of the preamble to the Charter of Feminist Principles for African Feminists as quoted in the spirit of gender equality and women's rights:

> …By naming ourselves as feminists we politicise the struggle for women's rights, we question the legitimacy of the structures that keep women subjugated, and we develop tools for transformatory analysis and action. We have multiple and varied identities as African feminists. We are African women – we live here in Africa and even when we live elsewhere, our focus is on the lives of African women on the continent. Our feminist identity is not qualified with "ifs", "buts" or "howevers.[35]

Thus, the 20th century African women have formed independent feminist movements that continue to demand freedom, equality and rights, for example, by seeking freedom of movement, political representation, educational and economic equality, and perhaps most commonly of all, freedom from sex and gender-based violence. Many other writers follow this zeal to try and make a case for African feminism arguing for nego-feminism, a form of feminism that emphasizes negotiation and compromise.[36] Nego-feminism was interpreted in the context of politics in Botswana to refer to as a source of inspiration for describing women's agency in their more practical work to support female political candidates in their preparations for campaigning not only for elections but also for broader perspectives on political empowerment and negotiation of

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33. D. Byrne, *Decolonial African feminism for white allies*, 21(7) JOURNAL OF INTERNATIONAL WOMEN'S STUDIES (2020), Article 4.

34. S. TAMALE, DECOLONIZATION AND AFRO-FEMINISM (2020).

35. Ahikire, *supra* note 30, at 7.

36. O. NNAEMEKA, NEGO FEMINISM: THEORIZING, PRACTICING, AND PRUNING AFRICA'S WAY (2004).

opportunities outside the formal political sphere.[37]

Another approach related to nego-feminism is the snail-feminism, which examines how the snail-sense feminism manifests in a womanist exploration of Nigerian women's history of power over time. Snail-feminism may be specific for the Nigerian context and focus on the negotiation around multiple systems of oppression such as patriarchy, but it is widely used as a means of cooperation with potential male allies and avoids confrontation.[38] The theory, Snail-Sense Feminism, adopts the habit of the snail to 'negotiate' or 'dialogue' with its environment to be able to get round obstacles on its way with a 'well-lubricated tongue', whether the obstacles be rocks, thorns or boulders.

> … smoothly and efficiently with a well lubricated tongue which is not damaged or destroyed by these harsh objects. Moreover, the snail carries its house on its back without feeling the strain. It goes wherever it wishes in this manner and arrives at its destination intact. If danger looms, it withdraws into its shell and is safe.[39]

The version of African feminism labelled 'womanism' applies to black women globally and relates to multiple forms of domination and discrimination when confronted with culture and colonialism. However, again there are mixed voices about womanness that points to geographical location of the Black woman. There is a distinction in the interpretations of the African women from the Afro-American women on the basis that some factors set the black woman apart as having a different order of priorities. Women belong to different socio-economic groups and do not represent a universal category. African feminists see the Afro-American (perceived synonymously with White feminists) as a feminism that lays an attack on men instead of attacking the system itself that thrives on inequality.[40] In addition, the writer further pronounces that:

> the Africana woman does not see the man as her primary enemy as does the White feminist, who is carrying out an age-old battle with her

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37. S. Mosime and M. Dikobe, *Candidate training programmes in Africa – A waste of resources or pedagogies of the oppressed?,* in GENDERED INSTITUTIONS AND WOMEN'S POLITICAL REPRESENTATION IN AFRICA (D.H. Madsen, 2021).

38. N. Nkealah, *African Feminisms and their Challenges*, 32(2) JOURNAL OF LITERARY STUDIES (2016), 61-74.

39. N. Ezenwa-Ohaeto, *Reflections on Akachi Adimora-Ezeigbo's 'Snail-Sense Feminism': A humanist perspective*, 4(2) JOURNAL OF ARTS AND HUMANITIES (2019), at 3.

40. Amaefula, supra note 28, at 293.

> White male counterpart for subjugating her as his property. Africana men have never had the same institutionalized power to oppress Africana women as White men have had to oppress White women.[41]

Africana Womanism tries as much as possible to escape from some of the radical tendencies of feminism by even suggesting that African woman's history depicts a flexible gender regime that saw some powerful women chiefs, priests, queen mothers rise to stardom.[42] Tracing the development of the portrayal of women, writers have insisted that African women were not passive to their condition and that they were not voiceless. Their womanist ideology feminine self-expression, self-retrieval, and self-assertion.[43]

The African feminism referred to as motherism emphasizes the female-shared experiences of motherhood with a particular emphasis on the role of rural women in caring for the citizens of the nation due to her role in production and reproduction. The thrust of this theory is the promotion of mutual love, tolerance and defence of family values, without violence and allied hostilities between man and woman.[44]

Also closely related is the femalist thought whose focus is on the woman's body—which she likens to mother earth, making a claim on the relationship between the liberation of African women and Africa at large. Femalism advocates for the creation of awareness an African feminism, which does not greatly oppose man; he is rather tolerated, on compassionate grounds, as a partner in progress, as long as he does not constitute a barrier to women's self-actualization.[45]

Despite the squabbles, African feminism has been noted to be an instrument of social, political and economic change in Africa. Optimists argue that African feminists have a golden opportunity to relaunch the feminist agenda of gender equality in a way that will fast-track social, political and economic change based on the viability of their feminist strategy of representation, redistribution and recognition. It can further be argued that African feminists using direct political activism and a feminist vision can be used to effect political change that is relevant in today's African conditions. The next section highlights this perspective.

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41. *Id.,* at 294.

42. *Id.,* at 296.

43. M.M. KOLAWOLE, WOMANISM AND AFRICAN CONSCIOUSNESS, 105 (2002).

44 A. Mama, *We will not be pacified': From freedom fighters to feminists*, 27(4) EUROPEAN JOURNAL OF WOMEN'S STUDIES (2020).

45 M. Judge, *African Feminisms Across Generations*, 1 HEINRICH BÖLL FOUNDATION (2021).

African Women and their Enduring Struggle for Parity in Politics

This section provides a link to the core substance of this article, which is to examine the ways in which women have struggled against systematic male dominance as elected or non-elected participants in the legislative and executive political arenas using the tools at their disposal, African feminism.

The blending of feminism into political science has given rise to the construction of an unconventional theoretical base towards understanding women's issues in politics. Writers on African women and politics (like Aili Tripp, Ann-Marie Goetz, Joni Lovesdaski, Amina Mama, Amanda Gouws) have a varied conceptualization of politics and political concepts which seem to be woman-centric. The feminist political theory incorporates a broad scope of approaches which includes feminist understanding of the state, feminism and the concept of power, feminist critique of rationality, and feminist notion of citizenship.[46] This introduction is intended to usher in the subject of gender politics, state politics and feminism, which are central in the discussion of struggles for gender equality in Africa.

To move forward, it's important to recognise that a number of continent-wide programmes are on the increase to support women's political participation. For example, the project on Enhancing Women's Political Participation in Africa (Women in Political Participation (WPP)) is a Pan-African gender project on the different aspects of women and politics. It aims to advance gender equality in politics and governance in line with the Maputo Protocol of 2003 and the United Nations Sustainable Development Goals (SDGs). The project includes working with key institutions of democratic governance such as political parties, parliaments, and the media, amongst others, to build constituencies, alliances, norms, templates, and targets for reform and change towards greater women's political participation.[47]

As a result, women's political representation has significantly increased in Africa, for instance, from 2000 to 2018, the proportion of women parliamentarians almost doubled, and women's representation in cabinet increased five-fold to 22% between 1980 and 2015.[48] Women's empowerment advocates in Africa believe that more women in politics leads to more inclusive decisions and can change people's image of what a leader looks like. Based on this view for instance, in 2019 the biennial

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46. S. Mahendra & D. Kabita Dahal, *Gender and Politics: A Feminist Critique of the State*, 22 JOURNAL OF POLITICAL SCIENCE (2022).

47. S. DUBE, ENHANCING WOMEN'S POLITICAL PARTICIPATION IN AFRICA, International Institute for Democracy and Electoral Assistance (2022).

48. *Id*.

Inter-Parliamentary Union (IPU)[49] Map of Women in Politics estimated that the number of women ministers worldwide reached a high peak of 20.7% (812 out of 3922).[50] The report identifies and highlights the benefits countries are deriving from politically empowering women.

In addition, in sub-Saharan Africa, the number of women seated in parliament grew with a regional average of 23.7%.[51] Djibouti, which had zero women in parliament in the year 2000, realized the most increase globally with 15 women in 2018. Its share of women in parliament rose from 10.8% to 26.2%. Ethiopia, on the other hand, realized an increase of 47.6% in 2019 women in parliament and 10% increase in women ministers. Among the top African countries with a high percentage of women in ministerial positions were Rwanda (51.9%), South Africa (48.6%), Ethiopia (47.6%), Seychelles (45.5%), Uganda (36.7%) and Mali (34.4%).[52]

The same report states that the lowest percentage in Africa was in Morocco (5.6%), which had only one female minister in a cabinet of 18. Other countries with fewer than 10% women ministers included Nigeria (8%), Mauritius (8.7%) and Sudan (9.5%). Notably, Rwanda, the leading country with the highest number of women parliamentarians, saw a slight reduction in the number, from 64% in 2017 to 61.3% in 2018. Other African countries with high percentages of women Members of Parliament include Namibia (46.2%), South Africa (42.7%) and Senegal (41.8%).[53]

Uganda and Rwanda have constitutional provisions reserving 30% of seats for women in the legislature while South Africa's Municipal Structures Act of 1998 requires political parties to ensure that 50% of the candidates on the party list are women and that women must be equitably represented in a ward committee as well. Although there is no penalty for non-compliance with this requirement in South Africa, the country's ruling African National Congress voluntarily allocates 50% of parliamentary seats to women.[54]

Furthermore, the number of female speakers in both the upper and lower houses of parliament on the African continent is commendably high, with 16 women out of 75

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49. IPU is made up of more than 170 national parliaments from around the world, tracks the number of women elected to parliaments globally every year and produces an analysis that helps to monitor progress, setbacks and trends.

50. UN WOMEN, WOMEN IN POLITICS, THE INTER-PARLIAMENTARY UNION FOR DEMOCRACY (2019).

51. *Id.*

52. *Id.*

53 *Id.*, at 4.

54 Z. MUSAU, AFRICAN WOMEN IN POLITICS: MILES TO GO BEFORE PARITY IS ACHIEVED (2019) Unpublished.

legislative bodies seating at the helm of these institutions. These countries included the Democratic Republic of the Congo, The Gambia, Madagascar, Malawi, Mozambique, Rwanda, South Africa, Togo, Uganda, Equatorial Guinea, Eswatini (former Swaziland), Ethiopia, Gabon, Lesotho, Liberia and Zimbabwe.[55] The region is now second only to Europe with seventeen female heads of parliament currently in office out of 70 legislative bodies. This stands in stark contrast with just eight female heads of parliament in Asia, and only one in the Middle East and North Africa.[56]

Critiques have questioned whether granting more political influence to women is beneficial to African societies**.** Several sources have pointed to the fact that when female policy makers have influence, they can positively impact the lives and well-being of women, girls, and society in general. They argue that policymakers are key actors who can implement and enforce laws against any form of gender discrimination. Female policymakers are in better positions to understand the hurdles associated with gender discrimination in social institutions and may be well placed to address their underlying causes and drivers.[57] Such justification of the African feminist strategies are provided with examples from across the subfields of African feminism. For instance, researchers in Botswana refer to nego-feminism as a source of inspiration for describing women's agency in their more practical work to support female political candidates in their preparations for campaigning not only for elections but also for broader perspectives on political empowerment and negotiation of opportunities outside the formal political sphere.[58]

In Africa still, there have been attempts to test how an increase in female political leadership and influence would affect the different forms of gender discrimination in social institutions. This approach relies on two different indexes. One is the Women's Leadership Index, which measures the level of government and executive influence of female politicians in African countries. It basically explains how the index considers legislative and executive influence.[59] Legislative influence captures the percentage of women represented in national assemblies and the percentage of legislative committees chaired by women. Executive influence measures the percentage of heads of the executive cabinet or ministry held by women and the percentage of the

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55. UN WOMEN, *supra* note 50.

56. N. BATHILY, AFRICA TAKES HISTORIC LEAD IN FEMALE PARLIAMENTARY SPEAKERS (2020).

57. M. KONTE & V.O. KWADWO, POLITICAL EMPOWERMENT OF WOMEN IN AFRICA: INFLUENCE OR NUMBER? (2019) Unpublished.

58. Mosime & Dikobe, *supra* note 37.

59. International Republican Institute (IRI), Women's Political Empowerment, Representation and Influence in Africa: A Pilot Study of Women's Leadership in Political Decision-Making (2016).

national budget allocated to ministries led by women.[60] The second is the Social Institutions and Gender Index (SIGI), which is an initiative of the OECD Gender, Institutions and Development Database, and measures the extent to which women are discriminated against in terms of social institutions and norms. This index measures four parameters: gender discrimination in the family code, restricted physical integrity, civil rights, and access to financial resources.[61]

However, the contradiction with such measures, as highlighted by some researchers, is that countries with a higher level of female political influence record lower levels of gender discrimination in social institutions. For example, South Africa records the highest female political influence and also the lowest gender discrimination in social institutions.[62] There is also the issue of data scarcity and promptness. For instance, only few countries like South Africa, Rwanda, Cape Verde and Uganda were able to report, while countries like Sudan, Democratic Republic of the Congo and Zambia were trailing at the bottom.[63] This could be due to the fact that perhaps the researchers do not have the ability to look a little bit deeper at the interactions between the data that was collected.

Other critiques have insisted that increasing women in parliament to move into substantive female leadership to advocate for gender-equal policies and even increase cooperation across party and ethnic lines needs to go beyond mere numbers. These claim that laws alone may not change cultural norms and discriminatory gender beliefs.[64] Structural barriers continue to prevent women from entering, as well as advancing within politics to more prestigious roles. It has also been argued that while several countries in Africa are making room for more women parliamentarians, several others such as the Central African Republic, Eswatini and Benin still lag behind. Even on the inside, women tend to be delegated to committees that are perceived as "soft," such as social affairs, family and education, in comparison to "hard" committees seen as more powerful and impactful, such as finance and defense.[65] However, important to note here is that the same apathy is expressed about those women who have occupied those hard positions, like in Uganda. The President of Uganda appointed women to key positions in his 2021 Cabinet—such as that of the Vice President and Prime Minister—raising public mixed reactions and subsequently naming of the new

60. *Id*., at 3.
61. Konte & Kwadwo, *supra* note 57.
62. *Id.*
63. Bathily, *supra* note 56.
64. *Id.*
65. *Id*., at 13.

cabinet—"the fishermen Cabinet", referring to how Jesus worked with fishermen and not elites.[66]

Overall, there is tremendous increase in women's participation and their representation in politics across the countries. The average increase in a period of up to 5 years is 10%. There are also gains in the attempts to test how an increase in female political leadership and influence would affect the different forms of gender discrimination in social institutions. This approach relies on two different indexes. In connection with the next sub-section, the discussion on African women's enduring struggle for parity in politics needs to tackle the major obstacles they encounter while they are in office. The issue of feminist co-optation has often been contrasted with the lack of capacity and experience by many women politicians to influence any political agendas, even those that are related to gender equality.

Co-optation of African feminist activism and women's political representation

This section defines and interprets the effects of feminist co-optation on women's political representation. The major question here is how formal and informal structures around political decision making curtail or enable women's ability to influence decisions, including those that are gender based. Whereas many governments have accepted that full and equitable participation of women in public life is essential to building and sustaining strong and vibrant democracies, they have not reduced the amount of pressure on them for co-optation.[67] It is also becoming increasingly clear that women's mere presence in political institutions does not necessarily translate into power and influence in political governance. As the cases of Rwanda, South Africa, Mozambique, Uganda, Tanzania, and Burundi demonstrate, the emerging challenge in respect to women's participation in formal (State) political governance is being in power but without having and/or exercising power.[68] The failure of various national machineries to build gender inclusive politics is an indication that there persists unresolved structural impediments in the political governance systems that are impervious, unresponsive and tend to block gender equality and democratic justice initiatives.[69]

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66. T. Kalyegira, *Will Museveni Cabinet of fishermen deliver?* DAILY MONITOR, June 13, 2021.

67. A.M. Tripp, *The Politics of Autonomy and Cooptation in Africa: The Case of the Ugandan Women's Movement*, 39(1) JOURNAL OF MODERN AFRICAN STUDIES (2001), at 101–28.

68. M. Nzomo, *Women and Political Governance in Africa: A Feminist Perspective,* JOURNAL OF AFRICAN WOMEN'S STUDIES CENTRE (2015).

69. *Id.*, at 2.

A. What is feminist co-optation?

Co-optation is defined as a process whereby "opponents adopt aspects of the content of a movement's discourse, while subverting its intent", and which "may have diluting, demobilizing, depoliticizing, and disempowering effects on the movement."[70] Co-optation is also an elite strategy of using apparently cooperative practices to absorb those who seek change to make them work with elites without giving them any new advantages. When cooptation is successful, those who seek change alter their positions when working with elites, hoping to gain new strategic advantages through compromising, but those advantages do not come and instead the elites' position prevails.[71]

The co-optation of feminism is discussed as the appropriation, dilution and reinterpretation of feminist discourses, and practices by non-feminist actors for their purposes.[72] A central locus for feminist co-optation is the movements for representation in legislatures and assemblies. In many ways, these have always been movements for presence that challenge political arrangements and seek to insert women's interests into policymaking by ensuring they are amongst the policymakers.[73] Feminists co-optation breeds a range of constraints which undermine feminist movements' ability to pursue their agenda effectively through means such as marginalization, role assignment and stigmatization.[74]

State feminism, in essence, is the application of feminist co-optation, which seeks to convert the feminist agenda into small changes within a flawed system rather than holding out for revolutionary dreams.[75] In this sense, state feminism relates mostly to changes in power relations by means of the promotion of feminist goals through

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70. W. Harcourt, *Feminist co-optation and body politics in development*, in QUI SAIT? EXPERTES EN GENRE ET CONNAISSANCES FÉMINISTES SUR LE DÉVELOPPEMENT (C. Verschuur 2017), at 231-252.

71. M. Holdo, *Cooptation and non-cooptation: Elite strategies in response to social protest*, 18 SOCIAL MOVEMENT STUDIES (2019), at 444-465.

72. S. de Jong & S. Kimm, *The co-optation of feminisms: A research agenda*, 19(2) INTERNATIONAL FEMINIST JOURNAL OF POLITICS (2017), at 185-200.

73. Madsen, *supra* note 37.

74. M. Sapkota & K. Dahal, *Gender and Politics: A Feminist Critique of the State*, 22 JOURNAL OF POLITICAL SCIENCE (2022).

75. P. Stoltz, *Co-optation and Feminisms in the Nordic Region: 'Gender-friendly' Welfare States, 'Nordic exceptionalism' and Intersectionality*, In FEMINISMS IN THE NORDIC REGION, NEOLIBERALISM, NATIONALISM AND DECOLONIAL CRITIQUE (2020), at 23-43.

public policies and measures taken by the state.[76] The debate on State feminism has travelled outside the Western world and has been applied to (post) socialist political systems and authoritarian States in developing countries.

The question of why some authoritarian regimes have the ability to sustain themselves while others fall has emerged as an important topic. Such researchers have demonstrated that various institutions (democratic facades) such as legislatures, parties, and elections are foundations of authoritarian resilience. Authoritarian regimes often rely on a mix of strategies, including not only repression but also legitimation and co optation. The co optation mechanisms, such as patron client networks and arrangements for selective political inclusion, can be used to make non democratic rule more resilient. State feminism, hence is the state-centric notion of feminism that is facilitated, created, or approved by the government of a state or nation.[77]

B. Feminist co-optation versus influence in political decision making

Africa's post-colonial States exhibit profound contradictions in the arena of gender politic no matter the nature of government, whether hailed for transitioning to the ballot box, or condemned for failing to hold elections. Where reforms have been achieved, implementation remains minimal, as undemocratic State structures and uncivil societies alike lack the political will to change.[78] Abundant sources have diverted the problem to the nature of governance on the continent. The writings are mostly about women's involvement in politics and the arrest of their feminist agenda by State regimes.

It has been argued that non democratic regimes often enact women friendly policies for the purpose of maintaining power. The researchers have demonstrated that various institutions (democratic facades) such as legislatures, parties, and elections are foundations of authoritarian resilience. Authoritarian regimes often rely on a mix of strategies, including not only repression but also legitimation and co optation.[79] The co optation mechanisms, such as patron—client networks and arrangements for selective political inclusion can be used to make non democratic rule more resilient.[80]

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76. J. Lorch & B. Bunk, Gender Politics, Authoritarian Regime Resilience, and the Role of Civil Society in Algeria and Mozambique, German Institute of Global and Area Studies, Working Paper No. 292 (2016).

77. *Id.*, at 8.

78. Mama, *supra* note 44.

79. Lorch & Bunk, *supra* note 76.

80. Sapkota & Dahal, *supra* note 74.

The example that is typically given is that of President Yoweri Museveni, who has led Uganda since 1986, but in 2021 he appointed a woman, as Vice-President and another woman, as Prime Minister. He has also increased the percentage of women in cabinet from 27% to 43%. This is the second time Museveni has appointed a woman as Vice-President. These appointments have provoked considerable debate in Uganda, reflecting both the constraints and the possibilities of women's rights reform in an authoritarian country.[81]

Similarly, a review of the research on State feminism shows that in authoritarian settings women's organisations can constitute authoritarian institutions and function as co optation mechanisms.[82] In post independence Southern Africa, women's activism has also often been channeled through women's mass organisations, which have supported national ruling parties through the mobilization of popular support.[83] In Algeria, for instance, the regime has long instrumentalized gender politics and the partial realization of women's rights in order to enhance its legitimacy.[84] As part of this strategy, the regime has implemented measures to increase the representation of women in politics. The regime also portrays the subject of women's rights as an embodiment of State led modernization and democratization instead of treating them as independent in their own right.

Overall, it is important to note that the political context plays an important role where women have a different relationship to State patronage than men. Their exclusion from many political arenas and networks where patronage networks form the political culture has the effect of reproducing patriarchy. These networks have been referred to as "homosocial capital" because of the way they are created to let men relate to each other in tight networks based on patronage that exclude women.[85] This leads to the consolidation of male dominance beyond the legislature. These male networks do not keep women out only because they are women, but because they want to protect the men. Women, on the other hand, continue to view themselves as unable to succeed without male support, hence confirming that they lack the competence and authority to do politics.[86]

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81. A.M. Tripp, *Women appointed to top positions in Uganda, but feelings are mixed*, THE CONVERSATION, 15 June 2021.

82. Lorch & Bunk, *supra* note 76.

83. *Id*., at 5.

84. *Id.*, at 6.

85. Madsen, *supra* note 37.

86. *Id*., at 9.

Conclusion and way forward for feminist activism

From the various analyses, it is noted that in spite of the progress achieved so far in the advancement of women`s political rights, both regional and international context indicate that these historical gains are being undermined. The fragility of democratic institutions, a conservative backlash and an economic crisis exacerbate the precarious situation of women in Africa and worldwide and weaken the opportunities of feminist movements for self-expression in their struggle for human rights.

This section of the article has shown the gendered nature of politics and how the feminist agenda gets hijacked by both structured and non-structured patriarchal political systems. As such, feminist activism is now more vulnerable than ever before. What is the way forward for the revitalization of a feminist African activism that is strong enough to withstand the rigors of patronage politics, massive corruption and co-optation?

Different feminisms have emerged in specific places and are built in local terms. There are characteristics common to these currents, such as the analysis of oppression mechanisms, the need to adopt their own agenda, and the demand for equality from the community. The cooperation that exists is not enough to allow a sustainable exchange of experiences in a systematic way. Other breakers include the non-existent consensual definition of feminism and a single approach, and pathways of the different feminists are too differentiated. Hence the diversity of women's identity is shaped by diverse principles, cultures, traditions and religions, translating into the multiplicity of demands.

But this is not to say that the African feminist actions and ideas cannot blossom. An interesting topic of discussion would be to clarify the relationship between academia and activism, and their different roles in the need to create an education that empowers women. The urgent need to re-focus and re-discuss the concepts to contemplate African feminism is imperative.

Also, the coexistence of different currents of feminism is not an obstacle if it takes into account the guarantee of the defense of women's freedom of choice and the negation of institutions that limit human rights. It is useful to acknowledge that feminist activism is always political and implies a clear position against social injustices, and that solidarity must be nurtured as a value and a principle to guide actions.[87]

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87. Friedrich Ebert Stiftung, Feminism in Africa: Trends and Prospects, Report of the International Workshop on Political Feminism in Africa, February 2017.

Co-optation can occur in three overlapping areas, namely: the co-optation of feminist discourses, concepts and frames by development policy frames; the co-optation of feminists into development institutions and organizational structures; and she looks at her own concerns about co-optation as a feminist working in development.[88] These ideas contribute to how to work with and against co-optation as part of feminist discursive and material practices. The conclusion is that feminist praxis is embedded within geographies of power relations, in neoliberal practices that feminists cannot step outside of, but can reflect and refocus when they see disconnects.

Other suggestions seem to advocate for snail-sense feminism strategies, which include but are not limited to effective dialogue and negotiation and the acquisition of good education. This can be done using the proverbial snail to adopt to the habit of 'negotiating' or 'dialogueing' with its environment to be able to get round obstacles on its way with a 'well-lubricated tongue', whether the obstacles be rocks, thorns or boulders.

Many other writers follow this zeal to try and make a case for African feminism through, for example, awareness raising, political archive and legacy building and as nego-feminism. They refer to nego-feminism as a source of inspiration for describing women's agency in their more practical work to support female political candidates in their preparations for campaigning not only for elections but also for broader perspectives on political empowerment and negotiation of opportunities outside the formal political sphere. Other examples include the intensified use of new information technologies to deal with hostility towards the demands of feminism and the growing hate speech in the media and social networks, exacerbated by the anonymity these provide. Some of the new technologies to be used include Twitter, WhatsApp and blogs. Social networks and media are opportunities to be explored in various dimensions. They may be used to react to and argue against misogynist and conservative views, causing alternative voices to be heard in a medium so far seldom used by feminists. Integration of young feminists has emphasized the struggle for rights pertaining to sexuality, bringing in a perspective that considers their specific needs and demands.

On the other hand, this new generation is more familiar with the new information technologies to initiate other forms of communication and struggle, bringing new vigor to social networks and feminist movements. Finally, the engagement and collaboration with men's organizations that fight for alternatives in the construction of identities and for equality signifies an advance in the defense of rights

88. Harcourt, *supra* note 70.

and opportunities for the establishment of broader alliances. The pressing need to form alliances at various moments of struggle with specific groups, such as unions, is to be reaffirmed, opening space to intervene in other areas.

LIABILITY OF PUBLIC OFFICERS FOR HUMAN RIGHTS VIOLATIONS: A COMMENT ON UGANDA'S HUMAN RIGHTS (ENFORCEMENT) ACT 2019

Robert Doya Nanima*

ABSTRACT

The enactment of the Human Rights (Enforcement) Act 2019 provides for the enforcement of the rights of an individual. It is argued that section 10 of the Act needs some reflection as it provides for a legislative framework for an effective remedy for human rights violations. To substantiate this position, the contribution evaluates the provision and reflects on its application. The general evaluation questions the lack of a definition of a public officer in section 10, his or her participation, and how this informs their relationship with the State. A conclusion and recommendations follow.

I. INTRODUCTION

Various international human rights instruments recognise the right to an effective remedy for a human rights violation. The Universal Declaration of Human Rights[1] provides for a right to an effective remedy for acts that violate the fundamental rights guaranteed by law.[2] The right to a remedy is secondary, deriving from a primary substantive right that has been breached.[3] The International Covenant on Civil and Political Rights explicitly requires that person whose rights or freedoms are violated has an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.[4]

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1. Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 A, dated 10 December 1948.

2. *Id.,* Article 8.

3. A.A. Agbor, *Pursuing the right to an effective remedy for human rights violation(s) in Cameroon: The need for legislative reform,* 20(1) POTCHEFSTROOM ELECTRONIC LAW JOURNAL/POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD (2017), at 10.

4. International Covenant on Civil and Political Rights 999 UNTS 171, acceded to by Uganda on 21 June 1995. *See*, Article 2(3)(a). *See*, *Blazek v. Czech Republic*, CCPR Communication No. 847/1999.

The Constitution of the Republic of Uganda, 1995 (Constitution) provides for a Bill of Rights that affirms the fundamental rights of an individual.[5] At its core is Article 50(4), which mandates Parliament to enact laws for the enforcement of rights and freedoms that have been violated. It is instructive to note that the Human Rights (Enforcement) Act 2019 (HREA) was received with mixed reactions, including the caution by the head of Uganda's Police Force to the police of possible individual criminal responsibility and payment of compensation by police officers who violate this law.[6] A circular by the head of Uganda's Police reiterates that given the new law, officers who may have been violating the rights of individuals through torture, detention beyond 48 hours, or denial of the right to a fair hearing (such as a denial of access to counsel, corruption and delayed prosecution), may face prosecution and be liable to pay compensation.[7]

This caution shows an interpretation of human rights obligations during investigations and trials of criminal cases, which is but a part of possible human rights violations.[8] While this circular calls on the police to be vigilant and uphold human rights in the course of their duties, a reflection on a wide array of issues arises. Various issues are evident in the work of the Justice, Law and Order Sector (JLOS) stakeholders. While these issues are not in the circular, they include the existence of internal complaint structures of public offices, such as the complaints procedures in the police,[9] the judiciary,[10] or the prosecution.[11] This also extends to any actions of a public officer (or public official) that may be interpreted as a violation of the rights of an individual entitled to a service. While this article does not make the circular the centre of the evaluation of the law, the latter provides a good basis for an examination of the section.

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5. The Constitution of the Republic of Uganda, 1995, Chapter Four.

6. Uganda Police Circular ADM/32/131/01, dated 3 July 2019.

7. *Id.*, paras. 4(1)-(3).

8. Other violations may include acts of public officers, like doctors in the (non)provision of healthcare or state legal officers in the discharge of their public duties- where civil other criminal liability may ensue.

9. The Professional Standards Unit investigates complaints against a police officer in cases of violation of human rights and unprofessional conduct under section 70 of the Police Act 303. See <https://www.upf.go.ug/complaints/> (accessed 17 July 2022).

10. The Judicial Service Commission established under the Constitution. See, UGANDA CONST., 1995, Article 146.

11. The Office of the DPP has an internal disciplinary committee. It should be noted that the Constitution provides for the Director of Public Prosecutions (DPP) who performs his or her duties personally and through designated officers. A practice has, however, developed to distinguish the DPP from the Office of the DPP.

International law provides guidance on the effectiveness of a remedy. It has to be prompt, accessible, and available before an independent body, and offer reparation for the cessation of the wrongdoing.[12] It should be readily pursued and effective in redressing a violation once it is granted by a competent tribunal.[13] This requirement for the availability, efficiency and effectiveness of a remedy has been reiterated in Africa's human rights system.[14] Although the implementation of international law is not the scope of this study, Uganda's constitution provides for international law as a source of law as long as it is not incompatible with any national laws.[15] To this end, in instances where the national law is silent on remedies, international law fills these gaps in ensuring that remedies are effective. Furthermore, the Bill of Rights in Uganda's Constitution, 1995 requires the courts to provide a remedy when there is a human right violation.[16]

Subsection 2 provides for a two-step process following a finding that a public officer has violated or participated in the violation of the rights of a victim. First, the foregoing public officer has to pay a portion of the reparations. Secondly, the court has to determine the portion payable by the public officer. Also, this section adds value to the realisation of a remedy for the compensation of human rights violations under Article 50 of the Constitution. This provision guarantees the constitutional enforcement of human rights in Uganda by individuals or organisations.[17] The application of section 10(2) of the HREA offers a framework for an individual who alleges a violation under section 10(1). It is on this basis that the application of section 10 is analysed.

As such, a reflection on the application of section 10 deserves attention now when Uganda is reiterating the right to an effective remedy to human rights violations through an established procedure. The reflections deal with the lack of a definition of

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12. Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 15; I/ACtHR, Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, 6 October 1987, Series A No. 9, para. 24. See Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013). Available at <http://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf> (accessed 30 July 2022).

13. *Sir Dawda K. Jawara v The Gambia,* Communication 147/1995 and 149/1996.

14. See also, *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia* Communication 71/1992, paras. 11-16. 138 AfrComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle M(5)(e).

15. The Constitution *supra* note 5, Objective XXVIII(b) of National Objectives and Directive Principles of State Policy. Articles 52(1)(h) and 287.

16. *Id*., Article 50.

17. *Id*., Article 50(1) and (2). The right to appeal from any such decision is provided for in Article 50(3).

a public officer in the HREA and his or her participation in a human rights violation. Besides, the discussion extends to the modes of liability and how this informs the relationship between the public officer and the State. These issues are important as they question the ability of the HREA to protect a victim against human rights violations by a public officer. In addition, these issues question the place of the use of a human rights approach over criminal and civil law as the benchmark for getting remedies to a victim.

II. BACKGROUND

The purpose of the enactment of the HREA[18] was to create a procedure to give effect to the enforcement of one's rights under Article 50(4) of the Constitution.[19] It was expected that the defects in the enforcement of the rights of an individual, such as the procedural requirement for the protection of such rights of an individual, would be addressed. This can be traced from the drafting history of the Constitution which indicates that Article 50 was adopted in the spirit of the need to enforce human rights by an individual or through public interest litigation.[20] It was argued in the Constituent Assembly that this Article would lead to the protection, promotion and enjoyment of human rights[21] by Uganda as a State Party to various international instruments that underscored human rights obligations.[22]

Emerging jurisprudence requires that the State adopt appropriate measures to prevent, punish, investigate or redress the harm.[23] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) reiterates a similar position. It requires States to ensure that their legal systems accord a victim redress and an enforceable right to reparations like compensation.[24] The UNCAT categorically requires States to provide remedies for victims of torture, cruel, inhuman and degrading treatment in the form of reparations that include restitution, compensation, rehabilitation, satisfaction and guarantees of non-

18. The Human Rights (Enforcement) Act, 2019 (HREA).

19. Human Right Bill, 2018, paragraph 1.

20. Submission of the Hon. Cecilia Ogwal in the Report of the Proceedings of Constituent Assembly, 1994 (CA Proceedings Report) 1809.

21. *Id*., CA Proceedings Report, 1809.

22. *Id*.

23. General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8.

24. United Nations Convention Against Torture 1465 UNTS 85, Article 14(1).

repetition.[25] Regional instruments have followed suit, with the African Commission on Human and Peoples' Rights requiring that a procedural remedy provided by the State is prompt, accessible and capable of offering a reasonable prospect of success.[26] The European human rights system requires that the effectiveness of a remedy is measured against its ability to directly remedy the impugned situation.[27] The United Nations Basic Principles and Guidelines do offer insights on reparations. They state that the obligation to respect, ensure respect for and implement international human rights raises a duty to provide remedies.[28] The States have to ensure access to justice; adequate, effective and prompt reparations for violations suffered and access to relevant information on violations and reparation mechanisms.[29] States have to ensure that victims of gross human rights and humanitarian law violations have equal access to an effective remedy in the courts of law.[30] The obligation extends to the provision of remedies in other areas of the law like administrative law.[31] The Parliament and the Courts have been keen to develop rules and test them in cases on the enforcement of remedies as discussed in the subsequent paragraph.

The Judicature (Fundamental Rights and Freedoms (Enforcement Procedure) Rules were adopted in 2008 to provide for the enforcement of human rights.[32] These Rules were based on the Judicature Act instead of Article 50(4) of the Constitution.[33] The Constitutional Court declared this law to be unconstitutional in *Bukenya Church*

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25. *Id*., Article 14(1). See also, General Comment No. 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22, 9 February 2018, para. 21.

26. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria,* Communication 155/96, October 2001. See also, the African Charter on Human and Peoples' Rights, Article 7, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), signed by Uganda on 18 August 1986 and ratified on 10 May 1986. See also, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted by General Assembly resolution 60/147, 16 December 2005, Part IX.

27. *Pine Valley Developments Ltd and Others v. Ireland* European Court Application No. 12742/1987.

28. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted by General Assembly resolution 60/147, 16 December 2005, Part IX.

29. *Id*., Part IX.

30. *Id*., guideline 12.

31. *Id*., guideline 12.

32. Statutory Instrument 55 of 2008.

33. Judicature (Fundamental Rights and Freedoms (Enforcement Procedure) Rules Judicature Act, Chapter 13 Laws of Uganda.

Ambrose v. the Attorney General.[34] The only ground on which this declaration was based, was on the fact that the Rules Committee of the Parliament in enacting the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure Rules) contravened Article 50(4) of the Constitution. This was because the Rules Committee is not mandated under the Constitution to take on the powers of the Parliament to make laws for the enforcement of rights and freedoms.[35]

It follows that the enactment of the HREA presents promising sections that speak to the enforcement of the rights of individuals.[36] Although the provisions of this Act are yet to be tested in courts, the enforcement of the violation of human rights has to a great extent been dealt with, as indicated below.

First, where there is a violation of any right, it can be enforced from the court of first instance and through appellate processes.[37] The new law provides for various remedies that are granted after a case, such as appropriate orders, compensation and reparations.[38] Furthermore, the general procedure for invoking the enforcement of the rights may be by way of filing a suit,[39] or an application under the Civil Procedure Act.[40] The courts are also empowered to stay proceedings until the questions of human rights are addressed.[41] The High Court acts as a court of reference to which the lower courts may forward cases to determine possible human rights violations.[42]

As will be shown below, various forms of liability arise that require introspection on the question of participation in the human rights violations in civil liability on one hand, and criminal law on the other. In addition, this also calls for a discussion on the individual liability of a public officer and vicarious liability by the State. The contribution now turns to the statement of the problem.

The approach in this article is based on the need to evaluate an otherwise robust framework for the enforcement of human rights, due to the provision in section 10(1). The civil liability emanating from the violation of the rights of an individual by a public

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34. Constitutional Petition 20 of 2010. The grounds for the decision of unconstitutionality are beyond the scope of this article.

35. *Bukenya Church Ambrose v. Attorney General* (Constitutional Petition 26 of 2010) [2011] UGCC 5 (20 March 2011). See also, *Jane Francis Ananio v. Attorney General*, Miscellaneous Civil Application No. 317 of 2002 (arising from Civil Suit No. 843/2001).

36. HREA, *supra* note 19, at preamble.

37. *Id*.

38. *Id*., sec. 9(1) & (2).

39. *Id*., sec. 6(1).

40. *Id*., sec. 17.

41. *Id*., secs. 7 and 8.

42. *Id*., sec. 7(1).

officer can be seen in the wording of the section. This reflection bridges a gap that would arise from the non-cautious application of section 10 and the practical challenges in attaching liability to the public officer. This will be evident in the contextualisation of a public officer, matters of participation and standard of proof as well as issues of individual and vicarious liability.

III. AN EVALUATION OF SECTION 10(1)

A. The definition of a public officer

The HREA does not define a public officer, a position that calls for a need to look at other laws that regulate public service. The Public Service Act is silent on the definition of a public officer. It refers the reader to Articles 175(a), 175(b) and 257 (1) (w), (x) and (y) of the Constitution.[43] A similar silence is maintained in the Education Service Act which adopts the definition in Article 175 of the Constitution.[44] This silence is further exacerbated in the Judicial Service Act Cap 18 which adopts the meaning of 'public service commission' as laid down in Article 165 of the Constitution. It is clear from the foregoing that the legislators intended to have one meaning that all forms of public service would look to. It is argued that this application creates consistency in the meaning of public service and a public officer across all the public service commissions. While this approach is a welcome development, there is a law that defines a public officer. There is a need to evaluate the definition therein before looking at the constitutional provisions. The Prevention and Prohibition of Torture Act defines a public official as "…a person, whether a public officer or not, employed by the government or local government at any Government agency or any other person paid out of public funds."[45] This definition is still restricted to the nature of the office from the perspective that the government is the employer. This creates a limited understanding of a public official. This creates a fragmented understanding of the concept.

A look at the Constitution's definition of public service is instructive in this regard. It defines public service as "any service in any civil capacity of the government where the emoluments for which are payable directly from the consolidated fund or directly out of monies provided by parliament."[46] This definition offers a wider

43. Public Service Act, Act 9 of 2008, Section 2.
44. Education Service Act, 2002, Section 2.
45. Prevention and Prohibition of Torture Act 3 of 2012, Section 1.
46. UGANDA CONST., 1995, Article 175.

appreciation of public service by looking beyond the nature of the office to the source of the funds that are used to pay a person to engage in public service. To this end, the Constitution defines a public officer as any person holding, or acting in, an office in the public service.[47] It is generally recognized that persons like teachers, doctors, state prosecutors, and judicial officers form part of the inclusive list that is the fabric of this definition.[48] Therefore, the source of payment for a public service connotes a broader pool that inculcates the nature of the office of public service and the source of emoluments to a public officer. This counters the fragmented approach under the Prevention and Prohibition of Torture Act and creates coherence in the meaning of a public official. Before turning to the proposed understanding of a public officer under the HREA, it is prudent to search for a meaning under international law.

The author is not aware of any specific instrument that defines a public officer. However, a look at the contextual application in some instruments is instructive. For instance, under the Convention Against Torture, a public officer/official is not defined.[49] However, the definition of the act of torture involves the participation of a public official or the depiction of a person working in an official capacity.[50] A look at the travaux preparatoires gives further insights into the context of a public official or person acting in an official capacity.[51] There was no concrete discussion on the definition of a public official. Manfred's commentary, however, offers insights into the context of a public official. The context of a public official is important as far as a State party retains the responsibility for the acts of its public officials. Some of the notable examples of public officials include the police, and others within whose premises acts of torture may occur.[52] As such, the public officer referred to under section 10(1) of the HREA includes persons who fall in this pool due to their employees and others due to the source of the payment as the consolidated fund or as directed by parliament.

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47. *Id.,* Article 175.

48. It is on this basis that the chapter on Public Service in the Constitution includes other service commissions, such as the District Service Commissions, Education Service Commission, Health Service Commission, and Judicial Service Commissions.

49. United Nations Convention Against Torture 1465 UNTS 85, Article 1.

50. *Id*., Article 1.

51. N. MANFRED, B. MORITZ & M. GUILIANO, THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL, A COMMENTARY, 2 (2018) 24-30.

52. *Id*., para. 124.

B. Participation and the standard of proof

One may argue that the application of Section 10(1) presents both a challenge and an opportunity for the victim of human rights violations. The subsection aids the contextualisation of the liability of individuals as a mode of ensuring accountability and justice to victims of human rights violations. This is through the participation of the public officer in the violation. Individual actions or participation ought not to be conflated and/or limited to the criminal principles of the participation in a crime for various parties as principal offenders, accomplices, aiders and abettors.[53] Section 10(1) engages the proof of a public officer acting individually or participating in the violation of a human right in a broader sense other than the restrictive approach in a criminal liability setting.

To attach liability to the public officer for his actions or his association with others, one has to establish 1) how to prove the human rights violations and 2) the standard of proof. This is in line with the evidentiary requirement that he who alleges the existence of facts bears the burden to prove them.[54] Concerning the proof of violation of human rights, the State has to protect and promote human rights in Uganda. To this end, the National Objectives and Directive Principles of State Policy require the State to guarantee and respect institutions which are charged with the responsibility to protect and promote human rights.[55] This is fortified by the Constitution which reiterates that fundamental rights and freedoms of the individual are inherent and not granted by the State and they have to be respected, upheld and promoted by all agencies of government and by all persons.[56]

Where the requisite public officer falls short of the standard of respecting, upholding and promoting the rights of an individual before him or her, he may have violated the right in issue. The question that arises is whether any allegation of liability in a claim ought to be taken as the gospel truth by a judicial officer. This matter was settled in *Lucas Marisa v. Uganda Breweries Ltd*,[57] where the Court reiterated its duty of evaluating the inherent and intrinsic probability and improbability of a human rights violation under the circumstances of the case before it. It follows that the Court has to look into the totality of the circumstances of each case before stating that there has been

53. The Penal Code Act, Cap 120 Laws of Uganda, sections 19-21.
54. The Evidence Act, Cap 100 Laws of Uganda, secs. 100, 101 (1) & (2) and 103.
55. National Objectives and Directive Principles of State Policy, para. V (i) and (ii).
56. Constitution, *supra* note 1, article 20(1) and (2).
57. [1988-1990] HCB 132.

a human rights violation.[58] It is instructive, however, to note that some public officers have to be in a position to make decisions that effectively violates the rights of the victim, they cannot claim that they were following superior orders.[59] As such while the victim may claim the existence of liability of a public officer for human rights violations, the court retains the duty to confirm it.

Participation in human rights violations can be proved on a balance of probabilities and this is sufficient to be invoked as a condition for an application for compensation on account of a human rights violation.[60] The Ugandan courts have adopted the principles of proof of evidence under common law.[61] To this end, the burden of proof rests on the party who asserts the existence of an issue.[62] This burden extends to the proof of all forms of evidence.[63] The court then evaluates the probability that in light of the evidence presented, the liability of the perpetrator is established.[64]

C. Individual and vicarious liability

Under the Penal Code Act, participation in crime may be directly by a perpetrator or jointly by persons in execution of a common purpose.[65] Section 10(1) of the HREA suggests that proof of participation in human rights violations is sufficient. One need not prove participation beyond reasonable doubt.

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58. *Rights Trumpet & 2 Others v. AIGP Asan Kasingye & 5 Others, Mucunguzi Abel & 9 Others v. Attorney General & 2 Others* [2020] UGHC 42 (15 May 2020). See also, *Dr. Kizza Besigye & Others v. The Attorney General*, Constitutional Petition No. 7/2009. See also, *Republic v. Amos Karuga Kavatu,* Kenya High Court Criminal Case No. 12/2006.

59. *Rights Trumpet & 2 Others v. AIGP Asan Kasingye,* 37. Article 221 of the Uganda Constitution requires the defence forces, the police force, the prisons service, all intelligence services and the National Security Council 'to observe and respect human rights and freedoms in the performance of their functions.'

60. This is because the burden of proof in civil cases is on a balance of probabilities and not beyond reasonable doubt. *See, Mudiobole Abedi Nasser v. Mugema Peter & Anor* [2011] UGHC 121.

61. *Joseph Constantine Steamship Line v. Imperial Smelting Corporation Ltd* [1942] AC 154 at 174. *Joseph Agenda v. Uganda* HCT-00-CR-CM 003 of 2011.

62. *Rights Trumpet & 2 Others v. AIGP Asan Kasingye,* 37. Article 221 of the Uganda Constitution requires the defence forces, the police force, the prisons service, all intelligence services and the National Security Council 'to observe and respect human rights and freedoms in the performance of their functions.'

63. *Uganda Ecumenical Church Loan Fund LTD v. Nakyejwe* [2016] UGCOMMC 14.

64. *Miller v. Minister of Pensions* [1947] 2 All ER 372; *Uganda v. Ssonko* [2019] UGHCCRD 42.

65. *Id*., Penal Code Act, *supra* note 53, Section 19.

A public officer who, individually or in association with others, violates or participates in the violation of a person's rights or freedoms shall be held personally liable for the violation notwithstanding the state being vicariously liable for his or her actions adds value to personal liability as far as it extends liability from the conservative vicarious liability by the government to personal liability by public officers.[66] This section also concretises the position of other laws that provide for personal liability. Section 10(1) presents two forms of liability- individual and vicarious liability on the part of the State. The section clarifies that vicarious liability does not oust a finding of individual liability. It is argued that individual liability arises where the public officer participates in the violation of the rights of a victim.[67] This liability is premises on the convergence of the public officer's act or omission evident in steps that materialise into the violation.[68] To this end, the principles of participation (discussed above) apply concerning the use of civil or criminal procedure.

Vicarious liability on the part of the government arises where human rights violations by a public officer occur in the performance of his or her duties. This principle has been reiterated in various cases by courts thus:

> Once the acts were done by the servant in the course of his employment, it is immaterial whether he did it contrary to his master's orders or deliberately, wantonly negligently or even criminally or did it for his (servant's) own benefit, the master is vicariously liable so long as what the servant did was merely a manner of carrying out what he was employed to carry out.[69]

The purpose of vicarious liability is to ensure that victims of human rights violations receive redress from the State.[70] Various principles underscore the use of vicarious liability in Uganda. While the employer-employee relationship is critical, there are limits to how far it may be inferred. The Supreme Court has stated that reliance on

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66. *Id*. *Muwonge v. Attorney* General, Civil Appeal No. 10 of 1966.

67. This calls for the prosecution to prove the participation of the public officer. A direct reading of Section 10 requires proof of participation as be sufficient to apply for compensation.

68. *Uganda v. Muwanga* [2018] UGHCCRD 13. See also, *Uganda v Odhiambo & Anor* [2017] UGHCCRD 25 (4 August 2017).

69. *Lutaya v. Attorney General* [2004] UGSC 13, *Muwonge v. Attorney General* (1967) EA 7, *Kafumbe-Mukasa v. Attorney General* (1984) HCB 33, *Barugahare v. Attorney General* Civil Appeal No.28/1995, and *Mutyaba Leonard Sembatya v. Attorney General* Supreme Court Civil Appeal 21/1994.

70. *Id*., *Muwonge v. Attorney General* [1967] EA 17 .

permission rather than an agency is not sufficient to sustain vicarious liability.[71] There is a need to tow the wedge that evaluates the extent to which an act by a servant (public official) makes a master (government) liable; as far as it is an act that the servant is employed to do or is incidental thereto.[72] One might argue that this presupposes a certain status of the public officer. Principles of vicarious liability in Uganda require that there is a servant and master relationship and that the act or omission occurs during the existence of an employer and employee relationship.[73] This is informed by the fact that a person, himself blameless, is held liable for another person's conduct, justified by the inference that one who acts through another acts himself.[74] The status that has to be visited on the public official is summarised in three requirements. There must be a relationship between employer and employee; the tort must be committed by the employee, and it should be in the course of business.[75] The exception to the application of vicarious liability is where the act which may be done in the course of a servant's employment is done contrary to the orders of the master.[76] The deliberate, wanton, negligent or criminal act or omission by the servant is immaterial provided (s)he was employed to carry it out.[77]

In some cases, the courts have hinted at the need for the existence of a superior-subordinate relationship, where the subordinates are subject to the effective control of the superior.[78] This calls for a subjective evaluation of the circumstances of a given case in an objective manner that engages the principles of vicarious liabilities.[79]

These foregoing two forms of liability greatly inform the relationship between the individual and the State. It appears that while the subjective nature of the relationship between the public official and the State may often lead to vicarious liability, this does not stop the court from making a finding of personal liability. The point of departure is the deliberate requirement for a public officer to pay a portion of the reparations, subject to the potion determined by the court. The mode of determining the amount of compensation is not given. This leaves the discretion to the court. In instances where the victim only sues the State, the latter maintains the discretion to

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71. *Lukungu v. Lobia* [2002] UGSC 12.
72. *Paul Byekwaso v. Attorney General* [2004] UGCA 9.
73. *Id.*, *Muwonge v. Attorney General* [1967] EA 17.
74. *Okupa v. Attorney General & 13 Ors* [2018] UGHCCD 10.
75. *Id*., *Okupa v. Attorney General & 13 Ors* [2018] UGHCCD 10.
76. *Id*., *Muwonge v. Attorney General* [1967]1 EA 17.
77. *Id*., *Muwonge v. Attorney General* [1967]1 EA 17.
78. *Omonyi v. Attorney General & Anor* [2017] UGHCCD 173.
79. Evident in the decisions above- *Muwonge v. Attorney General*; *Lukungu v. Lobia; Paul Byekwaso v. Attorney General and Omonyi v. Attorney General & Anor.*

apply for leave of court to add the officer as a second respondent, or it may use its internal disciplinary procedures to bring the public officer to book.[80] By implication, section 10 offers a victim a wide array of options in seeking relief for human rights violations, ranging from suing the public official, along with the State, or using a criminal procedure where (s)he so desires.

IV. CONCLUSION

The potentially dangerous predicament of the lack of a definition of a public officer in section 10(1) of the HREA is solved by a reading of other instructive jurisprudence like the CAT, its commentary to add meaning to the term. The lack of a definition also adds voice to the identification and attaching of liability to the public officer based on the determination of the source of payment of the services of the public officer. The most critical aspects that the introduction of section 10 enunciates are two specific elements; first, the remedies granted under section 10 should be available, efficient, and effective based on principles of international law. Secondly, all public officers are alerted of possible litigation by victims who can prove the violation of their rights under section 10. This extends beyond criminal prosecution to civil liability. The victim maintains the obligation to make an informed decision, as to whether to invoke relief through criminal prosecution under the penal laws or to use the civil process under the HREA. To this end, the participation of the public officer remains paramount subject to the requisite burden and standard of proof.

80. The police may use its Professional Standards Unit, or the Office of the Directorate of Public Prosecutions may use its disciplinary Committee to hand down administrative sanctions.

COMMITTAL PROCEEDINGS AND THE RIGHT TO A FAIR HEARING IN UGANDA

Nampwera Chrispus**

ABSTRACT

The right to a fair hearing is a person's right to have criminal charges or civil proceedings decided by a competent, independent, and impartial court or tribunal, following a fair hearing and public hearing. The right is recognized and protected by all major international and regional human rights instruments, and domestically. In criminal trials in Uganda, the right can be traced in Articles 2, 28 and 44(a) of the 1995 Constitution. Article 28(1) and (2) provide that in the determination of civil rights and obligations or criminal charges, a person shall be entitled to a fair and speedy trial, while 28(3)(a) enshrines the presumption of innocence. In addition, there is the Magistrates Courts Act and the Trial on Indictments Act which provides that an accused person, charged with an offence triable by only the High Court, can only be brought before the High Court through committal proceedings in a Magistrates Court. This has culminated in accused persons being on remand pending committal to the High Court for long periods which is oppressive, and is against the spirit of Article 28(1), and more often than not, causes grave psychological effects. With criminal matters also often handled only at criminal sessions which take forever to be organized, the overall effect has been the overstay on remand of accused persons, rendering the right to fair hearing an illusion and the process translating into abuse of court process and oppression of accused persons. This article will therefore discuss the extent to which committal proceedings have derogated the otherwise guaranteed right to a fair hearing, existing Constitutional and other legal safeguards notwithstanding.

I. INTRODUCTION

The right to fair hearing is one of the universally recognized rights. The essence of this right is that any violated right can be restored through a particular procedure. In the absence of an effective method for the protection of rights and interests, the rights and

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freedoms recognized and enshrined in law are only declarative provisions.[1]

The right to a fair hearing connotes a hearing by an impartial and disinterested tribunal; a proceeding that hears before it condemns, which proceeds upon inquiry, and renders judgment only upon consideration of evidence and facts as a whole.[2] Under Article 28 of the Constitution of Uganda, 1995, the framers of the Constitution condensed the meaning of the right to a fair hearing. The Supreme Court of Uganda has however noted that it is not safe to purport to give an all-inclusive definition of the phrase 'right to a fair hearing' because human rights jurists all over the world have written on the subject giving a wide-ranging and deep analysis of the phrase so much so that it is impossible to give a short definition of it.[3]

Article 28(1) of the Constitution is to the effect that in the determination of civil rights and obligations, or any criminal charge, a person shall be entitled to a fair, speedy, and public hearing before an independent and impartial court or tribunal established by law. Clause 3(a-g), on the other hand, among others, guarantees every person who is charged with a criminal offence the presumption of innocence until proved guilty or until that person has pleaded guilty, to be given adequate time and facilities for the preparation of his or her defense, among others.

The Supreme Court of Uganda has observed that the entire Article 28 is a package.[4] That each one of its contents constitutes what the right to a fair hearing means (at least in Uganda). However, this is not in any way intended to be an exhaustive definition of the right to a fair hearing.[5]

In the Ugandan context, the right to a fair hearing is absolute and non-derogable,[6] and includes the accused person being informed of the charges against them,[7] the presumption of innocence,[8] equality before the law,[9] an impartial trial,[10] pre-trial disclosure of the evidence to be brought against the accused, an opportunity to present the accused's case in defence,[11] among others.

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1. B. Perezhniak *et al*, *The right to a fair trial: Conceptual rethinking in an era of quarantine restrictions*, 10(38) AMAZONIA INVESTIGA (2021), 168-177. Accessed at <https://amazoniainvestiga.info/index.php/amazonia/article/view/1554/1569>.

2. *Bakaluba Peter Mukasa* v. *Nambooze Betty Bakireke*, Election Petition Appeal No. 04/2009.

3. *Uganda Law Society & Anor* v. *The Attorney General*, Constitutional Petition No. 2 of 2002.

4. *Id.*

5. *Id.*

6. UGANDA CONST., 1995, Article 44(c).

7. *Id.,* Article 28(3)(b).

8. *Id.,* Article 28(3)(a).

9. *Id.,* Article 20(2), 21(1).

10. *Id.,* Article 28(1).

11. *Id.,* Article 28(3)(c) and (d).

Following Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[12] in the determination of their civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The right to a fair hearing is a right that is as old as mankind as it dates back to the biblical account of Adam and Eve in the garden of Eden where God gave them an opportunity of being heard before passing his judgment upon them.[13]

A fair hearing means that it must be impartial, act under the law, and act based on equality, humanism, and other principles recognized by international law.[14] The right to a fair hearing is a fundamental protection of human rights and the rule of law that aims to ensure the administration of justice. A fair trial comprises fair and proper opportunities to show innocence as provided by law. Before the courts and tribunals, everyone is treated equally. Everyone has the right to a fair and public hearing before a competent, independent, and impartial tribunal established by law in the resolution of any criminal charge against them or of their rights and obligations in a legal proceeding. Thus, the right to a fair trial means the right to go to court and the right to have one's case heard and decided by the court. The accused should be able to exercise these rights without any obstacles or complications.

The right stems from the right to a reasonable, fair, and just trial, which also arises from the fundamental right to life and personal liberty.[15] However, in determining whether the proceedings as a whole were fair, it is possible to take into account the importance of the public interest in the investigation and punishment of a particular crime.[16]

The African Commission on Human and Peoples' Rights in its eleventh ordinary session held in Tunis, Tunisia, from 2nd - 9th March 1992, passed a resolution on the Right to Recourse and Fair Trial (ACHPR/Resolution 4(XI) 92). Conscious of the fact that the African Charter on Human and Peoples' Rights is designed to promote and protect human rights as per the provisions contained in the Charter and international

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12. Opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.

13. The Holy Bible, The Book of Genesis, Chapter 3:1-24. See also, *R.* v. *Chancellor, University of Cambridge* (Dr. Bentley's Case) [1723] 1 Str. 557; *Garba* v. *University of Maiduguri* [1986] 1 NWLR (Pt. 18) 550; *Adigun* v. *Attorney- General, Oyo State* [1987] 1 NWLR (Pt. 53) 678. Enobong Mbang Akpambang, *Fair Hearing: Sine Qua Non Under Nigerian Criminal Justice Jurisprudence*, 52 JOURNAL OF LAW, POLICY AND GLOBALIZATION (2016).

14. Perezhniak, *supra* note 1.

15. https://blog.ipleaders.in/right-to-a-fair-and-speedy-trial-a-human-right/

16. Perezhniak, *supra* note 1.

human rights standards, the Commission has noted that the right to a fair trial is essential for the protection of fundamental human rights and freedoms.

Under Article 7 of the African Charter on Human and Peoples' Rights, the right to fair trial includes among other things, the fact that all persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations; that persons who are arrested shall be informed at the time of arrest and in a language which they understand the reason for their arrest; and they shall be informed promptly of any charges against them. The right also includes requiring that persons arrested or detained be brought promptly before a judge or other officer authorized by law to exercise judicial power and their entitlement to trial within a reasonable time or be released; persons charged with a criminal offence to be presumed innocent until proven guilty by a competent court; have adequate time and facilities for the preparation of their defense and to communicate in confidence with Counsel of their choice; and, be tried within a reasonable time.[17]

The Kenyan High Court has noted that a fair hearing is an elementary principle in the administration of justice requiring that a judicial investigation, the adducing of and listening to evidence and arguments, is conducted impartially following the fundamental principles of justice and due process of law.[18] That a party must have had reasonable notice as to the time, place and issues or charges, for which they have had a reasonable opportunity to prepare, at which they are permitted to have the assistance of a lawyer. That they also have a right to present their witnesses and evidence in their favor, a right to cross-examine their adversary's witnesses, a right to be apprised of the evidence against them in the matter, a right to argue that a decision is made following the law and evidence.[19]

As such, the content of the right to a fair hearing consists of the following: the right to a trial; fair trial; publicity of the case and announcement of the decision; and reasonable time for consideration of the whole case. It also constitutes consideration of the case by a court established by law; independence and impartiality of the judiciary, and at both the national and international levels, the necessity to ensure such rights, the elements of the right to a fair trial.

The Victorian Law Reform Commission has defined the term committal to refer to the transfer of indictable (serious) criminal charges such as rape or murder from a

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17. ACHPR /Res.4(XI)92 of the African Commission on Human and Peoples' Rights meeting in its Eleventh Ordinary Session, Tunis Tunisia, from 2 to 9 March 1992.

18. *Omar Guyo Omar* v. *Republic* [2021] Eklr High Court Criminal Appeal No. 39 of 2018. Accessed at <http://kenyalaw.org/caselaw/cases/view/226245/>.

19. *Id.*

lower court to a higher court for trial or sentencing.[20] Charges for indictable offences are filed in a lower court and go through a series of preliminary procedures before they are committed to a higher court. For instance, the prosecution must provide the accused and the court with the evidence it will be relying on in the case (disclosure), and the parties must meet to discuss if the case can be resolved, and those preliminary steps are known as committal proceedings.

In Uganda, when a person is charged with an offence triable by only the High Court, the Director of Public Prosecutions (DPP) is by law required to file in a Magistrate's Court an indictment and a summary of the case signed by him or her, or by an officer authorized by him or her in that behalf acting under his or her general or special instructions. The summary of the case referred to above shall contain such particulars as are necessary to give the accused person reasonable information as to the nature of the offence with which he or she is charged.[21] When the accused appears before the Magistrate and the DPP has complied with the above requirement, the Magistrate shall then give the accused person a copy of the indictment together with the summary of the case; read out the indictment and the summary of the case and explain to the accused person the nature of the accusation against them in a language they understand informing that they are not required to plead to the indictment; commit the accused person for trial by the High Court and transmit the file to the registrar of the High Court.[22]

Section 1 of the Trial on Indictments Act, Cap. 23 is to the effect that the High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorized by law, except that no criminal case shall be brought under the cognizance of the High Court for trial unless the accused person has been committed for trial to the High Court per the Magistrates Courts Act, Cap. 116.

The purpose of committal proceedings is to enable the accused person to adequately prepare and present their defense case, for issues in contention to be adequately defined, and for the accused to receive disclosure of the prosecution case and to test whether there is sufficient evidence to support a conviction.[23] It is at that stage that the accused is notified of the charge(s) against them.

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20. Victorian Law Reform Commission, Law Reform Case Study: Committals (September 2021).

21. Sec. 168, Magistrates Courts Act, Cap. 16.

22. Sec. 168(3), *id*.

23. Victorian Criminal Proceedings Manual: Chapter 4 – Committal Hearings. Accessed at <https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27435.htm>.

Committal proceedings in Uganda are therefore conducted only when the charge(s) that has or have been brought against the accused person is or are not triable by the subordinate court but rather the High Court. The subordinate court, therefore, the Magistrates Court in this case, exercises the statutory duty of only informing the accused person of the charges brought against them, the court that has jurisdiction to try the matter, the status of the case, and thereafter, if investigations are complete, commit them to the High Court for trial.[24]

II. CURRENT LEGAL REGIME

Internationally, the key legal texts on fair trial are to be found in the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Universal Declaration of Human Rights, the Code of Conduct for Law Enforcement Officials, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the Guidelines on the Role of Prosecutors and the Basic Principles on the Role of Lawyers, the Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court. Some of these standards are discussed hereunder.

A. International Instruments

1. Universal Declaration of Human Rights, 1948—Article 10 of the Declaration provides that everyone is entitled in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him. Article 11, on the other hand, is to the effect that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense.

2. International Covenant on Civil and Political Rights—While the right to a fair trial is not listed as a non-derogable right in the Covenant, and specifically, under Article 4, some procedures that speak to the right to a fair trial in this provision may not

24. Sec. 168, Magistrates Courts Act, Cap 16.

be derogated from. General Comment on the right to a fair trial reiterates the need to uphold the right to a fair trial even in periods of emergencies.[25] It provides that States derogating from normal procedures required under Article 4 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of a fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.[26] In line with Article 4 on derogations, the General Comment reiterates the fact that the right to a fair trial is non- derogable.

Additionally, Article 14(1) provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Clause 2 guarantees every person charged with a criminal offence the right to be presumed innocent until proved guilty according to the law, while clause 3 provides that in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality. The clause also enshrines the right to be tried without undue delay.[27]

General Comment No. 32 on Article 14 on the right to equality before courts and tribunals and a fair trial provides that the right to equality before the courts and tribunals and a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.[28] It re-echoes the accused's right to be presumed innocent until proven or until he/she pleads guilty, to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, be accorded adequate time and facilities for the preparation of their defence, and the right to be tried without undue delay.[29]

Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

3. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11—Article 6(1) is to the effect that in the determination of his civil rights and obligations or of any criminal charge against him, every person

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25. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

26. *Id.,* para. 33.

27. https://www.ohchr.org/sites/default/files/Documents/Publications/training9chapter6en.pdf.

28. General Comment No. 32 on Article 14, *supra* note 25.

29. *Id*.

is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Clause 2 provides that every person charged with a criminal offence shall be presumed innocent until proved guilty according to the law while clause 3 provides that every person charged with a criminal offence has among others the minimum right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and to have adequate time and facilities for the preparation of his defence.

B. Regional Instruments and Bodies

1. African Charter on Human and Peoples' Rights—Article 7 of the Charter is to the effect that every individual shall have the right to have his or her cause heard. This comprises the right to an appeal to competent national organs against acts of violating one's fundamental rights as recognized and guaranteed by conventions, laws, regulations, and customs in force; the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to be tried within a reasonable time by an impartial court or tribunal, among others.

2. African Commission on Human and Peoples' Rights—The Commission has noted that every person whose rights or freedoms are violated is entitled to have an effective remedy. In its Resolution on the Right to Recourse and Fair Trial, conscious of the fact that the African Charter is designed to promote and protect human rights following the provisions contained in the Charter and recognized international human rights and bearing in mind the provisions of Article 7 of the Charter, the Commission has recognized that the right to a fair trial is essential for the protection of fundamental human rights and freedoms.[30]

In the Resolution, the Commission also noted that the right to a fair trial includes, among other things, that all persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations; that persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them; that persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released; that persons charged with a criminal offence shall be presumed innocent until proven guilty

30. See *supra* note 17.

by a competent court; and that in the determination of charges against individuals, the individual shall be entitled in particular to have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice and to be tried within a reasonable time.

C. Uganda

1. The 1995 Constitution—The State constitutionally reserves the duty to bring the suspect to justice without delay and to produce the suspect before a competent court within 48 hours. Article 28(3)(a) provides for the presumption of innocence until the accused is proven guilty or until they plead guilty before a competent court. Article 28(1) provides that every accused person shall have a right to a fair and speedy trial and this is also echoed in Article 126(2)(b) which provides that justice shall not be delayed, though it is silent on what amounts to a speedy trial.[31]

It is important to note that defining and clarifying what amounts to a speedy trial would go a long way in furthering the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and ensuring the effective utilization of resources.[32] In order to utilize limited resources effectively, jurisdictions ought to design case flow systems that enable an early assessment of the complexity and prospects for non-trial resolution of cases, and seek to facilitate an early resolution of cases. Such case flow systems should ensure that many cases are resolved rapidly and trial continuances are minimized.[33]

Speedy fair trials are the only way to prevent miscarriages of justice and are an essential part of a just society.[34] But it's not only about protecting suspects and defendants. The constitutional provisions that guarantee speedy trial are also an important safeguard to prevent undue and oppressive incarceration prior to trial; to

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31. Mbabazi Peace, Whatever happened to the right to a speedy and fair trial? How refugees as well as other suspects get stuck on remand in Uganda's prisons. Refugee Law Project (30 October 2019). Accessed at <https://www.refugeelawproject.org/index.php?option=com_content&view=article&id=166:whatever-happened-to-the-right-to-a-speedy-and-fair-trial&catid=26&Itemid=101>.

32. ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution of Criminal Cases, 3d ed., © 2006, American Bar Association. Accessed at <https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_speedytrial_blk/>.

33. *Id.*

34. Astha Sharma, Speedy Trial: Facilitation of Legal System. Available at https://www.latestlaws.com/articles/speedy-trial-facilitation-of-legal-system-by-astha-sharma (Accessed on 1st December 2022).

minimize concern accompanying public accusation; to limit the possibilities that long delays will impair the ability of an accused to defend themselves; makes societies safer and stronger; and, without fair trials, it is believed that the rule of law collapses.[35]

Specifically setting out what constitutes a speedy trial and the timeliness to adhere to will no doubt curb delays in police investigations, in processing and serving such things as warrants and summons, in pre-trial disclosure, summoning and examination of witnesses, submission of expert witnesses and their reports, and in hearings, among others.[36]

The right to speedy trial is a fundamental right of all people but, neither the relevant provisions highlighted above or below, nor the Courts in the country have fixed any timelines for expeditious disposal of criminal cases, which gives an opportunity to the parties or their counsel and State machinery for delaying the criminal proceedings. This has preserved the inefficient operation of Uganda's criminal justice system leading to high costs of pre-trial detention to the community and its other deleterious effects.

2. Magistrates Courts Act, Cap. 16—Section 168 is to the effect that when a person is charged in a Magistrate's Court with an offence to be tried by the High Court, the Director of Public Prosecutions shall file in a Magistrate's Court an indictment and a summary of the case signed by him or her or by an officer authorized by him or her in that behalf acting in accordance with his or her general or special instructions. Subsection 2 provides that the summary of the case referred to in subsection 1 shall contain such particulars as are necessary to give the accused person reasonable information as to the nature of the offence with which he or she is charged.

Subsection 3 provides that after compliance with subsection 1, the Magistrate shall give the accused person a copy of the indictment together with the summary of the case; read out the indictment and the summary of the case and explain to the accused person the nature of the accusation against him or her in a language he or she understands and inform him or her that he or she is not required to plead to the indictment, and commit the accused person for trial by the High Court and transmit to the registrar of the High Court copies of the indictment and the summary of the case. Section 118 provides that in cases triable only by the High Court, a Magistrate's Court with jurisdiction to hold preliminary proceedings shall, after complying with such of the provisions of section 168 as the circumstances allow, commit the accused to the High Court for trial under that section.

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35. *Id.*
36. *Id.*

3. Trial on Indictments Act, *Cap. 23*—Section 1 of the Trial on Indictments Act is to the effect that the High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorized by law; except that no criminal case shall be brought under the cognizance of the High Court for trial unless the accused person has been committed for trial to the High Court in accordance with the Magistrates Courts Act.

III. HOW COMMITTAL PROCEEDINGS AFFECT THE RIGHT TO A FAIR HEARING

The State has the primary responsibility of detecting, apprehending, prosecuting, and convicting offenders. In this process, the accused always faces the State in a bid to defend themselves and this sometimes comes with challenges including the fairness of the criminal justice system. Using various tools however, the law tries to maintain the balance between the search for truth and ensuring the fairness of the process. The criminal justice system is expected to maintain the rights of the individual even when this at times seems to go against the search for truth.[37]

The effectiveness and fairness of Uganda's criminal justice system have sometimes come under scrutiny. Justice Egonda Ntende in the case of *Shabahuria Matia* v. *Uganda* while dismissing charges against the accused, noted that a period of three years spent in incarceration without committal to the High Court for trial was exceptionally long to raise an inquiry as to whether the proceedings against the accused were not oppressive or otherwise in breach of his right to a fair and speedy trial.[38]

The Dakar Declaration on the right to a fair trial in Africa has observed that the right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore, the right is non-derogable, especially as the African Charter does not expressly allow for any derogation from the right it enshrines. The realization of this right is dependent on the existence of certain conditions and is impeded by certain practices.[39]

According to Professor Cranston, human rights are inherent entitlements that accrue to every human being merely for being human.[40] Many authors have written about the contents of the right to a fair hearing noting that it encompasses the right to

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37. Simeneh Kiros Assefa, *The Principle of the Presumption of Innocence and Its Challenges in the Ethiopian Criminal Process,* 6(2) MIZAN LAW REVIEW (2012).

38. *Shabahuria Matia* v. *Uganda* MSK-00-CR 5 of 1999.

39. The Dakar Declaration on the right to a fair trial, adopted in November 1999.

40. M. CRANSTON, WHAT ARE HUMAN RIGHTS? (London: Bodley Head, 1973).

be allowed to present one's side of the case, the right to appear before an independent and impartial court, the right to be presumed innocent until proven guilty or the accused pleads guilty, and the right to be tried within a reasonable time. It also includes the right to legal representation, the right not be convicted under retroactive penal law, the right to be present at the trial, the right not to be charged unless the offence defined and the penalty prescribed by the law, the right against double jeopardy, the right to assistance of an interpreter, the right to be given adequate time and facilities to prepare defence, among others as will be discussed hereunder.

In principle, committing a suspect for trial signals and should ordinarily be understood that investigations have been concluded, the Directorate of Public Prosecutions is convinced that the suspect has a *prima facie* case to answer, the State is ready to prosecute the matter and that the trial can and should commence. But committal has become a technical myth that throws prisoners into overly long and traumatizing periods of waiting for trial. These are characterized by anxiety, depression, and uncertainty with no possible legal recourse sometimes other than to pursue a plea bargain or to wait forever for the next convenient court date which never comes easily.

No wonder, some innocent suspects fall prey to plea bargain and plead guilty to crimes they did not commit.[41] Both written and case law are worryingly silent about the maximum periods for which a suspect who has been committed for trial should be expected to wait before the actual commencement of trial. Equally, they do not specify the period within which a trial, once started, should be concluded. These gaps in the law enable judicial bureaucracy to keep suspects' rights hanging.

In practice, when a suspect is committed to the High Court for trial, the process is subject to unnecessarily long delays. This has seen many suspects remain in a state of limbo between committal and actual prosecution for a very long time, even for 3 or sometimes 4 or more years before the trial commences. This prolonged detention pre and during trial is a blatant violation of the right to the presumption of innocence, liberty, speedy, and fair trial, rights which are internationally and nationally recognized and entrenched in the 1995 Constitution of Uganda. Such detention also contributes significantly to overcrowding and congestion in detention places and puts enormous pressure on inmates who are faced with a loss of income for those who are employed, as well as breaking of family and community ties. In worst-case scenarios, some who overstay on remand face torturous conditions, including sexual abuse while in detention.[42]

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41. Mbabazi, *supra* note 29.
42. *Id.*

In cases triable by only the High Court, there is a constitutional limit on the period a suspect spends on remand, between remand and committal to the High Court. There is however no similar explicit limit in the Constitution on how long a detainee may wait for disposition of his case once they have been committed. This is the problem since the time spent on committal significantly affects the total pre-disposition delay.

In 2011, Avocats Sans Frontiers made a report on 240 detainees under the jurisdiction of the High Court all of whom were facing capital charges.[43] For those individuals, the average number of days spent on committal was 488.4, measured from the date of committal to the date of data collection. Remarkably, 97 of the 199 detainees on committal whose trials had not yet begun (48.7 percent) had been waiting for over one year while two of the detainees had been waiting for over seven years.[44] In this section, therefore, the author discusses comital proceedings' general and overall effect on the right to a fair hearing, and specifically, the different concepts or principles that make up the right to a fair hearing including the presumption of innocence, and the right to a speedy hearing or the right to be tried without undue delay or within a reasonable time.

A. Presumption of Innocence

Under the law of evidence, a presumption of a particular fact can be made without the aid of proof in some situations. According to Black's Law Dictionary, a presumption is defined as a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.[45] Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of proof or persuasion to the opposing party, who can then attempt to overcome the presumption.[46] The presumption of innocence on its part has been defined to mean that an accused person is by law presumed innocent and treated as such until they are pronounced guilty by a competent court of law or unless they plead guilty.[47]

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43. AVOCATS SANS FRONTIERS, PRESUMED INNOCENT, BEHIND BARS: THE PROBLEM OF LENGTHY PRE-TRIAL DETENTION IN UGANDA (May 2011).

44. *Id.*

45. Bryan A. Garner, Black's Law Dictionary, 9th Edition, at 1304.

46. *Nalongo Naziwa Josephine* v. *Uganda*, Criminal Appeal No. 35 of 2014.

47. FOUNDATION FOR HUMAN RIGHTS INITIATIVE (FHRI), A CITIZENS HANDBOOK ON THE LAW GOVERNING BAIL IN UGANDA (2011), at 13, Chapter 1.

Benjam Odoki has written that presumption of innocence means that the burden of proof lies on the prosecution to prove their cases beyond reasonable doubt.[48] There is no such burden on the accused to prove their innocence. He further writes that it would have been too harsh if there was the presumption of guilt for it would have been the duty of the accused to prove their innocence and it is generally accepted that it is more difficult to prove a negative than a positive.[49]

Under Article 28(3)(a) of the Constitution, a person charged with a criminal offence is presumed innocent until proved guilty or until that person pleads guilty. The onus is on the prosecution to prove that the accused person committed the alleged offence, and the standard is proof beyond reasonable doubt. Therefore, if at the end of the hearing of a case against the accused there is any reasonable doubt as to the guilt of the accused, the benefit is given to the accused.

This principle guarantees the right to a fair hearing by ensuring that those who have pleaded or been found guilty by the court are the only ones who are incarcerated as punishment. In the same spirit, it protects the innocent and upholds their rights, but also the vulnerable against the State which has all the possible resources necessary in a trial. In *Woolmington v. DPP*, Lord Sankey described it as the golden thread woven into the fabric of our (their) law.[50]

Suffice to note that the principle is enshrined in almost all the major international and regional human rights instruments, including Article 7(1) of the African Charter on Human and Peoples' Rights, Article 14 of the International Covenant on Civil and Political Rights, Article 19(e) of the Cairo Declaration, Article 66 of the International Criminal Court Statute, the European Union Charter on Human Rights, the Arab Human Rights Charter, the European Convention on Human Rights, among others.

Elies Van Sliedregt writes that there is nothing in those international instruments and more that suggests that the presumption of innocence is a qualified right, a right that can be limited in a democratic society.[51] He re-echoes the Human Rights Committee's holding in General Comment No. 29 to Article 4 of the International Covenant on Civil and Political Rights regarding derogation in general emergencies that fair trial rights are explicitly guaranteed in laws of war and therefore apply in situations of armed conflict, there is no justification of derogation from these

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48. BENJAMIN ODOKI, A GUIDE TO CRIMINAL PROCEDURE IN UGANDA (1990), at 100.

49. *Id.*

50. *Woolmington* v. *DPP* (1935) UKHL 1.

51. Elies Van Sliedregt, *A Contemporary Reflection on the Presumption of Innocence*, 80 (1/2) NUMERO (2009).

rights in emergencies.[52]

The rule guarantees treatment of the accused as an innocent person and as such, no kind of punishment should be handed down until the person is convicted and even coercive measures like detention ought to be applied with maximum constraint and caution. It should however be noted that the issue here is not pre-trial detention, which is in itself illegal or unlawful, but rather undue delay in detention brought about by committal. In light of that, it is important to draw a distinction between factual guilt and legal guilt.[53] The corollary of labelling those who did it as factually guilty is that those who did not do it may be described as being factually innocent. The distinction between 'factual guilt' and 'legal guilt' recognizes that even one who is 'factually guilty' may not necessarily be convicted. There are many ways in which a prosecution may fail.[54]

Article 9 of the French Declaration of the Rights of Man and the Citizen, 1789 states that all persons are held innocent until they have been declared guilty. As such, if an arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law. This recognizes that some harsh treatment may be unavoidable and a suspect may have to be arrested and incarcerated but such treatment should be limited to that which is necessary, and must be reasonable.

From the foregoing therefore, keeping accused persons on remand for long pending committal proceedings or even after their committal for trial to the High Court is an affront to their right to be presumed innocent and generally, a derogation from their constitutionally guaranteed right to a fair hearing.

B. Trial without undue delay or within a reasonable time, or the right to a speedy hearing

In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair speedy and public hearing before an independent and impartial court or tribunal established by law.[55] According to the World Prison Brief, an online

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52. *Id.*

53. 'Factual guilt' (the accused did, as a matter of fact, perform the criminal act with the requisite *mens rea*), and 'legal guilt' (the prosecution was able to establish beyond a reasonable doubt and in conformity with due process that the accused performed the criminal act).

54. Pamela R. Ferguson, *The Presumption of Innocence and Its Role in the Criminal Process*, 27 CRIMINAL LAW FORUM (2016) at 131–158.

55. Article 28(1), UGANDA CONST., 1995.

database providing free access to information on prison systems around the world, as of October 2017, Uganda had Africa's second-most crowded jails and the sixth in the world.[56] And, the 2016 National Court Case Census report indicated that there were 114,809 cases pending in the system from all courts in Uganda under the civil, criminal, land, and family case categories, among others.[57] The report also showed that there are 254 ongoing cases that have been in the court system for more than ten (10) years and 52,221 of those, which was 45.49 percent of the total pending cases in the Judiciary, were of criminal nature. Such figures are a clear manifestation of the violation of the right to a fair hearing despite being a non-derogable constitutional right.

On what is meant by speedy hearing, reference is made to the case of *Shabahuria Matia* v. *Uganda* where the accused was remanded for three years and nine months without committal. The trial Judge interpreted the delay of prosecution as an aspect of abuse of the process of court for which criminal prosecutions may stay. In dropping charges against the accused and setting him free, Justice Egonda-Ntende noted that:

> According to Article 28, it is incumbent on the State to proceed promptly with bringing the accused to trial, by committing his case to the High Court for trial. Notably that a period of three years without committal to the High Court for trial was exceptionally long so as to raise an inquiry as to whether the proceedings against the accused are not oppressive or otherwise in breach of his right to a fair and speedy trial.[58]

In the case of *Musoke* v. *Uganda*, the trial court found that the constitutional right of the appellant to be brought to trial within a reasonable time or released had been infringed and that it is only in complicated cases that one could not be brought to trial within six months.[59]

It is important to note that the major goal of a speedy trial is to instil justice in society. Human rights are necessary because of human life. It is vital in a civilized society organized with the law and a system to provide a reasonably dignified existence for every citizen. As a result, every right is a human right since it allows a person to

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56. Institute for Crime & Justice Policy Research, World Prison Brief. Available at https://www.prisonstudies.org/ (accessed 01 December 2022).

57. THE JUDICIARY, THE REPORT OF THE JUDICIARY NATIONAL COURT CASE CENSUS – 2016.

58. *Supra* note 36.

59. [1972] EA 137.

live as a human being. The very basic aim for which every governmental apparatus establishes the court system is to provide justice to victims of crimes.

In *R* v. *Morin*, the Canadian Supreme Court considered a trial within a reasonable time as provided within its charter of rights. Sopinka J explained that the right to trial within a reasonable time was intended to secure three primary interests of the accused: the right to security of person, the right to liberty, and the right to a fair trial.[60] He stated that the right to security of the person is protected by ensuring observance of the same and that the effect is to minimize the anxiety, concern, and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to restrictions on liberty that result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that the proceedings take place while evidence is available and fresh.[61]

Sopinka J further noted that while the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows: the length of the delay; waiver of periods; the reasons for the delay, including inherent time requirements of the case, actions of the accused, actions of the Crown, limits on institutional resources, and other reasons for the delay; and prejudice to the accused.[62] Court, in *Sanderson* v. *Attorney General*, decided to consider three factors in determining delay beyond a reasonable time. These were: the nature of prejudice suffered by the accused person; the nature of the case the accused was facing; and the systematic delays.[63]

The right to trial within a reasonable time is based on the notion that justice delayed is justice denied, although it is also true that to rush justice is to deny justice. Musa Ssekaana, J writes that the right to a fair hearing seeks to protect three interests which are: to protect the security of the person by seeking to minimize anxiety, concern, and stigma of exposure to criminal proceedings.[64] It is also to minimize exposure to the restrictions on liberty that result from pre-trial incarceration and restructure bail conditions and ensure that proceedings take place while evidence is available and fresh. The other standards on speedy trial and timely resolution of criminal cases have been said to be for three main purposes. These are: 1) to effectuate the right of the accused to a speedy trial; 2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and 3) to ensure

60. [1992] 1 S. C. R. 771.
61. *Id.*
62. *Id.*
63. *Sanderson* v. *Attorney-General*, Eastern Cape (CCT10/97) [1997] ZACC 18.
64 MUSA SSEKAANA, CRIMINAL PROCEDURE AND PRACTICE IN UGANDA (2010), at 44.

the effective utilization of resources.

The Supreme Court of India has held in the case of *Sheela Barsa* v. *Union of India* that if an accused is not tried quickly and their case is pending before the Magistrate or Sessions Court for an unreasonable amount of time, their fundamental right to a speedy trial will be violated unless there is some interim order issued by the superior court or a deliberate delay on the part of the prosecutor. As a result of such a delay, the prosecution could be thrown out.[65]

According to Article 14(3)(c) of the ICCPR and Articles 20(4)(c) and 21(4)(c) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia respectively, every person facing a criminal charge shall have the right to be tried without undue delay. Under Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, and Article 6(1) of the European Convention, everyone has the right to be heard within a reasonable time.[66] The Human Rights Committee in General Comment No. 13 has stated that the right to be tried without undue delay is a guarantee that relates not only to the time by which a trial should commence, but also the time by which it should end and judgment is rendered, all stages must take place without undue delay. It has also emphasized that the rights outlined in the Covenant constitute minimum standards that all States Parties have agreed to observe.[67]

Concerning the consideration of a case within a reasonable time, this guarantee emphasizes the importance of the administration of justice without delay, which may undermine its effectiveness and credibility. The value of the reasonable time criterion is to guarantee a judgment within a reasonable time, thus setting the limit of the state of uncertainty in which a person finds himself through criminal charges or in connection with civil law relations.[68]

According to Article 6(1) of the European Convention on Human Rights, the start of the period to be taken into consideration can be the day a person is either charged, arrested, or committed for trial,[69] for instance, and the end of this period is

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65. *Sheela Barse & Another* v. *Union of India & Others*, 1986 AIR 1773, 1986 SCR (3) 443.

66. UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS & INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS (2003), Chapter 7.

67. Communication No. 390/1990, B. Lubuto v. Zambia (Views adopted on 31 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 14, para. 7.3.

68. Perezhniak, *supra* note 1.

69. Eur. Court HR, Case of *Kemmache* v. *France*, judgment of 27 November 1991, Series A, No. 218, at 27, para. 59 (date of charge); and Eur. Court HR, Case of *Yagci and Sargin* v. *Turkey*, judgment of 8 June 1995, Series A, No. 319-A, p. 20, para. 58 (date of arrest); Eur. Court HR, Case of

normally when the judgment acquitting or convicting the person or persons concerned becomes final.[70]

The Court of Appeal of New Zealand in *Moevao* v. *Department of Labour* has noted that it is not the purpose of the criminal law to punish the guilty at all costs.[71] It goes on to state that it is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by the State and citizens alike. Due administration of justice is a continuous process, not confined to the determination of the particular case.[72]

Justice Egonda Ntende, in the case of *Shabahuria Matia* v. *Uganda,* held that the following factors would provide sufficient guidelines in determining unreasonable delay, and to a certain extent when delay would amount to being oppressive and unjust to be an abuse of court processes.[73] These are: the length of the delay; the reasons for the delay including inherent time requirements of the case; actions of the accused; actions of the State; limits on institutional resources or systematic delays; and other reasons for the delay; and prejudice to the accused. In terms of length of delay, one looks at the period between the laying of the charge and the completion of proceedings against the accused or up to the time an issue is made out of the time that has passed since the laying of the charge against the accused.

The Judge further noted that committal to High Court was a necessary step to the trial of the case and without committal, the case would never be tried. In light of the provisions of Article 28(1) of the Constitution conferring upon the accused a right to a speedy trial, and to avoid unnecessary oppression of the accused by use of court processes, it must be incumbent on the State to proceed promptly with bringing the accused to trial, by committing his case to the High Court for trial. A period of three years without committal to the High Court for trial was therefore exceptionally long to raise an inquiry as to whether the proceedings against the accused are not oppressive or otherwise in breach of his right to a fair and speedy trial.

Suffice to note that a large percentage of prisoners in Uganda are usually always awaiting trial and for so long over-stay the Constitutional limits. For instance, between 2006 and 2008, accused persons made up approximately 60 percent of the

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Mansur v. *Turkey*, judgment of 8 June 1995, Series A, No. 319-B, at 51, para. 60 (committal for trial).

70. Eur. Court HR, Case of *Yagci and Sargin* v. *Turkey*, *id.*, at 20, para. 58.

71. [1980] 1NZLR 464, at 481.

72. *Id.*

73. *Supra* note 36.

prison population, with convicted criminals making up the minority of prisoners while in August 2006, it was reported that there were 18,250 prisoners across the country and that more than half of them (10,590 individuals) were still awaiting trial.[74] A few months earlier, a February 2006 report found that there were 4,700 persons accused of capital offences awaiting trial while on committal.[75] At least 375 of these individuals had been in prison for over four years.[76]

A March 2010 report from the Uganda Prisons Service showed that the population of the Ugandan prison systems had risen to 30,585, out of which 17,015 were accused persons.[77] Most of the prisons included in the study were extremely overcrowded and holding between 200-350 percent over capacity.[78] Although amendments to the Constitution were made in 2005 to decrease the maximum periods of detention before commencement of trial, these changes have not resulted in any significant improvement in prison overcrowding.[79]

Committal proceedings have the effect of delaying cases keeping accused persons on remand for long and thereby denying them the right to be fairly heard, to be tried without delay and within a reasonable time. In Uganda, because the Magistrates Courts Act and the Trial on Indictments Act require accused persons charged with an offence or offenses triable by only the High Court of Uganda to only be brought before the High Court after committal proceedings in the Magistrates Court, some challenges are likely to arise. These include accused persons overstaying on remand, sometimes, even as long as the would-be jail terms.[80] This would be against the spirit of Articles 28(1) and 44(c) of the Constitution plus making the accused feel the anxiety of being guilty without trial that causes grave psychological effects, and the ugly reality of the effects of committal proceedings.

This over-staying on remand by accused persons, the delays for which no one is accountable, have instead led to abuse of suspects' rights, especially their right to a fair hearing, and it continues unabated.

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74. *Supra* Note 41.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Juliet Kigongo, *Kazinda's jail term ends before appeal is heard*, DAILY MONITOR, 17 October 2018. Retrieved from <http://mobile.monitor.co.ug/News/Kazinda-jail-term-ends-before-appealheard/>.

IV. RECOMMENDATIONS

Having seen the link between committal proceedings and the right to a fair hearing, and the effect of the former on the latter, the author makes some recommendations herein below as to whether, and if so, how the effect may be addressed.

A. State brief and legal representation

Justice Egonda Ntende, in *Shabahuria Matia* v. *Uganda***,** noted that in Uganda most of our people are unaware of their rights and access to counsel is the exception rather than the rule.[81] As was the case in that matter, although the accused was entitled to counsel at the expense of the State, the practice was and still is that Counsel is not assigned to an accused person until the case comes to trial, at times, long after committal to the High Court for trial. The accused appeared in that revision unrepresented and from when he was arraigned before the Magistrate's Court on 5th September 1995 on capital charges till then, he had not had the benefit of counsel.

The constitutional right to State-funded legal representation for those accused of offences that carry a sentence of death or life imprisonment is currently limited to the trial process only and this has had the effect of leaving the accused hanging and stranded for as long as there is no trial yet. Therefore, this representation should also be made available at the time of detention, during bail hearings, court date attendances, and other such processes during which their legal interests need to be protected.

B. Legislative reforms

In August 2004, the American Bar Association (ABA) House of Delegates approved "black letter" standards that have been published with commentary in ABA Standards for Criminal Justice.[82] The ABA, in recognition that fairness and accuracy are essential components of the criminal justice process, noted that a defendant's right to a speedy trial should be formally recognized and protected by a rule or by statute that establishes outside limits on the amount of time that may elapse from the date of a specific event until the commencement of the trial or other disposition of the case. The time limits should be expressed in days or months.[83]

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81. *Supra* note 36.
82. *Supra* note 30.
83. *Id.*

There is a need for similar reforms in Uganda as well because an accused overstaying on remand has dire effects on their right to a fair hearing. For example, with time, the ability of the accused to mount a defense is affected, the witnesses may not be traceable, their memories may fade, and if on bail, they must incur travel and accommodation expenses regularly. If they cannot afford these expenses and jump bail, they are certain to be re-arrested. In detention, their right to be presumed innocent becomes a mockery existing only in name as they languish in pre-trial detention. It is also no secret that the conditions in Uganda's penal detention centres for prisoners are extremely severe. The accused must in the meantime bear anxiety, concern, and stigma of exposure to criminal proceedings not headed anywhere.

Second, the reforms ought to limit the amount of time an accused can be kept detained upon committal. The current provisions of the Constitution, except for providing for a maximum period of detention before committal above which an accused should be released on bail, do not limit the period of detention between committal and trial. Therefore, whether it's a new constitutional provision or guidelines/rules by the rules committee, there is a need to set out the maximum period which an accused person shall spend on remand between the committal date and the date of the trial date. The provision on mandatory bail could however also be interpreted, by the court to apply to detention after committal.

Criminal cases must be concluded within a specified time limit and specifically set pre-trial detention, investigation, and trial periods and failure to adhere to the same should result in the unconditional release of the accused.

C. Role of the Judiciary

There is need to increase the number of Judges of the High Court and Magistrate, in addition to increasing the resources to enhance the performance of both the lower and high courts. Increasing the number of Judges means that there will be more High Court circuits and therefore more criminal sessions. This will lead to the early disposition of more cases leading to hearings within a reasonable time.

Similarly, there is a need to explore the possibility of widening the jurisdiction of the lower bench to preside over cases which would not only go a long way in reducing case backlog but also drastically reduce long periods of pre-trial detention of accused persons.

Relatedly, disciplinary measures should be taken against judicial officers who habitually absent themselves from their duty stations, and fail to adhere to set court dates, thereby leading to countless adjournments that keep the accused person on remand for a long period of time. Third, there should be occasional and continuous

refresher and capacity-building courses for judicial officers to keep them abreast with the ever-evolving law but also, encourage judicial activism and dispense justice as envisaged in the law.

Musa Ssekaana, J referring to the case of *Bell* v. *DPP and the Attorney General*[84] notes that the right to a trial within a reasonable time that 'the courts have inherent jurisdiction to prevent a trial due to unreasonable delay.'[85] The activism and a Judge exercising their discretion to do justice can be seen in *Shabahuria Matia* v. *Uganda* where Justice Engonda Ntende held that the unexplained delay of three years and nine months without the accused being committed for trial while bearing the very grave charge of murder on his head was so oppressive as to amount to an abuse of court process warranting the extreme step of ordering a stay of prosecution.

Section 19(1) of the Judicature Statute, for instance, clothes the High Court of Uganda with jurisdiction to supervise the subordinate courts to it. Subsection (2) enshrines the common law doctrine of inherent powers of the High Court to prevent abuse of court process both with regards to its procedures and those of the subordinate courts with particular reference to stemming delayed prosecutions. It is interesting to note that the legislature deliberately restates the existence of this power and commands the High Court to apply it concerning delayed prosecutions. This inherent power of the courts in Section 19(2) of the Judicature should be used in appropriate cases to deal with the delay in the courts which is now known to have reached scandalous proportions.

In the final report of the Commission of Inquiry (Judicial Reform)—also known as the Platt Report—set up under Legal Notice No. 3 of 1994 by the Minister of Justice, it was drawn to the attention of the courts that:

> There has been debate on the Court's inherent powers to deal with delayed cases. The Commission would like to point out that Courts are empowered by the Judicature Act 1967, to follow the doctrines of the Common Law. It is one of these doctrines that a court will not permit abuse of its process. If it should be that a delayed prosecution reaches the point of abuse by jeopardizing the defence (inter alia), or by deliberately prosecuting an accused merely to harm him, then the Court should stay the proceedings.[86]

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84. [1985] 2 All ER 58, 589.

85. Ssekaana, *supra* note 64.

86. Crown Agents (1995), Justice Platt Commission of Inquiry Report on Delays in the Judicial System (1995), at 34.

And, in dealing with the committal of cases to the High Court, the Platt Report stated:

> As we have said, once the remand reaches five months, we recommend that the Chief Magistrate steps in to ascertain why committal to the High Court has been delayed. The State Attorney should be able to explain within a month, the cause of the delay and when he estimates that the accused will be committed for trial. If there is no excuse at all, the matter must be reported to the Chief Justice via the Chief Registrar, who will usually contact the Director of Public Prosecutions. If there is indeed no case, no doubt the case will be withdrawn.[87]

Unfortunately, no action has been taken to put in effect the recommendation, not even the administrative guidelines that were recommended.

Section 19(2) of the Judicature Statute specifically recognizes delay of prosecutions as an aspect of abuse of the process of court for which criminal prosecutions may stay.[88] But there is also further authority in the constitutional right to a fair and speedy hearing in Article 28(1) of the Constitution.

Justices and other Judicial officers could therefore emulate Justice Ntende who observed that the accused person was charged with murder on 5th September 1995, but the State had not yet taken interest in having him committed to the High Court for trial or dispose of the case in any other way. That such was a case of abuse of court process and following the inherent jurisdiction of the court to prevent abuse of court process, and as per Section 19(2) of the Judicature Statute, he ordered a stay of prosecution of the charge against the accused, dismissed the said charge of murder and discharged the accused, setting him at liberty forthwith.

D. Compensation

Existing legislation should be supplemented with practices and norms that enshrine the right to entitlement to any person to compensation by the State for any financial, psychological, or any other form of damage caused by exceeding a reasonable time of proceedings in courts of general jurisdiction. There is also need to establish the procedure for filing a complaint about exceeding a reasonable period of consideration and compensation for the damage caused by it, and also determine the sources of funding for such claimed damages caused by exceeding reasonable time limits for legal

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87. *Id.*
88. Judicature Act, Cap. 13 Laws of Uganda.

proceedings.[89]

E. Legal Awareness

There is an urgent need to increase levels of awareness about legal limits on pre-trial detention amongst the population, but most importantly among those in incarceration. Also, prison and court personnel should have better knowledge of the laws of Uganda to inform a greater will to enforce them.

In a survey conducted by the Human Rights Awareness and Promotion Forum (HRAPF) from 2009-2011 among 832 respondents drawn from all four regions of Uganda, it was established that the right to a fair and speedy trial is among the least known human rights in Uganda.[90] Only 0.3 percent of the respondents knew about this particular right.[91] As such, the general lack of knowledge on the right to a fair and speedy trial among the people of Uganda (including remand prisoners) is among the key factors that have contributed to the problem of lengthy/illegal detention in Uganda. This raises the need for creating awareness amongst the population about their rights.

V. CONCLUSION

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind and the advent of a world in which human beings shall enjoy rights and freedoms, the right to be fairly heard has been proclaimed as one of those that form the bedrock of both civil and criminal trials. It is not surprising that the Constitution of Uganda makes it non-derogable, for the right has existed as far as the first man and woman.

The High Court of Uganda cannot hear any criminal matter before the process of committal has been completed even if it takes such a long time since its scope and limits are not defined, save for the grant of pre-trial bail and mandatory bail. Those provisions however mean that the time spent in custody after the case is committed but in advance of the trial is not subject to any legal limits. Thus, the amount of time a prisoner has been detained on committal but before their trial ought to be addressed as a separate issue. The fact that this period is not constitutionally restrained is

89. T. Podkovenko, *Justice in the system of values of law*, 4 AKTUAL'NÍ PROBLEMI PRAVOZNAVSTVA (2016).

90. Human Rights Awareness and Promotion Forum (HRAPF), The State of Human Rights Awareness and Promotion in Uganda (April 2011), at 10.

91. *Id.*

problematic because the High Court has the power to postpone or adjourn proceedings from time to time at its discretion if it considers it "necessary or reasonable."

With no specific legislation to limit their scope, this makes the right to a fair hearing an illusion, and sometimes a way of abusing the court process and oppressing the accused, an affront to the most cardinal of all rights, the presumption of innocence and the non-derogable right to a fair hearing by all people in Uganda.

The establishment of an independent judicial system, the inclusion of fundamental rights and freedoms, making some of them non-derogable, and the justiciability of the national objectives and directive principles of state policy, demonstrate our Constitution's commitment to making the judicial system an effective organ of State machinery on which people can rely with trust and hope for justice, which is, unfortunately, evidently still a mile away. Perhaps the case of *Ssewajjwa Abdu* v. *Uganda* where the court was proactive and held that the applicant who was held in custody for inordinately long periods after his case had been committed to the High Court for trial was entitled to bail could be the future.[92]

92. [1999] KALR 183.

RELIGIOUS FREEDOM, BELIEVERS AND UGANDA'S FORGOTTEN LESSONS

Diogo Eric*

ABSTRACT

Unlike most discussions about human rights and freedoms, freedom of religion has attracted less significant research in Uganda. This article examines the quality of influence of 'men and women of God' onto the social lives of their believers as they seek to enjoy their religious freedoms. Does a duty exist between the two? Findings largely show a people whose religious obedience is blind and uncritical. This article therefore seeks to highlight the position of the law in relation to religious practices and to critically evaluate the social relationships of the worshippers, their spiritual leaders and the State.

I. INTRODUCTION

In Post-Colonial Uganda, it has been only during the period between 1971-78 that the State meddled in the religious affairs of the nation by officially recognizing only four religions, namely: Islam, Roman Catholicism, Anglicans and the Orthodox. The coming of President Yoweri Museveni into power brought about many changes in Uganda, one of these being the promulgation of the 1995 Constitution. This supreme law guarantees various freedoms and rights under its Chapter Four, among which is the freedom of religion. Important to note here is that under Article 29(2) of the Constitution, the government may intervene where it finds it necessary to secure due recognition and respect for the rights and freedoms of others and in protecting morality, public order and the general welfare in a democratic society.

Part I is an introduction. Part II deals examines what religion is and what it involves. It defines religion, church, cult and sect. The article further discuses selected post-independence religious movements and their impact in Uganda. Because freedom of religion has attracted less judicial commentaries and research in Uganda, part III of the article examines ways in which western courts, particularly in the United States of America, have handled this freedom. The law originating from common law jurisdictions such as the United States of America is persuasive authority and the courts in Uganda may borrow these authoritative decisions by virtue of the fact that both

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States apply the common law.[1] Part IV of the article discusses the legal aspects of freedom of religion in Uganda, and Part V is a reflection on some past occurrences where the freedom has come under the spotlight. Part VI is an inquiry into the real problem that there is. This particular part of the article attempts to explain the common 'believers' problem, why many religious men and women find themselves on the wrong side of the law. The article discusses the dangers of the leverage that every spiritual leader has over their subjects or listeners which has for long been a cause of manipulation. Part VII is a conclusive call to every stakeholder to appreciate the duties that accrue with the existence and enjoyment of this freedom of religion.

II. WHAT IS RELIGION?

Etymologically, the word "Religion" comes from the Latin *religare* and *religere*, which means to bind.[2] The term has thus come to mean a bond, whether physically, socially or spiritually.[3] On the other hand, *relegere* means to execute painstakingly as what obtains in most religious rituals.[4] Prof. Leonard Ngcongo suggests that in the face of the multitude of definitions of religions, various cultures seem to define religion differently.[5] From the African point of view, the definition restricts itself to life bonds in reference to the reality of life as lived in a cobweb of relationships in the known life environments, that is life in the womb, on earth and in the spirit world.[6] Indeed, Ngcongo notes that religion pre-existed way before the existence of any churches, synagogues, mosques, temples and cults or denominations.[7]

The post-independence period in Africa saw the introduction of New Religious Movements across the continent. For example, the late 1950s and 1960s saw the introduction of the Pentecostal-related church movements like the Full Gospel and Elim

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1. A recent example was in the Supreme Court of Uganda in *Betty Kizito* v. *Dickson Nsubuga & Ors*, C.A Nos 25 & 26 of 2021 where the court in accepting another common law jurisdiction's position, the Supreme Court of Canada's definition of contempt of court as was held in *Poje* v. *Attorney General* for British Columbia [1953] 1 S.C.R 516 at 522, found that court's position as persuasive authority and good law.

2. A.B.J. Byaruhanga-Akiiki, *Religious Cults and Sects: Towards a Comprehensive Understanding of the Terms*, in THE KANUNGU CULT-SAGA: SUICIDE, MURDER OR SALVATION? (S. Kabazzi-Kisirinya, Nkurunziza R.K. Deusdedit, G. Banura Gerard, eds., 2000).

3. *Id.*

4. *Id.*

5. Public talk, 5 November 1989.

6. *Id.*

7. *Id.*

Church founded in 1961 and 1962 respectively.[8] In fact, between 1971-1979, the then President of Uganda, Idi Amin issued a ban on various religious groups as he suspected them to be American Central Intelligence Agency operatives due to their overwhelming numbers.[9]

This article will also adopt Rodney Start and William Sims Bainbridge definitions of a church as a conventional religious organization, a sect as a deviant religious organization with traditional beliefs and practices and a cult as a deviant religious organization with novel beliefs and practices.[10]

Article 18 of the Universal Declaration of Human Rights (UDHR)[11] guarantees everyone the right to freedom of thought, conscience and religion. The right includes the right to manifest one's religion or belief in teaching, practice, worship and observance.

FREEDOM OF RELIGION IN OTHER JURISDICTIONS: A CASE STUDY OF THE UNITED STATES OF AMERICA

The west, and in particular the United States of America, considers religious liberties as a weight bearing pillar of human freedom. The First Amendment of the U.S. Constitution, the typical starting point for analysis of the law on religion and the State, provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.[12] Under Supreme Court precedent, the prohibition against governmental establishment of religion prevents the State from promoting or endorsing religion. It also prohibits the government from denigrating or disapproving of religion.[13] Nevertheless, this freedom of worship has been construed not to involve the freedom to act contrary to the legal provisions of the State where certain acts considered religious are forbidden by law.[14] This jurisprudence is therefore particularly of good academic value in this case.

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8. P. Musana, *New Religious Movements in Uganda: Characteristics and Roots,* in Kabazzi-Kisirinya, *supra* note 2.

9. *Id.*

10. R. START & W.S. BAINBRIDGE A THEORY OF RELIGION (1987).

11. Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

12. CENTER FOR RELIGION AND PUBLIC AFFAIRS, RELIGIOUS EXPRESSION IN AMERICAN PUBLIC LIFE: A JOINT STATEMENT OF CURRENT LAW (2010). Available at https://www.brookings.edu/wp-content/uploads/2012/04/0112_religious_expression_statement.pdf (accessed on 4 November 2022).

13. *Id.*

14. *Id.*

In the case of *Reynolds* v. *United States,*[15] while faced with a charge of marrying another woman while still in a subsisting marriage, the plaintiff proved that at the time of his alleged second marriage he was—and for many years before—a member of the Marmon church and a believer in its doctrines. That it was the duty of male members of the said church circumstances permitting to practice polygamy and such members who did not would be punished.[16] And that the penalty for such failure and refusal would be damnation in the life to come. The question before court was whether religious beliefs can be accepted as a justification of an overt act made criminal by the law of the land.[17] Court held that laws are made for the government of actions and while they cannot interfere with mere religious beliefs and opinions, they may with practices.[18]

The court went ahead to analogize that "supposing one believed that human sacrifices were a necessary part of religious worship. Would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" It was therefore concluded that to permit polygamy where the law expressly did not provide for it simply because of a religious belief would be to make the professed doctrines of religion superior to the law and in effect permit every citizen to become a law unto himself.[19] In this instance, the court then ruled that the religious practice in issue conflicted with public interest and law.[20]

In *Prince* v. *Massachusetts,*[21] the court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that the child of the Jehovah's witnesses faith believed that it was her religious duty to perform this work.

Similarly, while dissenting in the case of *United States* v. *Ballard,*[22] Chief Justice Stone opined that "……. I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences…'' In this case, the respondents were indicted for their use of mails to defraud and a conspiracy to commit that offence by false statements of their religious experiences which had not in fact occurred. The representations were falsely and fraudulently made. Chief Justice Stone further held that certainly none of the

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15. 98 US 145 supreme court 1879.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 321 U.S 158.
22. 322 U.S. 78 (1944).

respondents' constitutional rights were violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise.[23]

Suffice to say that falsity and lack of good faith belief in a fraudulent scheme, holy as it may be, should attract prosecution. As elaborated in these cases, the American Jurisdiction draws a line between the religious beliefs and the religious practices. The liberty to believe in any religious grouping is entirely a private matter but when one chooses to manifest one's religion, such a manifestation must pass the test of constitutionality. The enjoyment of this freedom should not be abused lest society may fail to achieve its purpose.

Lord Diplock, in *Attorney General of the Gambia* v. *Modon Jobe*,[24] states that:

> A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. It follows then that any provision of law must be subject to the general aspirations of the people in a particular State.

The enjoyment of rights and freedoms guaranteed by the American Constitution must confirm to the spirit of that very Constitution. Indeed, the court, in *Smith Dakota* v. *North Carolina*, held that:

> As an elementary rule of constitutional construction, no one provision of the constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.[25]

FREEDOM OF RELIGION IN UGANDA

Article 21(1) the Constitution of Uganda provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. Article 21(2) thereof also provides that persons shall not be discriminated against on the ground of sex, race,

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23. *Id.*
24. (1984) A.C 689, at 700.
25. 192 US 268 (1940).

religion, color, ethnic origin, tribe, birth, creed and other factors. The people of Uganda indeed affirm their commitment to protect these rights and freedoms laid in the supreme law of the land by virtue of Article 20(2) which states that "The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons."

The freedom of religion and its protection is enshrined in Article 29(c) of the Constitution which provides that one may enjoy the freedom to practice any religion and manifest such practices in a manner consistent with the Constitution. Its noteworthy that Uganda is a secular State by virtue of Article 7 of the Constitution. The country has no State religion. Such a status quo gives all Ugandans the free will to subscribe to any religious affiliation in consonance with their conscience. Interestingly and albeit ironically, the State through the National Anthem and the National Motto "FOR GOD AND MY COUNTRY". seems to acknowledge the very existence of God and in effect subject the country to the being of God.

It is a proposition too plain to be contested, that the Constitution controls any religious practice repugnant to it, hence this particular freedom is not an absolute one. As a test of constitutionality, any custom or practice which is inconsistent with any provisions of the constitution shall to the extent of its inconsistency be void. This is the position of the law captured in Article 2(2). Consequently, any alleged practice of religion in Uganda today must not violate any law of the land and must be consistent with the Constitution.

The standard against which every limitation on the enjoyment of fundamental rights and freedoms as set out in Article 43(2)(c)[26] is to be set is an objective one. Accordingly, in the enjoyment of those rights and freedoms, one must not prejudice the fundamental or other rights and freedoms of others or public interest. This may best be elaborated by the judgement of Mulenga JSC in *Onyango Obbo & Anor* v. *Attorney General* in which he said:

> The provision in clause 2(c) clearly presupposes the existence of universal democratic values and principles to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those principles and values and therefore to that standard, while there may be variations in application, the democratic values remain the same.[27]

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26. *Id.*
27. [2004] UGSC 81.

In this same ruling, the court made reference to the Zimbabwean case of *Mark Gova & Another* v. *Minister of Home Affairs & Another* in which the Supreme Court formulated the following criteria as justification of law imposing limitations on guaranteed rights.

> a) The legislative objective which the limitation is designed to promote must be sufficiently important to warrant the overriding a fundamental right.
> b) The measures designed to meet the objective must be rationally connected to it and not arbitrary unfair or based on irrational considerations.
> c) The means used to impair the right or freedom must be more than necessary to accomplish the objective.[28]

It is noteworthy that the Zimbabwean authority is indeed persuasive when it comes to judicial practice by virtue of common law application to which Uganda subscribes to. The State has an obligation to compel the faithful, if need be, to desist from furtherance of any actions if the result of such action would be unconstitutional. Often times, individuals go against the law in the guise of 'freedom of religion.' This has in the past, as earlier mentioned, "led to mass murders, fraudulent acquisition of other's property, child sacrifice, noise pollution" among other absurdities.

Suffice to say that every man is presumed to intend the necessary and legitimate consequences of what he knowingly does, when every act necessary to constitute the crime is knowingly done, the crime is therefore knowingly committed. Therefore, anybody who carries out an action that is contrary to the law of the land is bound to answer for his/her actions.

VI. LESSONS FROM THE PAST

Religion has previously been used as a vehicle to rally support by selfish individuals both during pre-colonial and post-colonial periods of Uganda. Among these were the following post- independence movements that had significant impact onto the masses.

The Holy Spirit Movement (HSM) was led by a former prostitute-turned spirit medium.[29] She claimed to use a spirit named "*Lakwena,*" and therefore she got to be

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28. *Mark Gova & Anor* v. *Minister of Home Affairs & Anor* S.C.36/200: Civil Application No.156/99.

29. https://www.theeastafrican.co.ke/tea/magazine/alice-lakwena-and-the-holy-spirit-movement-1308008 (Accessed on 4 November 2022).

known as Alice Lakwena.[30] The HSM rose up in arms against the new Museveni government in 1987.[31] Indeed, Lakwena's charismatic leadership attracted a large brood of followers.[32] She told them that if they smeared 'miracle' shea butter oil on their bodies, the bullets of the government soldiers would not kill them and believed it.[33] In fact, Prof. Isaac Newton Ojok, a former Minister in the Obote 11 government, was one of several highly placed people who participated in Lakwena's spectacular but tragic march to Kampala.[34]

The Lord's Resistance Army/Movement (LRA/M) is an armed opponent of the Museveni government which has been operational since 1987 although nothing seems to be known of them in the recent years.[35] Joseph Kony, who is believed to be the leader of the group, is also "a man many believe to be clinically insane" and is said to see his mission as "purifying" the Acholi people and to encourage a quasi-religious cult involving black magic.[36]

Despite the fact that many of Kony's followers were abductees, a good number of them voluntarily accepted his teachings and actually fought to sustain his struggle.[37] The Movement, which is widely known for the cutting off of many young children's body parts such as ears, was influenced by the earlier Holy Spirit Movement of Alice Lakwena.[38] To-date, a limited number of the leaders of the Movement have been brought to book and held accountable for their actions. This is partly because the LRA has been pushed further into Chad and is no longer hiding in South Sudan or Democratic Republic of Congo from where it was easier to cross into Uganda.[39]

In 2011, lobbying led by U.S. charity group, Invisible Children prompted President Barack Obama to send about 100 soldiers to support the country in dealing with the LRA insurgency.[40] The aim of the mission was to back armies that have "the goal of removing from the battlefield Joseph Kony and other senior leadership of the LRA."[41] Currently, Kony is still on the run and has a small force of around 100

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. M. SCHOMERUS, THE LORD'S RESISTANCE ARMY IN SUDAN: A HISTORY AND OVERVIEW (2007).
36. The Independent online, November 8, 2008.
37. http://www.bbc,com/news/world-africa-17299084 (accessed on 24 March 2020).
38. *Id.*
39. *Id.*
40. https://www.bbc.com/news/world-africa-39999324 (accessed on 4 November 2022).
41. *Id.*

fighters.[42] "The U.S. sees him [Kony] as irrelevant, no longer a threat.[43] When you look at the LRA's effectiveness it's no longer what it used to be," argues US army spokesman Lt Col Armando Hernandez.[44]

On 17th March 2000, a tragic fire broke out at the premises of the Church of the Movement for the Restoration of the 10 commandments of God at Nyabugoto in Kanungu district claiming hundreds of lives. Established in 1989, the Church was said to have been led by a one Joseph Kibwetere.[45] Investigations prompted by this inferno unearthed hundreds of other cases of cult-related deaths exemplified by graves in Bushenyi and Kampala districts bringing the cumulative death toll to about 1000.[46] The Movement for the Restoration of the Ten Commandments of God demanded that its members sell their property, take an oath of silence, and that their children leave school. Paradoxically, the movement itself owned a primary school in its early stage, which was later closed due to failure to meet minimum health and education standards.[47] The Movement emphasized the oath of silence, which arguably was to tame any dissenting voices that could emerge. In fact, Kibwetere claimed to have died and resurrected after three days and it was forbidden to debate this.[48]

These are only a sieve of some of past instances when we have failed to protect ourselves and country from the extremes of freedom of Religion. A lot and seemingly minor occurrences like individuals setting up noise polluting churches in strictly residential areas continue to go unchecked due to the fear of annoying men and women of God.

EXCESSIVENESS IN PRACTICING FREEDOM OF RELIGION: ANALYZING THE ROOT CAUSE

In undertaking this analysis, one needs to appreciate the desire for approval and fear of rejection in society. For instance, when it comes to Christians, acceptance and approval require the endorsement of the pastor or the respective spiritual leader. A

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42. *Id.*
43. *Id.*
44. *Id.*
45. R.E. TWESIGYE, POLITICS AND CULTS IN EAST AFRICA: GOD'S WARRIORS AND MARY'S SAINTS (2010).
46. REPORT OF THE PARLIAMENTARY COMMITTEE ON DEFENSE AND INTERNAL AFFAIRS ON THE PETITION BY THE ORPHANS OF THE VICTIMS OF THE KANUNGU CHURCH INFERNO (2014).
47. Byaruhanga-Akiiki, *supra* note 2.
48. Orumuri, April 10th - 16th 2000.

spiritual leader may use his or her influence to fulfill his or her religious ambitions. This gives him or her the leverage over every pew person. Not that this is always misused but it's prudent to say that he or she has it. The effect of this is that the congregation behaves and is motivated by the leverage they intuitively know the preacher or leader has. The spiritual leader is considered a parent figure and should s/he exclude any individual, the general congregation will also exclude such a person.

Since the resumption of public gatherings following Covid-19 related restrictions, complaints about noise pollution mainly from religious gatherings and recreation areas—particularly bars, have increased across the country.[49] Even with environmental and noise-pollution regulations in place, it appears that the zoning of worship places in Uganda today leaves a lot to be desired. Indeed, in August 2022, while warning church and bar owners to regulate their operations, the then Deputy Inspector General of Police, Maj. Gen. Geoffrey Tumusiime warned churches to avoid exceeding the noise limits.[50]

Byaruhanga notes that much as we know, generally, that physical diseases are bad, spiritual ones are worse.[51] This is because the most critical aspect of a person is one's thinking.[52] Unsuspecting victims are easily gullible as they are desperate, which is a recipe for disaster itself.[53]

The question that begs is, what is the yardstick that law enforcers should apply to protect against abuse of freedom of religion? Take an example of the 'Holy Rice' project as initiated by Samuel Kakande, a self-proclaimed prophet and Pastor at the Synagogue Church of Nations in Kampala, Uganda's capital.[54] The public can safely find remedy in the law of contract if certain terms and conditions come to issue. This is cognizant of the boundaries within which the law of contract operates.[55]

The New vision in march 2017 reported the closure of St Andrew, the Lord's Holy Ark Church in Kaberamaido district by police officers after the church's prophecy of world ending had failed to come to pass.[56] The church had been in

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49. https://www.nema.go.ug/media/nema-and-leadership-born-again-christian-church-uganda-agree-measures-noise-management (accessed on 4 November 2022).

50. https://www.newvision.co.ug/category/news/police-warn-churches-about-noise-pollution-141925 (accessed on 4 November 2022).

51. Byaruhanga, *supra* note 2.

52. *Id.*

53. *Id.*

54. https://panafricanvisions.com/2017/02/uganda-pastor-sells-holy-rice-followers-u-s-14-kilogram/

55. See, *Carlill* v. *Carbolic Smoke Ball Co*.

56. New vision, 23 March 2017.

existence for over 2 years by the time of its closure.[57] Reminiscent of the Kanungu 2000 fire inferno, these officers did a commendable job as over 20 children who had dropped out of school were found in this church, waiting for the end of the world. The church had caused confusion and indeed its very existence spelt doom.[58]

CONCLUSION

On 2nd December 2000, the Government of Uganda instituted a seven-member Judicial Commission of inquiry to investigate the inferno that occurred in Kanungu on 17th March 2000. To date, the findings of the Commission, if any, have never been made public. The government must make these findings public as a commitment to avoid the dark past that shadows our history from resurfacing. The relationship between the State and its citizens is based on responsibilities when it comes to issues to do with religion. Primarily, the individual citizen has the duty to take caution while making such personal decisions as to where, whom and with whom to worship. In several cases, victims have petitioned the government seeking ex-gratia payments[59] as has been the case with the victims of the Kanungu inferno.[60] The problem should be addressed as it necessarily so demands. The State should devise a mechanism of monitoring the different activities of registered and non-registered organizations that bring people together.

According to Tamale, freedom of worship includes the following indivisible, independent and interrelated human rights:

- The human right to freedom of thought, conscience and religion.
- The human right to manifest one's religion or belief in worship, observance, practice and teaching.
- The human right to freedom from discrimination based on religious beliefs or activities or because of refusal to conform to a certain religion.
- The human right to freedom of expression and of association.

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57. *Id.*

58. *Id.*

59. In *Specioza Kalungi & 61 Ors* v. *Attorney General,* the court held that ex-gratia payments may be made when the government is prepared to compensate victims of an event such as accidents, etc. but not to admit liability to pay compensation.

60. REPORT OF THE PARLIAMENTARY COMMITTEE ON DEFENSE AND INTERNAL AFFAIRS, *supra* note 49.

- The human right to conscientious objection on grounds of religious beliefs.
- The human right of parents to choose schools for their children in conformity with their own convictions.[61]

Be that as it may, there is enough legal machinery in form of statutory law and case law to support law enforcement in the fight against abuse of religious freedom. In addition, Parliament should make a stringent law to streamline operations of various religious groups so as to avoid the ugly past that characterizes our history.

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61. S. Tamale, *Cults and Sects in Uganda: The Good, the bad and the ugly*, in Kabazzi-Kisirinya, *supra* note 2.

ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF POOR PERSONS IN UGANDA: A COMMENTARY ON THE CONSTITUTIONAL COURT's DECISION IN *CENTRE FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT & ORS* v. *ATTORNEY GENERAL,* CONSTITUTIONAL PETITION NO. 16 OF 2011

Brian Kibirango*

ABSTRACT

This article examines the nexus between poverty and the realization of economic and social rights (ESRs) in Uganda. It makes reference to maternal health rights, which field has recently attracted the most attention due to increased activism by the civil society through public interest litigation. The article particularly lays emphasis on the landmark decision in the case of Centre for Health, Human Rights and Development (CEHURD) v. Attorney General (Constitutional Petition No. 16 of 2011), which opens a window of opportunity for strengthening the protection of the right to health in Uganda. The article therefore examines how the realization of ESRs can be a key pillar in the ensuring poverty reduction. The first part of the article is a brief contextual background to poverty in Uganda and the linkage between poverty and human rights. The second part examines the relationship between poverty and realization of maternal health rights, and most importantly the significance of the decision of the Constitutional Court of Uganda in Petition 16. Important to note is that this decision compels the government of Uganda to provide basic goods and services for realization of maternal health rights, an approach that can be innovatively extended to other ESRs.

I. INTRODUCTION

Human rights would be fully realized, if all human beings had secure access to the objects of these rights…most of the current massive under fulfillment of human rights is more or less directly connected to poverty. The connection is direct in the case of

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basic social and economic human rights.[1]

Uganda is ranked among Africa's poorest countries, both in terms of poverty rates (34.5%) and actual population (13 million) living in poverty.[2] According to the Uganda Bureau of Statistics (UBOS), at least 8.5% of the households in the country are living in chronic poverty.[3] Similarly, the percentage of households living below the National Poverty Line (NPL) has been increasing from about 19.7% between 2014 and 2017 to 21.4% from 2017 to-date.[4] More households (10.2%) reportedly slipped into poverty compared to 8.4% which escaped the condition.[5] This grim picture or outlook is reflective of what is actually happening on the African continent. For instance, Africa's poor population increased epidemically from 278 million in 1990 to 413 million in 2015, thus giving credence to projections about the continent being destined to be the exclusive hub of poverty in the immediate future.[6]

In a bid to address the poor economic situation of her citizens, Uganda launched its Vision 2040[7] in 2013 in which it has set out strategies of ending poverty in the country. These include increasing the per capita income of Ugandans from USD506 to USD9500, as well as reducing the percentage of the population below the poverty line from a baseline of 24.5% in 2010 to 5% by 2040. Vision 2040 aims to have a "transformed Ugandan Society from a Peasant to a Modern and Prosperous Country within 30 years".[8]

The country's goals under Vision 2040 with respect to resolving poverty appeared to be within easy reach. An example in this regard is the ambition to reduce the number of people living below the NPL to 5% within the next 19 years.[9] In setting this target, Vision 2040 considered the following persuasive indicators: a) a stabilizing economy with a percentage growth of 6.4%; b) increasing levels of foreign

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1. T. Pogge, Poverty and Human Rights. Available at <https://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf> (accessed 1 August 2022).

2. K. BEEGLE & L. CHRISTIAENSEN (EDS), ACCELERATING POVERTY REDUCTION IN AFRICA, 39-40 (2019).

3. UBOS, 2020 STATISTICAL ABSTRACT. Available at <http://library.health.go.ug/sites/default/files/resources/UBOS%20Statistical%20Abstract%202020.pdf> (accessed 1 August 2022).

4. *Id.,* at xxx.

5. *Id.,* at xii.

6. Beegle & Christiaensen, *supra* note 2, at 3.

7. GOU, Uganda Vision 2040*,* at 13. Available at <http://www.npa.go.ug/wp-content/uploads/2021/02/VISION-2040.pdf> (accessed 1 August 2022).

8. *Id*.

9. *Id.,* at 87.

direct investment into the country including in emerging sectors such as oil and gas; and c) inspiration from past trends such as the period from 1992 and 2010 when the percentage of Ugandans below NPL reduced from 56% to 24.5%.[10]

However, the world has in the recent past witnessed debilitating developments such as the outbreak of the COVID-19 pandemic, the Russian invasion of Ukraine, as well as the backlash from the related responses to the same. It remains to be seen if some of the aforesaid milestones at the domestic level in Uganda will still be achieved in spite of this backlash.

The Nexus between Poverty and Human Rights

The genomic bond between poverty and human rights—especially economic and social rights—is no longer a controversial assertion.[11] Economic and social rights (ESRs) notably often occupy a marginal position in the global south.[12] This culture could be attributed to the leverage offered to States by the International Covenant on Economic, Social and Cultural Rights (ICESCRs) which, under Article 2(1), only requires States to achieve the rights enshrined in the Covenant in a progressive manner, "to the maximum of available resources".

Capitalizing on the age-old justification of resource constraints, poverty in such contexts preposterously establishes itself as an impervious drape to the realization of ESRs through a systemic failure to sufficiently provide the requisite basic goods and services, for instance, in respect to education and health. Conversely, the ambition to end poverty remains an illusion, partly due to a failure

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10. *Id*.

11. See for instance, Pogge, *supra* note 1; DUROJAYE & MIRUGI-MUKUNDI (EDS.) EXPLORING THE LINK BETWEEN POVERTY AND HUMAN RIGHTS IN AFRICA (2020); S. Fredman, *Women and Poverty–A Human Rights Approach,* 24(4) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2016), 494-517; A.B. Rukooko, *Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights,* 14(1) *The International Journal of Human Rights* (2010), 13-33; J.C. Mubangizi & B.C. Mubangizi, *Poverty, human rights law and socio-economic realities in South Africa,* 22(2) DEVELOPMENT SOUTHERN AFRICA (2005), 277-290; A. Sengupta & T. Pogge *Poverty eradication and human rights,* in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR 1 (T. Pogge, ed., 2007), 323-344; A. McKay & P. Vizard, *Rights and economic growth: Inevitable conflict or common ground,* in HUMAN RIGHTS AND POVERTY REDUCTION: REALITIES, CONTROVERSIES AND STRATEGIES (T. O'Neil, ed., 2006).

12. *See*, UN HRC, *The parlous state of poverty eradication: Report of the UN Special Rapporteur on extreme poverty and human rights,* 2 July 2020 (UN Doc A/HRC/44/40) at 3 <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_40_AUV.docx>.

to realize economic and social rights.[13] The next section attempts to highlight this reality through the experience and lessons generated from litigating maternal health rights of poor persons in Uganda.

POVERTY AND MATERNAL HEALTH RIGHTS IN UGANDA

More than 16 women die daily in Uganda from preventable causes, including hemorrhage, sepsis, unsafe abortion, obstructed labor, and pre-eclampsia. There has been no statistically significant decrease in maternal mortality in the country for the last eight years.[14]

A. Litigating Poor Persons' Maternal Health Rights: Insights into Petition no. 16 of 2011

On Wednesday, 19 August 2020, the Constitutional Court of Uganda issued its decision in *Centre for Health, Human Rights and Development (CEHURD) & Ors v. Attorney General,* Constitutional Petition No. 16 of 2011. This case successfully challenged the constitutionality of certain actions and omissions of the government of Uganda in relation to maternal health goods and services. These included:

> a) Failure to provide Minimum Maternal health services such as basic indispensable maternal health facilities;
> b) Inadequate number of midwives and doctors to provide maternal health services;
> c) Inadequate budget allocation to the maternal health sector;
> d) Frequent stock outs of essential drugs;
> e) Lack of emergency obstetric services at health facilities;
> f) Non-supervision of public health facilities; and
> g) The unethical behavior of health workers towards expectant mothers.[15]

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13. *See*, McKay & Vizard, *supra* note 11, at 329.

14. CEHURD, Press release: Landmarks hearing on maternal deaths proceeds in Uganda's Constitutional Court, 3 October 2019. Available at <https://www.cehurd.org/press-release-landmark-hearing-on-maternal-deaths-proceeds-in-ugandas-constitutional-court/>.

15. Judgment, at 2.

The petitioners argued that the actions and omissions of the Government of Uganda resulted into a deplorable situation in Uganda where as many as 16 maternal deaths are recorded daily.[16] The petitioners particularly demonstrated the lived experiences of poor persons' interaction with human and maternal health rights service provision in Uganda. This was done through an affidavit sworn by a medical doctor, who narrated horrifying circumstances in which two expecting mothers, Ms. Sylvia Nalubowa and Ms. Jennifer Anguko, died at Mityana Hospital in central Uganda and Arua Regional Referral Hospital in northwestern Uganda respectively, as their relatives watched helplessly.[17] The late Nalubowa reportedly bled to death with no medical doctor attending to her because her mother-in-law failed to give the nurses the money and supplies they demanded as a prerequisite for attending to her.[18]

Similarly, the late Anguko died after excessive bleeding during child birth. As there was no medical doctor to attend to her, the nurses simply "told her sister and husband to try and stop her bleeding with old pieces of cloth".[19] The petitioners argued that these actions and omissions on the part of the government of Uganda violate several provisions of the 1995 Constitution of the Republic of Uganda, namely: the right to health (under Articles 8A, 39 and 45, and objectives XIV and XX under the National Objectives and Directive Principles of State Policy; the right to life (under Article 22); the rights of women (under Article 33(1), (2) and (3)); protection from inhuman and degrading treatment (under Articles 24 and 44(a)), as well general provisions contained in Article 287.

In their defence, the Attorney General of Uganda unsurprisingly invoked the ICESCR's threshold allowing States to ensure progressive realization of the chartered rights within the means (*i.e.,* resources) available to them. This was followed by a listing of several constraints in the country in what appears to have been an attempt to justify the state of affairs. These included: a general shortage of medical staff in the country due to a shortage of trainees; limitation in the government's resource envelop which could not allow it to pay good wages to medical staff; limitations in space for theatres necessary to conduct emergency obstetric care; as well as corruption among health workers who steal drugs and commodities supplied to health services.

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16. *Id*.
17. See affidavit of Dr. Waiswa, at paras. 35-38 of the judgment.
18. Paras. 15-16.
19. *Id*.

However, the Constitutional Court outstandingly upheld all the grounds raised by the Petitioner, thus marking a firmer basis for enforcing maternal health rights in Uganda, and by extension, the right to health. Importantly, the court issued several orders in its decree judgment which are of practical consequence with some being bound to time. Key among these is requiring the Government to:

> 1. Prioritize and provide sufficient funds in the budget for maternal health care;
> 2. Ensure full training of all staff who provide maternal health care services in Uganda and equipping all health centers within the next two financial years;
> 3. Submit (through the Minister of Health) to Parliament at the end of the two years immediately following the judgment, a full audit report on the status of maternal health in Uganda.

Additionally, each of the families of the two victims (Nalubowa and Anguko) were awarded Uganda shillings 70 million (approx. 19,000USD) in general damages for the psychological torture; violation of the rights to life; health; and cruel and degrading treatment of their loved ones, as well as exemplary damages worth Uganda shillings 85 million (approx. 23,000USD) for the loss they suffered as a result of acts and omissions off the medical personnel at the respective government facilities.

IMPLICATIONS OF THE DECISION IN PETITION 16

The decision in Petition 16 is a welcome development for Uganda's increasingly poor population as it widens the scope of rights to demand for and enforce in the event of violation. Notably, the decision found in place a glossy picture painted by statistics showing, for instance, a 71% level of staffing in public health facilities as of 2018, coupled with an increase in the government budgetary spending on health—from 6.4% in 2018 to 7.2% in 2020.[20] It thus offers a judicial foundation upon which the demands for tangible steps of ensuring the realization of maternal health and generally the right to health in the country will be based.

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20. UBOS, *supra* note 3, at 51.

Among the key outcomes of Petition 16 was the Court dismissing the argument of financial constraints as a ground for the not fulfilling the maternal health rights and instead stressing the duty of the State to put in place measures to facilitate the realization of maternal health rights of poor persons and, indeed, the right to health generally. The court compared this duty to the long-established practice of States providing legal aid services to indigent and poor accused persons in order to guarantee their right to a fair hearing. Justice Christopher Madrama invoked the decision of the Indian Supreme Court in *Bengal & Another, 1999 SCC (4) 37, JT 1996 (6) 43* which stressed the State's "constitutional obligation to provide free legal aid to a poor accused [where] the State cannot avoid its constitutional obligation …on account of financial constraints".[21] The approach taken by the Indian Supreme Court in this case inspired the holding of the Constitutional Court of Uganda, that the government of Uganda could not be vindicated for violating maternal health rights by virtue of resource constraints.

Notably, the government's claim that it is "too poor to fight maternal mortality effectively" was already contested by the Lead Petitioner as a mere lack of commitment towards maternal health rights even before the court issued its decision.[22] For instance, it is noted that the reduction of the health sector's budget from 7.1% in financial year 2018-19 to 6.4% in financial year 2019/20 was unexplainable, in view of the fact that during the same period, there was a 20.9% budget expansion, coupled with an increase in the allocation to other calls such as classified expenditure.[23] For context, Uganda's classified expenditure is widely implicated for being a conduit for looting of public resources—since it is not subject to scrutiny or accountability—and for procurement of military hardware and other resources necessary to sustain President Museveni's near-four decade grip on power.

There is more evidence to show that the plight of poor persons in accessing maternal health care in Uganda is not essentially due to a lack of resources, but rather due to non-prioritization of the needs of poor persons. For instance, in 2012—around the time when Petition 16 was filed—the government of Uganda secured a USD 30.2 million loan to improve on the capacity of the country's national referral hospital, Mulago, to provide maternal and neonatal health care through the construction and equipment of a specially dedicated

21. Decision of Justice Madrama, at 24.
22. *See*, CEHURD, *supra* note 14.
23. *Id*.

wing.[24] This loan was to be supplemented by another USD 3.2 million injection by the government of Uganda.[25] However, it later emerged that the facility would most likely not benefit the country's poor, judging from the considerably high prices set for its services.[26]

There are also media reports alleging continuing manifestation of gross misconduct of healthcare workers at such a high-level facility, including frequent staff absenteeism from duty, coupled with diverting clients to their individual facilities conveniently located in the neighborhood.[27]

It follows that what should have been a public—preferably cost-free/friendly facility—simply provided the rich with yet another option among the already fairly abundant number of private facilities offering quality healthcare services. One wonders why the resources spent on the facility were not instead applied to resourcing and equipping the already existing—*albeit* crippling—lower-level public health facilities to enhance their capacity to provide better and accessible maternal health related goods and services. This would indeed be in line with the UN guiding principles on extreme poverty and human rights.[28] Meanwhile, Uganda's poorer persons continue to face limitations in accessing public health facilities.

Such developments are concerning in light of the poverty situation in Uganda, as well as a general void of social security safeguards with over 95% of the population in the reproductive stage who are not covered by health insurance.[29] This situation effectively stagnates the poor in poverty, in addition to having more people join the cycle due to the cost and at times a lack of quality healthcare.[30]

It is noted that the decision in Petition 16 found in place some progress which may be attributed to, among others, the institution of Petition 16 itself in 2011. For instance, in its response to the question from the Committee on Economic, Social and Cultural Rights (CESCR Committee) on the steps the State had taken to, among others, enhance access to sexual and reproductive health

24. ISER, (2018) 3.
25. *Id*.
26. *Id.,* at 8.
27. Daily Monitor, 2019.
28. UN Guiding Principles on extreme poverty and human rights, para 82.
29. ISER, *supra* note 24, at 5.
30. UN Guiding Principles on extreme poverty and human rights, para 81.

services and information, including ante-natal and post-natal care,[31] Uganda indicated that it had "procured and distributed Maternal and New Born equipment worth USD 4 million under the Uganda Health System Strengthening Project (UHSSP) to 230 health facilities …countrywide."[32] Furthermore, the government reported to have launched an annual US$ 11 million worth "Saving Mothers Giving Life" project in six districts of Northern Uganda".[33] The judicial affirmation of more fundamental issues relating to maternal health rights thus goes to strengthen their level of protection.

Furthermore, the court established a connection between the government's failure to provide the relevant maternal health goods and services and the right of patients and their caretakers to dignity and protection from cruel, inhuman and degrading treatment. The Court noted that the deaths of Nalubowa and Anguko due to non-availability of basic maternal health services and negligence of Health workers caused utmost pain, degrading and cruel treatment of the deceased for the period they spent in the hospitals fighting for their lives with no hope of survival until they died, and also caused untold suffering and loss to their families. By the court taking a broader assessment of the impact of the government's actions and omissions, and taking these into consideration for purposes of the redress, one sees an attempt at delivering justice in its wholeness.

Additionally, the decision guarantees protection of poor pregnant women from violence which may manifest when they fail to pay bribes to medical attendants or to buy maternity service-related supplies where the state does not make adequate provisions.[34] This indeed appears to be the case in Uganda where reports of corruption[35] and intermittent industrial actions by health workers in

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31. *See*, Committee on Economic, Cultural and Social Rights, List of issues in relation to the initial report of Uganda, E/C.12/UGA/Q/1, 22 December 2014.

32. See the presentation on questions under Article 12 of the ICESCRs in Government of Uganda 'The Presentation of the initial report of the Republic of Uganda to the United Nations Committee on Economic Social and Cultural Rights at its 55th Session held in Geneva, Switzerland 1-19 June 2015, at 26 (accessed at https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/UGA/E_C-12_UGA_Q_1_Add-1_20730_E.pdf).

33. *Id.,* at 14.

34. *See*, P. Farmer, *An anthropology of structural violence,* 45(3) CURRENT ANTHROPOLOGY (2004), at 305–325 for a discussion on the nexus between obstetric violence and poverty, corruption and poor governance.

35. See for instance, 'Disguised Uganda Minister catches corrupt hospital workers' *The Independent* 17 September 2017. Accessed at <https://www.independent.co.ug/disguised-uganda-minister-opendi-catches-corrupt-hospital-workers/>.

public facilities abound.[36] Although grievances of medical workers often times relate to genuine demands for improvement in their remuneration and provision of operational tools in form of medical supplies and equipment,[37] the government's response has in some cases been disparaging; in form of utter dismissal of the demands/grievances and instead coercing them into returning to work or risk relinquishing their positions to, for instance, imported Cuban doctors.[38]

There is therefore a need for studies inquiring into the relationship between the nature of efforts of the government of Uganda at bridging the health crisis and the bitterness and other manifestations of violence reported in some public facilities, such as nurses beating up pregnant women, a phenomenon which has previously been acknowledged by a person no less the Minister of Health in 2008.[39] It is hoped that such scenarios will then be included in the training of the medical personnel and, importantly, in the making of decisions relating to allocation of essential medical goods and services, particularly to poorer persons.

Another significant contribution of Petition 16 is the fact that it opens doors for more judicial recognition of and litigation seeking to enforce economic and social rights broadly. Notably, this case was decided after a decade of waiting after its progress and substantive determination was temporarily frustrated on its first hearing in 2012 when the Respondent successfully invoked the Political Question Doctrine (PQD). This was after the Respondent successfully argued that the matters raised in the petition constituted political questions¾namely reviewing and implementing health policies—which the Constitutional Court could not pronounce itself on as doing so would constitute interference with political discretion of the executive. It took the Petitioners' successful appeal to the Supreme Court which directed the Constitutional Court

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36. See for instance, NTV 'Kawolo hospital patients left stranded as nurses, midwives strike', 26 May 2022. Accessed at <https://www.ntv.co.ug/ug/news/kawolo-hospital-patients-left-stranded-as-nurses-midwives-strike-3828076>; see also, Samuel Okiror, *Uganda brought to its knees as doctors strike paralyses health service*, THE GUARDIAN, 16 November 2017. Accessed at <https://www.theguardian.com/global-development/2017/nov/16/costing-lives-doctors-strike-health-service-uganda>.

37. Okiror *id*.

38. See for instance, Emmanuel Ainebyoona, *Government to import Cuban doctors,* DAILY MONITOR, 4 December 2017. Accessed at <https://www.monitor.co.ug/uganda/news/national/govt-to-import-cuban-doctors-1729122>

39. *See*, Egesa Hajusu, *Uganda: Nurses Beat Pregnant Women – Minister,* NEW VISION, 1 June 2008.

to proceed and hear the Petition on its merits, observing among others that the Constitution of the Republic of Uganda provides rights to citizens to access medical care.[40]

Notably, the PQD has since Uganda's independence "had a profound effect on Ugandan jurisprudence" where it has stood in the way of access to justice in cases relating to an array of human rights issues.[41] The ruling of the Supreme Court in *CEHURD & 3 Ors v. AG* which ordered the Constitutional Court to hear and determine Petition 16 on its merits has been applauded as one that dealt the PQD "a significant blow"; it having addressed "the more overt dimensions of the PQD, namely reluctance of courts to address matters they deem too 'political.'"[42]

CONCLUSION

In conclusion, the significance of the decision of the Constitutional Court of Uganda in Petition 16 lies in the value it adds to the jurisprudence relating to the right to the highest attainable standard of physical and mental health, the right of everyone to have access to health care services—which includes reproductive health care services, as well as the right to protection from violence and importantly VAW which manifests in form of abuse of poor expecting mothers who do not have the ability to meet the financial needs of medical care providers which appear to be generally unmet by the state.

It is further noted that the precedent set by the decision of the Constitutional Court in Petition 16 has the potential to translate into heightened protection of poor persons' other economic and social rights such as the right to food, health (this meaning other medical conditions beyond maternal needs), education, clean and safe water, housing, among others. The gains so far made in advancing the protection of maternal health rights in Uganda therefore need to be spread across these other rights. One way of doing this is seeking recourse to the courts to adjudicate on shortfalls within related government policies and actors.

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40. *See*, *CEHURD & Ors v. AG*, Constitutional Appeal No. 01 of 2013.

41. See for instance, J. Oloka-Onyango, The Political Question Doctrine in Uganda: An Analysis of the technicalities on the realization of the freedoms of expression, association and assembly in Uganda', Chapter Four Uganda (April 2017).

42. *Id*., at 41.